THE STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED
Dec 11 2020
S.C. SUPREME COURT

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas
Clifton Newman, Circuit Court Judge

Case No. 2016-CP-06-291

Tunzy A. Sanders,

Petitioner,

v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Tunzy A. Sanders appeals the order of dismissal issued by the Honorable Clifton Newman on January 27, 2020, and the order denying the motion to alter or amend pursuant to Rule 59(e), SCRCP, issued by Judge Newman on November 10, 2020. Undersigned counsel received the order on November 11, 2020, via email.

Judge Newman dismissed Sanders' post-conviction relief application as beyond the statute of limitations and successive. Pursuant to Rule 243(c), SCACR, undersigned counsel explains the decision was improper because Sanders presented new evidence invoking S.C. Code Ann. § 17-27-45(C) and presented a prima facie case entitling him to a new trial based upon newly discovered evidence satisfying the "sufficient reason" requirement under S.C. Code Ann. § 17-27-90.

December 11, 2020

s/ Susan B. Hackett
Susan B. Hackett
Robert M. Dudek
SCCID – Division of Appellate Defense
1330 Lady Street, Ste 401
Columbia, S.C. 29201
Attorneys for Petitioner

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600291

Tunzy A Sanders		**South Carolina State of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):** ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

FILED FOR RECORD
2020 FEB -3 PM 2:04
RHONDA D. McELVEEN
CLERK OF COURT
BARNWELL COUNTY, S.C.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/I Clifton Newman	**2127**	2/3/2020
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **February 3, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **February 3, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Michael Dudek PO Box 11589 Columbia, SC 29211

David A. Spencer PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Tunzy A. Sanders, #255493	)	2016-CP-06-291
Applicant, v.	)	**FINAL 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 on July 1, 2016. Respondent filed its Return and Motion to Dismiss on November 7, 2016. This Court issued an order of dismissal based on the State's motion on November 10, 2016 on the grounds raised by Respondent because: (1) of a pending action between the same parties for the same claim under Rule 12(b)(8), SCRCP; (2) the application was filed beyond the statute of limitations; (3) the application was a successive PCR application; (4) Applicant's claims of after-discovered evidence were insufficient to warrant hearing a successive application.

This Court set aside the November 7, 2016 order because its order, through inadvertence, was served on Applicant individually instead of his counsel. This Court issued the consent order to set aside the order of dismissal on May 31, 2019. This Court's May 31 order also granted leave to Respondent to submit a new Conditional Order of Dismissal for this Court's consideration.

Respondent submitted an Amended Return renewing its motion to dismiss on October 4, 2019, requesting this Court to summarily dismiss this application because it is (1) successive and

(2) filed beyond the statute of limitations. Additionally, the State noted one of Applicant's two claims in his new application was previously litigated – the claim that his prior PCR counsel had a conflict of interest.

Applicant made its Response to the State's Motion to Dismiss on December 18, 2019. The State then made its reply to Applicant's response on January 15, 2020. Now, after Applicant has fully responded to the State's motion, and after careful review by this Court of both parties' pleadings and the records referenced and attached, this Court dismisses this Application with prejudice because Applicant has failed to show a sufficient reason for this Court to entertain a successive application and the claim has been filed beyond the statute of limitations. This Court finds that Applicant's claims do not justify a successive claim on the basis of after-discovered evidence or the provisions of S.C. Code § 17-25-45.

In finding this Application should be dismissed, this Court had before it the pleadings of both parties and their attachments, the Clerk of Court records, the South Carolina Department of Corrections' records, the appellate records, and the prior PCR records.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Barnwell County. Applicant was indicted at the July 1998 term of Barnwell County Grand Jury for Murder (1998-GS-06-0180). Applicant was indicted at the January 1999 term of the Barnwell County Grand Jury for Attempted Armed Robbery (1999-GS-06-0078) and Criminal Conspiracy (1999-GS-06-0079). He was represented by Daniel Williams, Esquire. Prior to trial, Applicant's sister, Brenda Sanders, Esquire, was admitted pro hac vice to act as co-counsel. However, Brenda Sanders was removed by the trial

court on the prosecution's motion because the prosecution contended she became a necessary witness. Applicant proceeded to a jury trial on January 11-14, 1999, before the Honorable Gary E. Clary. Applicant was found guilty and sentenced to life imprisonment for murder, and consecutive sentences of twenty years' imprisonment for armed robbery and five years' imprisonment for criminal conspiracy.

Applicant appealed the convictions and sentences and was represented by appellate defender Joseph L. Savitz, Esquire. The South Carolina Supreme Court reversed and remanded the case for a new trial finding the trial court erred in removing Brenda Sanders as counsel, violating Applicant's right to counsel under the Sixth Amendment. State v. Sanders, 341 S.C. 386, 534 S.E.2d 696 (2000).

Following the Supreme Court's reversal and remand, Applicant proceeded in his second trial to a bench trial before the Honorable James R. Barber, III, on February 5-8, 2001. He was represented by Daniel Williams, Esquire, and Brenda Sanders, Esquire. Judge Barber found Applicant guilty of all charges. Judge Barber sentenced Applicant to concurrent sentences of thirty-five years' imprisonment for murder, twenty-five years' imprisonment for attempted armed robbery, and five years' imprisonment for criminal conspiracy. The attempted armed robbery sentence was later reduced to twenty years' imprisonment.

Applicant appealed the convictions and sentences. Applicant was represented on appeal again by Savitz. The South Carolina Court of Appeals affirmed the convictions and sentences. State v. Sanders, 356 S.C. 214, 588 S.E.2d 142 (Ct. App. 2003). After the Court of Appeals denied Applicant's Petition for Rehearing on February 19, 2004, Applicant filed a Petition for

Writ of Certiorari in the South Carolina Supreme Court. The Petition was denied by order dated May 18, 2005. The remittitur was issued on May 19, 2005.

First PCR application: 2006-CP-06-0106

Applicant filed his first application for post-conviction relief (PCR) on May 11, 2006 (2006-CP-06-0106), asserting various allegations of trial court error, ineffective assistance of appellate counsel, and a Brady violation. Applicant filed an amended application on June 8, 2006, asserting defective indictments and a lack of subject matter jurisdiction over the charges.

The State made its Return on June 13, 2007. An evidentiary hearing was convened before the Honorable J. Michael Baxley on August 8, 2007, at which Applicant was present and represented by Jane Matthews Moody, Esquire. Applicant alleged that local counsel, Williams, was ineffective and Applicant did not freely and voluntarily waive his right to a jury trial. Applicant further alleged that appellate counsel was ineffective, and that the trial court lacked subject matter jurisdiction. Judge Baxley ruled that Applicant was precluded from raising any allegations against Brenda Sanders because the allegations were not pled in the original PCR application. Brenda Sanders did not testify at the first PCR hearing. By order dated September 18, 2007, Judge Baxley denied the application with prejudice.

