

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Perry H. Gravely Circuit Court Judge

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Case No. 2017CP2302111

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Samuel L. Whitner # 00263066,.....Petitioner

v.

State of South Carolina,.....Respondent.

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NOTICE OF APPEAL

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Petitioner, Samuel L. Whitner, by and through undersigned counsel, William G. Yarborough III, appeals Order, filed June 11, 2020 and dismissing Petitioner's application for post-conviction relief in the above captioned case. A copy of the Order of Dismissal is attached to this notice.

Respectfully Submitted,

By: 

William G. Yarborough III, #10271  
308 W. Stone Avenue, Greenville SC 29609  
(864) 331-1612 Fax (864) 370-0711

Greenville, SC  
July 10, 2020

STATE OF SOUTH CAROLINA )  
 COUNTY OF GREENVILLE )  
 )  
 )  
 Samuel L. Whitner, #263066, )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 THE THIRTEENTH JUDICIAL CIRCUIT

Case No.: 2017-CP-23-2111

**CONDITIONAL ORDER OF  
 DISMISSAL**

ENTERED COMPUTER

FILED-CLERK OF COURT  
 PAUL B. WICKESINGER  
 GREENVILLE

2018 OCT -8 PM 2:51

This matter comes before the Court by way of an application for post-conviction relief filed by Samuel Whitner (Applicant) on April 30, 2017. Respondent made its Return, requesting the application be summarily dismissed.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Greenville County Clerk of Court. In February 2009, the Greenville County Grand Jury indicted Applicant for criminal sexual conduct with a minor, first degree (2009-GS-23-1072). Christopher D. Scalzo, Esquire represented Applicant. Assistant Solicitor Christy K. Sustakovitch, Esquire prosecuted the case.

On March 11, 2009, the State brought the case to trial before the Honorable Victor Pyle, Jr. On that date, Judge Pyle granted Applicant's motion to suppress an audio recording of a telephone conversation between Applicant and the victim.

The State filed a notice of appeal and a motion to vacate Judge Pyle's order. On June 11, 2009, the South Carolina Court of Appeals issued an order vacating Judge Pyle's order and finding that he lacked subject matter jurisdiction. On July 22, 2009, a three-judge panel of the Court of Appeals presided over a suppression hearing pursuant to the procedure set forth in the South Carolina Homeland Security Act. See S.C. Code Ann. §§ 17-30-10 et seq. Mr. Scalzo

*PAK*

represented the Applicant at this hearing. By order issued July 27, 2009, the Court of Appeals denied the Applicant's motion to suppress.

The State brought the case to trial a second time before the Honorable John C. Few and Applicant was found guilty. On November 9, 2009, Judge Few sentenced Applicant to thirty years imprisonment for criminal sexual conduct.

A timely notice of appeal was filed at the South Carolina Court of Appeals and, upon Applicant's request, was certified to the South Carolina Supreme Court. Robert M. Dudek, Esquire, perfected the appeal. The Supreme Court affirmed Applicant's conviction and sentence on July 11, 2012. State v. Whitner, 399 S.C. 547, 732 S.E.2d 861 (2012). The remittitur was returned to the circuit court on July 27, 2012.

#### 2013-CP-23-0765

In his first application, filed February 8, 2013, Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
  - a. "Trial counsel acted jointly in concert with the State and illegally gain jurisdiction of the South Carolina Court of Appeals/6 amendment violation."
2. Ineffective Assistance of Appellate Counsel
  - a. "Appellate Counsel failed to challenge this jurisdictional defect."

Respondent filed its return on October 23, 2013 and its amended return on June 16, 2014. An evidentiary hearing into the matter was convened on June 19, 2014, at the Greenville County Courthouse. Applicant was present at the hearing and was represented by Caroline Horlbeck, Esquire. Karen C. Ratigan, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On August 12, 2014, the Honorable Robin B. Stilwell, issued the order of dismissal denying Applicant's application for post-conviction relief.

On May 15, 2015, John H. Strom, Esquire of the South Carolina Commission on Indigent Defense, filed a Johnson<sup>1</sup> petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On February 16, 2016, by written order the South Carolina Court of Appeals denied the petition. The Remittitur was issued on March 3, 2016.

**8:16-1392-CMC-JDA**

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on June 22, 2016. Applicant set forth the following grounds for relief:

1. "The Petitioner was denied due process of law under the fourteenth and fourth amendments to the U.S. Constitution when the prosecutor moved for an interlocutory appeal."
  - a. "The Petitioner was without knowledge, had not consent to his private conversation with his daughter being recorded. The Petitioner's daughter's mother's 'husband' had 'secretly' taped the Petitioner's conversation without the Petitioner's knowledge or consent. The Solicitor was well 'aware of this crime,' S.C. code ann § 17-30-20 Authorization had not been granted to the Solicitor per a judge of competent jurisdiction S.C. code ann § 17-30-15 (8) to disclose the contents of the Petitioner's call in the trial proceeding with honorable Victor Pyle presiding 2009-GS-23-1072."
2. "The Petitioner was den[ied] due process of law under the 14th amendment equal protection, due to the 'obvolutional [sic] presence of an unlawful wiretap."
  - a. "The Petitioner's confindment [sic] violates the constitution laws and treaties of the United States. The oringin [sic] of a violation was apparent before the South Carolina Court of Appeal. It was unequivocally clear that the violation had risen to a fundamental defect, and inherently resulted in a complete miscarriage of justice. The d[e]mands of fair procedure was impossible to meet, upon the South Carolina Court of Appeal was apprised per the South Carolina Attorney General that no order authorizing the interception was involved in this case See App. p. 50"
3. "The Petitioner was denied his right to effective assistance of counsel under the 6 Amendment to the U.S.Const., by improperly perserving [sic] the record."
  - a. "Trial counsel failed to apprise the Honorable C. Victor Pyle Jr, of the fact that the surreptitious taped conversation between the Petitioner and his daughter violates "S.C. Constitution Article 1 § 10," and "U.S. Constitution amendment 4." The Petitioner was not apprise that "his conversation," was going to be recorded by his daughter mother's husband. More so the state could not legally rely on the vicarious consent as expressed in Pollock v. Pollock, 154 F.3d 601, prior to an unlawful wiretap!!"