Second PCR hearing: 2009-CP-06-0146

Subsequently, Applicant filed his second application for post-conviction relief on June 16, 2009. Applicant asserted the following grounds for relief:

1. "Was PCR Attorney, Jane A. Moody, ineffective as counsel when she failed to communicate with Tunzy A. Sanders about his PCR Petition and PCR hearing?"
2. "Was PCR Attorney, Jane A. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to communicate with the former attorney for the Applicant, Tunzy A. Sanders, after being requested to do so on several occasions?"

3. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify the Applicant of the scheduling of the PCR hearing in the Barnwell County Circuit Court?"
4. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify trial counsel, Brenda K. Sanders, of the scheduling of the PCR hearing and when she failed to call Brenda K. Sanders to testify at the PCR hearing for the Applicant, Tunzy A. Sanders?
5. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to file a timely notice of appeal on behalf of the Applicant, Tunzy A. Sanders within 30 days of the Barnwell County Circuit Court's decision which was rendered on October 4, 2007?"
6. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to notify the Applicant of the issuance of the Order Denying his PCR application until nine months after the Order had been entered by the Barnwell County Circuit Judge?"
7. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to adequately and individually address all of the issues outlined in the PCR Application of the Applicant, Tunzy A. Sanders, when she was specifically requested to do so on behalf of the Applicant, Tunzy A. Sanders?"
8. "Was PCR Attorney, Jane N. Moody, ineffective as counsel for the Applicant, Tunzy A. Sanders, when she failed to file a post-hearing motion with the Barnwell County Common Pleas Circuit Court requesting that Judge Baxter [sic] tender a ruling on each issue brought in the Applicant's PCR Application for Relief despite the fact that the PCR Attorney, Jane Moody, was specifically requested to do so on behalf of the Applicant, Tunzy A. Sanders?"

Respondent made its Return on September 18, 2009, requesting all allegations except for Applicant's Austin[1] claim to be summarily dismissed. An evidentiary hearing into the matter was convened on January 29, 2010, at the Aiken County Courthouse. Applicant was represented by Christopher Moore, Esquire. Assistant Attorney General Mary S. Williams represented the Respondent. Counsels for both parties consented to the dismissal of his Application for post-conviction relief and the grant of belated review of the first PCR application (2006-CP-06-0106) pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). The PCR Court therefore found that Petitioner did not knowingly and voluntarily waive his right to appellate review and

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). cw

was therefore entitled to a belated review of the denial of his first PCR application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). By Order filed March 30, 2010, the Honorable William Jeffrey Young granted Petitioner belated review pursuant to Austin v. State and denied his remaining allegations.

De novo PCR hearing granted after failed reconstruction hearing

Subsequently, the court reporter reported that part of the hearing on Applicant's first post-conviction relief application (2006-CP-06-00106) was missing from her tapes. Applicant moved in the South Carolina Supreme Court for a de novo hearing on Applicant's first post-conviction relief application. The South Carolina Supreme Court granted the petition and remanded the matter to the Honorable J. Michael Baxley for the purpose of attempting to reconstruct the record of the hearing. After a reconstruction hearing was held on August 8, 2007, before Judge Baxley, Judge Baxley informed the Supreme Court that the record could not be fully reconstructed. Applicant renewed his petition to remand for a de novo hearing. By Order dated March 23, 2012, the South Carolina Supreme Court vacated the previous order denying relief and remanded for a de novo hearing on Applicant's first post-conviction relief application.

Pleadings for de novo hearing

Petitioner filed an Amended Post-Conviction Relief Application on August 22, 2013. In the amended application, Petitioner presented eleven new claims for relief:

> (1) Trial counsel failed to adequately advise Petitioner of all the potential disadvantages of a bench trial versus a jury trial.
>
> (2) Trial counsel failed to thoroughly advise Petitioner of the potential benefits of a jury trial, and that resulted in Petitioner's inability to make a knowing and voluntary waiver of his right to trial by jury.

(3) Trial counsel failed to provide Petitioner reasonable professional assistance of counsel by failing to seek a continuance despite the fact that lead counsel, Brenda Sanders, was not properly notified that Petitioner's case was scheduled for trial.

(4) Trial counsel was ineffective for failing to adequately argue the facts in support of Petitioner's motion to exclude from evidence a transcript of Aurelin Vigier's testimony from Petitioner's trial where Attorney Sanders had no previous opportunity to cross-examine this witness.

(5) Trial counsel Sanders was ineffective for failing to respond to the trial judge's assumption that she had the opportunity to have Attorney Williams pose any questions she deemed necessary to witness Vigier.

(6) Trial counsel was ineffective for allowing a transcript of witness Vigier's testimony from Petitioner's first trial to be admitted without objection.

(7) Trial counsel was ineffective for neglecting to object to a pattern of leading questions by the prosecution.

(8) Trial counsel was ineffective for failing to object to hearsay testimony from Dr. Joel Sexton concerning what he was told concerning the type of ammunition used in this homicide.

(9) Trial counsel was ineffective for failing to object to the Solicitor's misstatement of Maurice Benning's testimony during the prosecution's summary of the evidence before the Court where the prosecutor erroneously advised the Court that Maurice Benning testified that he heard a shot from the area around the restaurant where the record fails to support that claim.

(10) Trial counsel was ineffective for failing to object to Petitioner's 25 year sentence for armed robbery where Petitioner was charged with Attempted Armed Robbery. [The original 25 year sentence was reduced to 20 years imprisonment].

(11) Trial counsel was ineffective for failing to point out to the Judge that the State did not rebut claim by Petitioner that only one officer got of the car at the first Chinese Restaurant; a fact that was not disclosed in Gadson's testimony.

On August 21, 2013, Petitioner filed a Second Amended Application for Post-Conviction Relief. In the second amended application, Petitioner added two additional claims: (1) trial counsel was ineffective for failing to request the Judge to publish on the record all of the law to

be applied by the Judge in reaching his verdict; and (2) trial counsel provided Petitioner ineffective assistance of counsel by waiving the right to make a comprehensive closing argument summarizing the evidence and arguments in favor of the defense.

De novo PCR hearing

An evidentiary hearing into the matter was convened on August 20, 2013, at the Bamberg County Courthouse before the Honorable Doyet A. Early, III. Applicant was present at the hearing and was represented Tara D. Shurling, Esquire. Respondent was represented by Senior Assistant Attorney General David Spencer and Assistant Attorney General Daniel Gourley. By order filed August 19, 2014, the Honorable Doyet A. Early, III, denied and dismissed Applicant's application for post-conviction relief with prejudice.