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<sup>1</sup> Johnson v. State, 294 S.C. 310 (1988)

4. "Trial counsel ineffective upon not moving for a mistrial due to clear Prosecutorial misconduct; thus failing to admonish the court of double jeopardy."
  - a. "Trial counsel ineffective for not moving for a mistrial based on the Solicitor's willful misconduct in the Pre-trial proceeding, which constituted egregious misconduct, when the solicitor violated S.C. code ann § 17-30-10 as well as the 5th and 6 Amendments to U.S. Constitution; thus failing to preserve for the record on appeal the prosecutorial misconduct could be considered, thus seen as "intentional" for the purpose of goading, before both the presiding Judges (i.e. The Honorable C. Victor Pyle Jr. and The Honorable John C. Few. 2009-GS-23-1072."
5. "Appellate counsel failed to challenge the jurisdictional defect."
  - a. "Appellate counsel ineffective by not challenging the Court of Appeal's jurisdiction thus to entertain the state's interlocutory appeal with respect to S.C. code § 17-30-110 (A), prior to the fact that the state could not and did not provide the required accompanying application under which said interception could have been or was authorized or approved, the Honorable C. Victor Pyle Jr., decree denying [sic] the state's attempts for admitting the surreptitious taped conversation did not provide an impediment [sic] on the state's ability to prosecute..."
6. "The Petitioner was deni[ed] due process of law under the 14th amendment equal protection, due to the Supreme Court Clerk of Court's endorsement is solely upon the February 16, 2016 order."
  - a. "The February 16, 2016 order of dismissal which is endorsed solely by the South Carolina Supreme Court Clerk of Court, can not stand as lawfull [sic] per the South Carolina Supreme Court, which is violative [sic] with respect to the South Carolina Constitution Art. V § 5, and obstruct a necessity, which is for a "Justice", to provide a declaration of law, also upon the fact that requirement regarding application were in compliance when the Petitioner had timely submitted the pro se response to the Appellate Counsel's Johnson Petition."

Respondent filed its Return and Motion for Summary Judgment on August 15, 2016. On January 30, 2017, the Honorable Jacquelyn D. Austin, United States Magistrate Judge issued a Report and Recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. Whitner v. Cartledge, 8:16-1392-CMC-JDA. On March 21, 2017, the Honorable Cameron McGowan Currie, United States District Judge adopted the Magistrate's Report and Recommendation granting Respondent's Motion for Summary Judgment and dismissed Applicant's petition. Whitner v. Cartledge, 8:16-1392-CMC-JDA. On April 25, 2017, Judge Currie vacated the Order of Summary Judgment so Applicant could file his objections. Applicant filed his objection to the Report and Recommendation on May 9, 2017. Respondent

filed a reply to Applicant's Objections on May 23, 2017. On July 5, 2017, Judge Curries granted Respondent's Motion for Summary Judgment. Applicant then filed a Notice of Interlocutory Appeal with the United States Court of Appeals for the Fourth Circuit on May 15, 2017. The Court of Appeals dismissed the appeal at Applicant's request on June 1, 2017. On May 18, 2018, the Fourth Circuit Court of Appeal denied Applicant's motion for a certificate of appealability and his appeal was dismissed.

Before this Court are the records of the Greenville County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcripts, Applicant's appellate and habeas corpus records, Applicant's previous PCR application, and the current application.

### **CURRENT APPLICATION**

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Ineffective Assistance of Counsel"
  - a. "Trial counsel was ineffective in not objecting when the State, prior to the jury being sworn, stopped the trial and moved for an interlocutory appeal on a Motion to Suppress being granted to [Applicant]"
  - b. "Counsel failed to preserve the record by not objecting/appealing the South Carolina Court of Appeals' decision to grant the admission of a wire-tapped, private conversation between [Applicant] and his daughter without his knowledge, to the record."

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

#### **Statute of Limitations**

The Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted of criminal sexual conduct with a minor on November 9, 2009. The Remittitur from the direct appeal was issued on July 27, 2012. This application was filed on April 30, 2017, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

### **Successive Applications**

The Court further finds the Application must be summarily dismissed because it is successive to Applicant’s previous PCR application. 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. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can 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, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450. If the applicant could have raised these allegations in a previous application, then the applicant 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 application for post-conviction relief; 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 allegation in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

***Res Judicata***

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, 427 S.E.2d 918 (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, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior applications for post-conviction relief. The prior PCR Court issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

[Conclusion and Signature on Following Page]

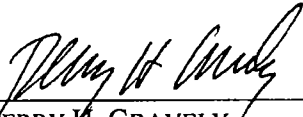
**CONCLUSION**

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: DeShawn H. Mitchell, Esquire  
PCR Division – 13<sup>th</sup> Circuit  
Post Office Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 4<sup>th</sup> day of Oct., 2018.

  
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PERRY H. GRAVELY  
Chief Administrative Judge  
Thirteenth Judicial Circuit

Pickens, South Carolina