During the hearing, PCR counsel Shurling addressed a concern by the State regarding Brenda Sanders paying and retaining Shurling as PCR counsel for Applicant. The Court engaged in a colloquy with Shurling regarding the representation. Shurling informed the PCR court that Brenda Sanders did assist Applicant in preparing the initial PCR application that Applicant adopted and entered pro se, but that Brenda Sanders did not assist Shurling in drafting and preparing the amended PCR application. App. pp. 543-44. The original PCR application, from May 11, 2006, did not allege Brenda Sanders was ineffective. However, Shurling confirmed that she was alleging in the amended application that Brenda Sanders was ineffective. Shurling informed the PCR court that after a de novo PCR hearing was granted, Shurling told both Brenda Sanders and Applicant "that no matter who pays my fee [Applicant] was the client." App. p. 549, lines 1-6. She told Applicant her "primary and only allegiance is to the client and

that the third party should not and will not be allowed to dictate to me how I handle the case, what issues I raise and so forth." App. p. 549, lines 7-11.

The PCR court noted:

> So what we have here is an Applicant who was represented by his sister, he loses the trial, he files now after all of the background getting here, he's got a post conviction application filed by you, Ms. Shurling, alleging that his sister who has been responsible for paying the fee and signed the fee agreement is ineffective.

App. p. 551, lines 10-18. Shurling confirmed this, the PCR court did not think it "smelled" right. App. p. 551, lines 17-18. The PCR court explained his view, "Well, what we got here is, in effect, a trial lawyer PCRing herself by hiring you to say she was ineffective." App. p. 553, lines 8-9. Shurling analogized the present situation to a routine situation where a public defender believes they made a mistake in representing a client and subsequently writes the client, attaching a copy of the PCR application, advising the client to file an application alleging the public defender was ineffective. App. p. 553, lines 10-22. Shurling explained Brenda Sanders did not attempt to influence Shurling as to what issues she would raise in the PCR application. App. p. 554, lines 14-20.

The PCR court then addressed the State, noting the State handed the court authority concerning dual representation – where a trial attorney also acts as a PCR attorney. See Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987). The State conceded that dual representation was not present in this case, and that the authority the State provided the PCR court did not apply based on the facts brought to the PCR court's attention. App. pp. 556, lines 11-24. The State explained its view that Brenda Sanders was rendering legal assistance at one point, but this ceased after Shurling came into the case, and Brenda Sanders was not representing Applicant at

the PCR hearing, so there was no issue of dual representation. App. p. 556. The State explained it wanted everything on the record in that regard. App. p. 559.

Shurling subsequently engaged in an extensive colloquy with Applicant concerning her representation:

> Q: Mr. Sanders, when I was hired to represent you by your sister, later when it became apparent that we were going to be doing a new PCR instead of a PCR appeal, you and I had discussions about the fact that your sister had hired me; didn't we?
>
> A: Yes, ma'am.
>
> Q: And I assured you that the fact that she was the one paying my fee was not going to in any way affect my tenacity with regard to raising claims of ineffective assistance of counsel against her; is that true?
>
> A: Yes, ma'am.
>
> Q: But we discussed that and I explained to you that she had paid my fee and you agreed to have me to be your PCR lawyer anyway; right?
>
> A: Yes, ma'am.
>
> Q: And you understand the argument the State's making that since she paid my fee, arguably there might have been a conflict if I felt some kind of loyalty to her instead of you. Do you understand that argument?
>
> A: Yes, ma'am.
>
> Q: Have you at any time during my representation had the feeling that I had divided loyalty between you and your sister?
>
> A: No, ma'am.
>
> Q: Are you comfortable going forward with me as your PCR counsel even though I was paid by your sister?
>
> A: Yes, ma'am.

App. p. 689, line 9 – p. 690, line 13.

PCR appeal from de novo hearing

Applicant's PCR counsel appealed the denial of relief and was ultimately represented on the PCR appeal by Appellate Defender John H. Strom, Esquire. On July 24, 2015, Mr. Strom filed a Motion to Hold Appeal in Abeyance and to Remand for a New Evidentiary Hearing Based on After-Discovered Evidence and provided an appendix of attachments. The premise of the motion was the discovery of evidence that Brenda Sanders was diagnosed with a psychotic disorder by a psychiatrist appointed to evaluate Applicant's sister by the Michigan Judicial Tenure Board. Then Judge Brenda Sanders did not appear for any of the scheduled appointments and the psychiatrist diagnosed Brenda Sanders based on documents provided to him without actually seeing Brenda Sanders.

The State filed a return to Applicant's motion to remand objecting to Applicant's motion. Applicant filed a Reply on August 14, 2015. By Order filed November 5, 2015, the South Carolina Supreme Court denied Applicant's motion for remand.

Applicant subsequently filed a Petition for Writ of Certiorari presenting three arguments for review: (1) the PCR court erred in finding Applicant knowingly and intelligently waived his constitutional right to a trial by jury because of the objectively unreasonable advice of his lead trial attorney and inadequate advice by his attorneys of the consequences of proceeding with a bench trial; **(2) the PCR court erred in allowing Applicant 's evidentiary hearing to proceed since PCR counsel had an actual conflict of interest as she was retained by lead trial counsel Brenda Sanders, Applicant's sister, and this conflict of interest compromised PCR**

counsel's representation as she admittedly failed to investigate Counsel Sanders' mental illness or past disciplinary infractions; and (3) the PCR court erred in finding both of Applicant's trial attorneys provided ineffective assistance of counsel where neither counsel corrected the trial court's false belief that Counsel Sanders had the opportunity at the first trial to participate in the cross-examination of key State's witness Aurelien Vigier through Counsel Williams when, in actuality, Counsel Sanders could not participate and the trial court's false belief was central to both its ruling and the Court of Appeals' affirmance of Applicant's conviction.

On April 6, 2016, the State filed a Motion to Strike the Petition for Writ of Certiorari, Appendix, and Supplemental Appendices for Failure to Comply with Rule 210(c), SCACR. The State subsequently submitted an Amended Motion filed on May 17, 2016. Applicant filed his Return Opposing the State's Motion to Strike Petition for Writ of Certiorari, Appendix, and Supplemental Appendices for Failure to Comply with Rule 210(c), SCACR on May 27, 2016. The State filed a Reply on June 26, 2016. By Order filed January 13, 2017, the South Carolina Supreme Court denied the Petition for Writ of Certiorari and found the State's outstanding motion to strike was moot. The Remittitur was issued on January 31, 2017.

Federal Habeas Corpus petition: Sanders v. Warden, Allendale Correctional Institution, Case No. 2:17-cv-1819-HMH-MGB

Applicant filed a petition for writ of habeas corpus on July 6, 2017, and a subsequent amended petition on October 13, 2017. The Office of the South Carolina Attorney General filed a motion for summary judgment on behalf of Respondent on October 17, 2017. On July 12, 2018, The Honorable Federal Magistrate Mary Gordon Baker issued a report and

recommendation to grant Respondent's motion for summary judgment and dismiss the petition with prejudice. On August 28, 2018, the Honorable District Court Judge Henry M. Herlong adopted the recommendation to grant summary judgment. Applicant's subsequent appeal to the Fourth Judicial Circuit Court of Appeals was dismissed by the Court of Appeals on March 1, 2019.

Current PCR application

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

1. "Applicant was deprived of his Sixth Amendment right to effective assistance of counsel where his lead trial counsel Brenda Sanders was suffering from a serious, undiagnosed mental illness that rendered her unable to properly interpret reality and caused her to experience paranoid delusions. Her mental illness, and irrational paranoia, animated many of her key tactical trial decisions, including the election of a bench trial."

2. "Applicant's lead trial counsel Brenda Sanders retained and paid PCR Counsel Shurling. This financial arrangement resulted in an active conflict of interest because Sanders' intense desire to hide her mental illness and payment of PCR Counsel's retainer conflicted with PCR Counsel Shurling's duty to investigate Sanders and to examine whether she made objectively reasonable decisions while representing Applicant."

Applicant sets out the following statement of facts in his application to support his claims in part:

> Petitioner's lead trial counsel, Brenda K. Sanders has been diagnosed as having a serious, long-term non-specified psychotic disorder. Specifically, Sanders suffers from "psychotic delusions" manifested by "firmly fixed false beliefs of being persecuted by nearly everyone;" none of those persecutory beliefs "correspond to reality."

In support of his PCR application, Applicant attached an affidavit by Dr. Norman S. Miller, a psychiatrist, provided to the Michigan Judicial Tenure Board, opining Brenda Sanders suffered from psychiatric symptoms including paranoid psychotic delusions. The opinion is

based primarily on a letter then-Judge Sanders wrote to the United States Attorney in December 2013, claiming the existence of a conspiracy to murder two other Michigan judges. Dr. Miller did not personally evaluate Judge Sanders because she did not appear for any of the scheduled appointments.

Applicant's Habeas Pleadings

The State, in its return, attached two pleadings by Applicant in his aforementioned Habeas Corpus petition. The first, entitled: "Petitioner's Brief in Support of Response in Opposition to Respondent's Motion for Summary Judgment" was filed March 16, 2018. In the pleading, Applicant complains:

> Just one week after the Petitioner's sister, Brena K. Sanders, hearing was conducted to remove her as a judge of the 36th Judicial District Court, Attorney Tara Shurling, without the knowledge or consent of the Petitioner and Petitioner's sister filed a motion with a claim of After Discovered Evidence pursuant to Rule 60(b) with the South Carolina Supreme Court. The after discovered evidence motion was filed more than a year after the Petitioner and his sister ceased communications with Attorney Shurling and when the Attorney Shurling failed to consult with the Petitioner or his sister. Petitioner asserts that the after discovered evidence motion was filed to damage the reputation of his sister and had no evidentiary value to add to the PCR hearing wherein the Petitioner's sister testified about her representation of her brother at the trial.
> ***
> PCR counsel Shurling's sole purpose was to defame the Petitioner's sister by including a full transcript and review of the proceedings that caused the removal of the Petitioner's sister from office as a judge of the 36th District Court.
> ***
> Attorney Shurling did not consult with Petitioner's sister, Brenda K. Sanders, wherein she learned that the removal was determined in retaliation for Petitioner's sister's report of a "suspicious death" of one of her colleagues to the U.S. Justice Department in 2013. Furthermore, PCR counsel Shurling would have learned that the Petitioner's sister was pronounced as having a "mental illness"

> which prevented her from the performance of her judicial duties when she was never interviewed or diagnosed by any doctor and the decision was a sham.

Pet. Resp. in Opposition CA#: 2.17-cv-17-01819-DCN-MGB (Filed 3/16/18 Entry No. 51-1) p. 59.

Applicant further complains his appellate defender "failed to address the issues raised by Petitioner at his PCR hearing which was conducted in 2013, but instead, elected to raise an issue of Petitioner's sister's mental stability which constituted legal malpractice." Id. p. 60. Applicant later complains his appellate counsel "also took the extraordinary step of furnishing the Petitioner with a copy of all of his sister's pleadings involving her disciplinary proceedings as a judge and an attorney in the State of Michigan which Petitioner's sister had not shared with her brother. More importantly the transcripts that involved Petitioner's sister were generated after the August 19, 2013 PCR hearing **and had no bearing on the proceedings.**" Id. p. 60 (emphasis added).

While Applicant alleged in the instant PCR application that Brenda Sanders' mental condition affected her advice for Applicant to proceed with a bench trial, Applicant filed a "PETITIONER'S OBJECTION TO REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE" in which he argues "The Magistrate's finding constitutes clear error. Petitioner's sister, Brenda Sanders, entertained serious doubts about the fair-mindedness of the jury after the publication of the biased editorial in the Barnwell Sentinel. Her fears of unfairness, whether rational or not, were already present based on the lack of notice about the jury trial from co-counsel and her experience after sitting through the first trial which caused her to heavily influence her brother to abandon his jury trial demand and proceed with a bench trial. Trial

counsel Sanders was merely defending her brother. **Somehow, her normal defense tactics have been categorized as "mental paranoia."** CA#: 2.17-cv-17-01819-DCN-MGB (filed 8/17/18, Entry No. 67) p. 10 (emphasis added).

Therefore, this Court notes Applicant has taken a contrary position in his habeas proceedings regarding his sister's mental health, even arguing to the federal court that the materials from the Michigan Tenure Board that his attorneys in State court have relied on are actually irrelevant to his August 2013 PCR hearing.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds that this PCR Application should 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. S.C. Code Ann. §17-27-45(a) reads as follows:

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

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The remittitur was sent following the Applicant's unsuccessful appeal on May 19, 2005. The Applicant was therefore required to file his application on or before May 20, 2006. This Application was filed on July 1, 2016, which was well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute.

Successive Application

This Court further finds the current application should also be dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

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

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 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. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

After-Discovered Evidence

As to Applicant's allegation of after-discovered evidence, it appears Respondent is entitled to judgment as a matter of law. Under the Uniform Post-Conviction Procedure Act:

> The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

S.C. Code Ann. § 17-27-70(C). Summary disposition of a PCR application is appropriate "when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Pelzer v. State, 378 S.C. 516, 519, 662 S.E.2d 618, 619 (Ct. App. 2008); *see also* Savannah Bank, N.A. v. Stalliard, 400 S.C. 246, 734 S.E.2d 161 (2012) ("Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law.").

To warrant granting a new trial on a claim of after-discovered evidence, Applicant must show that the evidence:

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

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983). With respect to an after-discovered evidence claim, the application must be filed within one year of when the facts were, or should have been, discovered. S.C. Code Ann. § 17-27-45 (2003).

In the context of determining the propriety of a successive application, "[t]he standard test governing newly discovered evidence is properly applied when relief is sought based on evidence discovered post-trial that is material to the accused's guilt or innocence." McCoy v. State, 401 S.C. 363, 371, 737 S.E.2d 623, 627 (2013).

Applicant's alleged after-discovered evidence is the discovery that one of his trial attorneys (and sister, Brenda Sanders) suffers from "psychotic delusions." (Applicant's Application, 11(a)). This information comes from a Report produced by Dr. Norman S. Miller on August 27, 2014, as part of an investigation by the Michigan Judicial Tenure Commission to determine Counsel Sanders' fitness to remain on the bench. His report relies primarily on a letter Judge Sanders wrote to the United States Attorney in December, 2013, four months after she testified at the PCR hearing, and over twelve years since she represented Applicant in his 2001 trial. Not only is the claim that Counsel Sanders now suffers from a psychotic disorder irrelevant to Judge Early's findings that Brenda Sanders did not render ineffective assistance of counsel, but it is wholly speculative that she may have suffered from any psychological disorder when Applicant was tried in 2001 or even at the PCR evidentiary hearing in August 2013.

Applicant is merely offering another reason as to *why* Applicant believes Brenda Sanders rendered ineffective assistance of counsel without offering any further evidence of *how* she was ineffective.

The Ninth Circuit rejected an argument that trial counsel, who suffered from Alzheimer's disease, should be found ineffective per se in Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000) ("the mere fact that counsel may have suffered from a mental illness at the time of trial, however, has never been recognized by the Supreme Court as grounds to automatically presume prejudice."). The Ninth Circuit noted its prior precedent which reasoned, "[M]ental illness is too varied in its symptoms and effects to justify a per se reversal rule without evidence that the attorney's performance fell below the constitutional norm." Id. (quoting Smith v. Ylst, 826 F.2d 872, 876 (9th Cir. 1987) (internal quotation marks omitted). The Ninth Circuit concluded that because of the varied manifestations in different individuals, neither the petitioner nor anyone else would be able to prove what effects, if any, the disease would have had on trial counsel's memory and cognitive ability at the time of trial. Id. at 485-86. The Ninth Circuit then simply analyzed the alleged errors under the two-prong test of Strickland without analysis of whether made supposed errors because of the onset of Alzheimer's disease. Id. at 486-87.

The Eighth Circuit likewise refused to find per se ineffective assistance of counsel where trial counsel was alleged to have suffered from bi-polar disorder at the time of trial, concluding "We are not convinced there is anything about [trial counsel's] bipolar condition that would not lend itself to normal fact-specific Strickland analysis." Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000). The Eighth Circuit observed, "Any errors [trial counsel] made, even as a result of his mental illness, should be apparent from the face of the trial record, or otherwise susceptible of proof, and thus readily reviewable." Id. The Johnson court noted trial counsel's testimony about his bi-polar condition in 1996 was not particularly probative to prove counsel's deficient performance in 1991. Id.

Likewise, evidence of Brenda Sanders' mental health condition in 2013 is not probative of her performance in 2001. Like Norris, any deficiencies of counsel would be apparent in the record and could correctly be resolved through normal Strickland analysis. The speculative assertion that Brenda Sanders might have had some symptoms of a mental illness that would not be diagnosed for another dozen years by a doctor who never met Brenda Sanders is not probative and does not entitle Applicant to a successive application.

Therefore, Applicant fails to make a *prima facie* case for a new trial based on after-discovered evidence as (1) he does not have any evidence relevant to the issue of guilt or innocence, and (2) the information put forth as evidence is merely speculative, at best, and is irrelevant to the objective test of ineffective assistance of counsel. At most, Brenda Sanders' mental health status would have at most provided impeaching evidence for the Applicant's own witness at the PCR hearing, it would not have been relevant to the issue of Applicant's guilt or innocence.

Applicant's reliance on McCoy and Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016) is misplaced. In McCoy, the applicant alleged juror misconduct discovered after the first PCR application was denied. The Supreme Court noted that the issue alleged misconduct concerned material facts impacting the applicant's right to a fair and impartial jury and therefore, alleged facts if proven would require vacation of the conviction or sentence pursuant to section 17-27-45. McCoy, 401 S.C. at 369, 737 S.E.2d at 369-70.

In Robertson, the applicant, seeking post-conviction relief for his capital murder conviction, alleged in a successive application that counsel representing him for the first PCR application was not qualified as required by statute to be appointed for a capital PCR case. The

Supreme Court reversed the grant of dismissal finding the applicant was denied a "state created right to qualified counsel" which constituted a sufficient reason to permit a successive application.

In the present case, Applicant's claim does not present facts that would require Applicant's conviction or sentence to be reversed like the juror misconduct issue in McCoy, and Applicant was not denied any statutory-created right to counsel found in Robertson. Brenda Sanders was merely a witness called to testify by Applicant, she was not representing Applicant.

Further, no evidence suggests that she would not have been competent to testify under the low threshold of Rule 601, SCRE. Every person in South Carolina is presumed competent to be a witness except as otherwise provided by statute or rule. Rule 601(a), SCRE; Sellers v. State, 362 S.C. 182, 607 S.E.2d 82 (2005); State v. Needs, 333 S.C. 134, 508 S.E.2d 857 (1998). A person will not be disqualified as a witness unless the court determines that (1) the proposed witness is incapable of expressing himself to the judge or jury concerning the matter or (2) the proposed witness is incapable of understanding the duty of a witness to tell the truth. Rule 601(b), SCRE. "A witness's mental illness is not enough to rebut the presumption set forth in Rule 601, SCRE." Sellers, 362 S.C. at 190, 607 S.E.2d at 190. The most Applicant can claim is he would have had additional impeachment evidence of a witness he called to testify at the PCR hearing. This is inadequate for Applicant to be entitled to have a successive application heard by this Court.

Thus, even viewing the evidence and all inferences which can be reasonably drawn therefrom in the light most favorable to Applicant, no genuine issue of material fact remains, and

the Court holds that Respondent is entitled to judgment as a matter of law with regard to Applicant's claim of after-discovered evidence.

Alleged conflict of interest already litigated

Applicant claims there was a conflict of interest at the PCR hearing because his PCR counsel's fee was paid by his sister and trial counsel, Brenda Sanders. However, this issue was raised on appeal to the Supreme Court as discussed above and the Supreme Court declined to grant certiorari to review the issue. Therefore the issue has already been litigated. "Under the doctrine of res judicata, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993).

Further, the PCR court engaged in an extensive colloquy with Shurling, and Shurling questioned Applicant extensively to ensure that any question of a conflict was resolved. Shurling raised several allegations that Brenda Sanders was ineffective and confirmed that her loyalty was solely to Applicant. This Court would also note that the allegation of a conflict of interest by PCR counsel in a successive PCR application amounts to a collateral attack on the prior PCR application, not on the conviction itself. Therefore, Applicant is not entitled to have a successive application on this allegation.

Claims of ineffective assistance of PCR counsel not cognizable

This Court further notes neither the allegation of Brenda Sanders' mental stability during the PCR proceedings nor the alleged conflict of interest for PCR counsel alleged in the PCR application are cognizable collateral attacks on the conviction itself, but represent an allegation

that Applicant had insufficient representation of PCR counsel and a claim of the existence of after-discovered evidence that is merely impeaching as to a witness at the PCR hearing. A convict may not maintain a successive application on the basis that the prior complete PCR application was insufficient due to ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 448, 409 S.E.2d 392, 393 (1991). "Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 394.

CONCLUSION

Pursuant to subsection 17-27-70(b) of the South Carolina Code (2014), this Court finds it should grant the State's motion to dismiss this PCR application as Applicant fails to state a sufficient reason to entertain a successive application. Therefore, this Application must be dismissed with prejudice and Applicant shall remain in custody of the Department of Corrections.

AND IT IS SO ORDERED this 27th day of June, 2020.

Clifton Newman
Chief Administrative Judge
Second Judicial Circuit

Aiken, South Carolina

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP0600291

Tunzy A Sanders		**South Carolina State of**	
PLAINTIFF(S)		**DEFENDANT(S)**	
Submitted by:		**Attorney for:** ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

S/I C. Newman — **Circuit Court Judge**
2127 — **Judge Code**
11/12/2020 — **Date**

For Clerk of Court Office Use Only

This judgment was entered on **November 10, 2020**, and a copy mailed first class or placed in the appropriate attorney's box on **November 12, 2020**, to attorneys of record or to parties (when appearing pro se) as follows:

Robert Michael Dudek PO Box 11589 Columbia, SC 29211
Susan Barber Hackett Division Of Appellate Defense PO Box 11589 Columbia, SC 29211-1589

David A. Spencer PO Box 11549 Columbia, SC 29211

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Constance B. Carter

Court Reporter

Constance B. Carter - Deputy Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	IN THE COURT OF COMMON PLEAS SECOND JUDICIAL CIRCUIT
Tunzy A. Sanders, #255493, Applicant, v. State of South Carolina, Respondent.	2016-CP-06-291 **ORDER DENYING APPLICANT'S MOTION PURSUANT TO RULE 59(e), SCRP**

This matter is before this Court by way of an application for post-conviction relief (PCR) filed July 1, 2016. This Court dismissed the PCR application on January 27, 2020, finding it was successive and filed beyond the statute of limitations. This Court also found the claims were prohibited under res judicata and that Applicant was raising claims not cognizable in an application for post-conviction relief.[1] Applicant filed a motion pursuant to Rule 59(e), SCRCP, dated February 7, 2020. The State submitted to this Court its return to the 59(e) motion by e-mail attachment on July 17, 2020. This Court heard Applicant's motion by way of Web-X on July 21, 2020.

Applicant was present, via Web-X, and was represented by Susan B. Hackett, Esquire. The State was represented by Senior Assistant Attorney General David Spencer. This Court also heard testimony from John Strom, Esquire, who originally filed the instant PCR application on Applicant's behalf.

[1] Applicant argues in his motion that Rule 12(b)(8) does not apply to the present case. This Court believes Applicant misapprehends the order's grounds for dismissal in that regard. That was a basis for the *prior* final order, dated November 10, 2016, that was subsequently set aside. However, as noted in the second paragraph of the order, that order was set aside on agreement of the parties. To clarify, Rule 12(b)(8), SCRCP is no longer applicable and is not part of this Court's Final Order issued on January 27, 2020.

After careful consideration of the arguments and testimony presented at the hearing, the arguments contained in Applicant's motion, the State's response to the motion, and the prior pleadings of both parties and their attachments, this Court denies Applicant's motion to alter or amend the judgment.

This Court provided a detailed account of the procedural history for this case in its Order of Dismissal. However, it is useful to revisit the two issues raised by Applicant in his current PCR application:

1. "Applicant was deprived of his Sixth Amendment right to effective assistance of counsel where his lead trial counsel Brenda Sanders was suffering from a serious, undiagnosed mental illness that rendered her unable to properly interpret reality and caused her to experience paranoid delusions. Her mental illness, and irrational paranoia, animated many of her key tactical trial decisions, including the election of a bench trial."

2. "Applicant's lead trial counsel Brenda Sanders retained and paid PCR Counsel Shurling. This financial arrangement resulted in an active conflict of interest because Sanders' intense desire to hide her mental illness and payment of PCR Counsel's retainer conflicted with PCR Counsel Shurling's duty to investigate Sanders and to examine whether she made objectively reasonable decisions while representing Applicant."

Applicant sets out the following statement of facts in his application to support his claims in part:

> Petitioner's lead trial counsel, Brenda K. Sanders has been diagnosed as having a serious, long-term non-specified psychotic disorder. Specifically, Sanders suffers from "psychotic delusions" manifested by "firmly fixed false beliefs of being persecuted by nearly everyone;" none of those persecutory beliefs "correspond to reality."

In support of his PCR application, Applicant attached an affidavit by Dr. Norman S. Miller, a psychiatrist, provided to the Michigan Judicial Tenure Board, opining Brenda Sanders suffered from psychiatric symptoms including paranoid psychotic delusions. The evaluation was prepared on or around August 2014. Dr. Miller's opinion is based primarily on a letter then-

Judge Sanders wrote to the United States Attorney in December 2013 – four months after the August 2013 PCR hearing – claiming the existence of a conspiracy to murder two other Michigan judges.

Summary disposition of a PCR application is appropriate "when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief." Pelzer v. State, 378 S.C. 516, 519, 662 S.E.2d 618, 619 (Ct. App. 2008). When considering summary dismissal of an application, the PCR court must assume the facts presented by Applicant are true and view those facts in the light most favorable to the Applicant. Id.

In the present case, this Court assumes under this standard of review that Brenda Sanders did suffer paranoid delusions and severe mental illness during and after December 2013, when she sent the letter to the US attorney that led to Michigan authorities becoming concerned for her mental health. This Court assumes that in the light most favorable to Applicant, Brenda Sanders suffered from mental illness during much of 2013. However, this Court does not believe the facts and evidence presented allows for an inference that Brenda Sanders suffered from mental illness in 2001, at the time of trial. Applicant argues that but for the alleged conflict of interest, his prior PCR attorney, Ms. Shurling, could have discovered Brenda Sanders mental illness prior to the August 2013 PCR hearing. This seems to be more of an explanation as to why the evidence alleged in the first ground was not discovered until later rather than a free-standing claim. This Court finds Applicant has not presented facts linking the supposed lateness in Ms. Shurling's discovery of Brenda Sanders' mental health issues to any divided loyalty on Ms. Shurling's part between Applicant and Brenda Sanders.

Successive Application

Applicant requests this Court to explain its holding in its Order of Dismissal that the Application warranted dismissal as impermissibly successive so a more detailed analysis follows. Our courts disfavor successive applications. Under S.C. Code §17-27-90, all grounds for relief should be raised in the first PCR application and "[a]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived" and "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." (Emphasis added).

Our Supreme Court has interpreted the "sufficient reason" language narrowly. Aice v. State, 305 S.C. 448, 450-51, 409 S.E.2d 392, 394 (1991). The Supreme Court noted, "[A]s long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application." Id. The Supreme Court recognized the problem of a relaxed rule, which it rejected: "As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." Id. at 451, 409 S.E.2d at 394.

First, the conflict of interest issue was addressed by Judge Early during the August 2013 PCR hearing after the State brought the issue to his attention. Any concern of divided loyalties on Ms. Shurling's part was addressed by Ms. Shurling upon inquiry by Judge Early. Judge Early was satisfied by the inquiry and further observed, "And I've known Ms. Shurling a long time. If there was anything that was there, she would tell me." App. p. 558, lines 4-8.

Further, Ms. Shurling engaged in a thorough colloquy with Applicant and asked him if he remained comfortable with Ms. Shurling as his attorney. App. p. 689, line 9 – p. 690, line 13. In the instant case, Applicant could have raised his concerns about the potential conflict of interest claim or otherwise requested new counsel in his prior PCR application. This is demonstrated by the colloquy between Applicant and his PCR counsel, Ms. Shurling, at the August 2013 PCR hearing:

> Q: Mr. Sanders, when I was hired to represent you by your sister, later when it became apparent that we were going to be doing a new PCR instead of a PCR appeal, you and I had discussions about the fact that your sister had hired me; didn't we?
>
> A: Yes, ma'am.
>
> Q: And I assured you that the fact that she was the one paying my fee was not going to in any way affect my tenacity with regard to raising claims of ineffective assistance of counsel against her; is that true?
>
> A: Yes, ma'am.
>
> Q: But we discussed that and I explained to you that she had paid my fee and you agreed to have me to be your PCR lawyer anyway; right?
>
> A: Yes, ma'am.
>
> Q: And you understand the argument the State's making that since she paid my fee, arguably there might have been a conflict if I felt some kind of loyalty to her instead of you. Do you understand that argument?
>
> A: Yes, ma'am.
>
> Q: Have you at any time during my representation had the feeling that I had divided loyalty between you and your sister?
>
> A: No, ma'am.
>
> Q: Are you comfortable going forward with me as your PCR counsel even though I was paid by your sister?
>
> A: Yes, ma'am.

App. p. 689, line 9 – p. 690, line 13. Therefore it is clear that Applicant was aware Brenda Sanders paid Ms. Shurling's fee and was made aware of the potential conflict, but chose to go forward with Ms. Shurling as his counsel. Those are known facts and not facts discovered since the conclusion of the prior PCR application. Accordingly, the issue of a "conflict" could have been raised, and was raised, during the August 2013 PCR hearing, and does not provide a sufficient reason to entertain a successive PCR application.

The fact Applicant was made aware of the potential conflict prior to the PCR hearing sets this case apart from Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016), upon which Applicant relies. In Robertson, the death penalty PCR applicant was appointed two attorneys pursuant to statute for his 2006 PCR application. It was discovered in 2011 by his federal habeas attorneys that the two attorneys were not qualified pursuant to state statute. The Supreme Court found it was unreasonable to expect an indigent PCR applicant to question the qualifications of two attorneys appointed to represent him. In the instant case, Applicant agreed during the August 2013 hearing that Ms. Shurling made him aware of the potential conflict of interest due to Brenda Sanders paying his legal fee, and he agreed that nonetheless he was comfortable with Ms. Shurling continuing to represent him. Therefore, unlike Roberston, who did not know he was represented by unqualified counsel, Applicant was made aware of the potential conflict, he waived the potential conflict, and he confirmed he waived the conflict during the PCR hearing.

The issue of the supposed conflict was raised on appeal from the denial of relief by Applicant's appellant defender and certiorari was denied. Given Ms. Shurling's assurances to Judge Early her loyalty was only to Applicant, Judge Early's ability to consider the matter, and Applicant's ability to express any concerns about representation at the prior PCR hearing, Applicant is not entitled to a successive application. Further, the issue was raised at the PCR

hearing and raised in Applicant's petition for writ of certiorari, so the Supreme Court had the opportunity to review the matter if it was concerned about the adequacy of the on record waiver of what might have constituted a possible conflict. Applicant likens the South Carolina Supreme Court's denial of certiorari to cases discussing the effect of the denial of certiorari by the United States Supreme Court. However, the role of review of a writ of certiorari in these contexts is markedly different. Our state supreme court is ensuring the PCR court's order is supported by probative evidence while the United States Supreme Court tends to focus on the broad application of federal issues raised and is often focused on splits of authority requiring resolution. Nonetheless, given the broad sweep of the limitations of a successive application to issues that were raised or could have been raised, this Court finds it does not need to reach the issue of res judicata because the simple matter is the issue was presented to Applicant and he waived objection to Ms. Shurling proceeding as his PCR counsel.

Applicant argues that he did not knowingly waive the conflict claim because he did not know Brenda Sanders was allegedly hiding her mental health condition and Ms. Shurling did not find out about the mental health issues because of the conflict. However, there is no nexus to the claim about Brenda Sanders' undiscovered mental health issues and the supposed conflict. This Court notes Applicant claims he could not have found out about Ms. Sanders' mental health issues until July 2015, which contradicts his claim Ms. Shurling should have known something before the August 2013 PCR hearing. Second, Applicant fails to show that Ms. Shurling failed to take any action because of a supposed duty to Brenda Sanders. Indeed, the only evidence is that Ms. Sanders unfortunate mental illness was only discovered in December 2013, four months after the August 2013 hearing, because of a letter she wrote to the US Attorney in Michigan.

There are no facts alleged tending to show that unless clairvoyant, Ms. Shurling would have been aware of Ms. Sanders' unfortunate mental illness prior to December 2013.

The other allegation, that Ms. Sanders might have suffered from mental health issues at the time of trial in 2001, is not actually a specific claim of deficient performance, but a generalized allegation as to a potential cause of deficient performance. Applicant raised numerous allegations of ineffective assistance of counsel as to both of his trial attorneys. In his current PCR application, Applicant refers to his allegation during the prior PCR hearing concerning his election of a bench trial in lieu of a jury trial. However, allegations regarding his election of a bench trial were raised in the prior PCR application. Ms. Shurling raised allegations concerning (1) the reasonableness of her advice and strategy for Applicant to waive jury trial and elect a bench trial, and (2) whether Applicant freely and voluntarily waived his right to a jury trial. The PCR court ruled only on whether Applicant freely and voluntarily waived his right to a jury trial, finding he did so *despite* Ms. Sanders' PCR testimony, as discussed more thoroughly later in this order.

Brenda Sanders severe mental health illness discovered in December 2013 does not entitle Applicant to a new hearing. First, this Court finds that evidence Brenda Sanders suffered from severe mental illness in December 2013 does not provide any evidence or even a reasonable inference that Ms. Sanders suffered from severe mental illness in 2001. Further, this allegation does not present any new allegations of ineffective assistance of counsel, but is merely offered as an explanation of why she might have provided deficient performance.[2] This Court

[2] The testimony at the PCR hearing established significant pretrial publicity in the local Barnwell paper, and is supported by the response to Judge Barber's voir dire question as to whether the jurors had read any media accounts of the murder – according to local counsel Williams, three quarters of the voir dire panel indicated by standing that they had read media accounts of the murder. App. p. 25; p. 58. So there is certainly reason to believe the motivation for a bench trial arose from real events and was the product of reasonable trial strategy.

does not believe the facts presented, taken as true, are sufficient to allow a successive application.

To summarize, this is an impermissibly successive application because Applicant has failed to present issues could not have been raised in a prior PCR application. Indeed, the substance of the issues alleged in the current PCR application were raised during the prior PCR application. As shown above, Applicant had the opportunity to address any concerns he might have regarding representation and did not. Further, claims about Brenda Sanders' mental health is merely a claim of why counsel might have provided deficient performance, but claims that Ms. Sanders made errors or omissions constituting deficient performance – including her advice and strategy in pursuing a bench trial – could and were raised in the prior PCR application.

"Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 391. Applicant's waiver of what has been termed a conflict of interest did not come with a guarantee of clairvoyance or perfect performance by Ms. Shurling, and does not entitle him to enjoy yet another PCR proceeding. Ms. Shurling declared her loyalty was only to her client and no facts were offered to show otherwise. Further, the discovery of events occurring after Applicant's PCR hearing does not provide sufficient reason to relitigate his claims concerning his waiver of a jury trial in 2001.

Statute of Limitations

This Court found that the present application was found well-beyond the statute of limitations. The present Application was filed July 1, 2016. The conviction and sentence occurred in 2001. Applicant's direct appeal was affirmed and the remittitur was issued on May 20, 2005, thus should have been filed by May 20, 2006 under S.C. section 17-27-45(A).[3]

[3] Applicant's motion contains what appears to be a scrivenor's error when it state's this Court found in its order of dismissal that the application should have been filed by May 20, 2016.

Accordingly, this PCR application was filed eleven years past the statute of limitations under paragraph (A).

However, Applicant's argues his application is timely under the exception of paragraph (C) under section 17-27-45 applies and asks in its motion for this Court to consider paragraph (C). The paragraph provides:

> If the applicant contends that there is evidence of material facts not previously presented and heard **that requires vacation of the conviction or sentence,** the application must be filed under this chapter within one year after the date of 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 section 17-27-45(C).

Brenda Sanders' mental illness in 2013 and 2014, or even her mental health in 2001, does not constitute a material fact requiring vacation of a conviction or sentence. This Court would refer back to the cases cited in its order that observe mental illness does not lead to a *per se* finding of ineffectiveness. In particular, this Court would refer to the holding of the Eighth Circuit Court of Appeals: "We are not convinced there is anything about [trial counsel's] bipolar condition that would not lend itself to normal fact-specific Strickland analysis." Johnson v. Norris, 207 F.3d 515, 518 (8th Cir. 2000). The Eighth Circuit observed, "Any errors [trial counsel] made, even as a result of his mental illness, should be apparent from the face of the trial record, or otherwise susceptible of proof, and thus readily reviewable." Id. The Johnson court noted trial counsel's testimony about his bi-polar condition in 1996 was not particularly probative to prove counsel's deficient performance in 1991. Id. Likewise, this Court finds that the mere fact, if assumed, that Brenda Sanders might have suffered from mental illness during the 2001 trial does not constitute a fact, in and of itself, that would require vacation of the conviction and sentence. It does not meet the requirements of paragraph (C).

Further, this Court finds evidence of Ms. Sanders' mental health issues in 2013 and 2014 does not constitute evidence of her mental health during Applicant's February 2001 trial in General Sessions.[4] It is wholly speculative at best that Ms. Sanders suffered from any mental health issues over twelve years earlier during the 2001 bench trial before Judge Barber. The evidence fails to show Brenda Sanders suffered from any mental health issue during Applicant's trial in 2001, the operative time frame for consideration of an ineffective assistance claim. Taken as true, at most, Dr. Miller's report suggests mental health issues only as far back as 2009, approximately eight years after Applicant's trial when she was sanctioned for running for mayor in Detroit despite recently being elected a judge. Therefore, the information is irrelevant as to Ms. Sanders' mental health at the time she represented Applicant in 2001 and therefore does not qualify as facts sufficient to implicate paragraph (C).

The conflict of interest claim relies on the same newly discovered facts about Brenda Sanders' mental health. The logic is that Ms. Shurling did not find out about Brenda Sanders' mental health illness because she was not motivated to do so because of the alleged conflict of interest. However, for the same reason that the newly discovered fact of Brenda Sanders mental health in 2013 and 2014 does not qualify as sufficient facts entitling Applicant to implicate paragraph (C), the failure of Ms. Shurling to discover those facts until late 2014 does not entitle Applicant to invoke paragraph (C).

[4] Applicant claims Brenda Sanders did not reveal her mental illness to Appellant at the time of trial in 2001. However, no facts are presented that Brenda Sanders had a mental illness to reveal in 2001. Further, contrary to Applicant's argument, no evidence suggests Brenda Sanders' advice to waive a jury trial in 2001 was the product of paranoid delusions as evidence concerning her health in 2013 is not evidence of her health in 2001. Mot. p. 12.

Any claim that Brenda Sanders suffered from a possible mental illness during the August 2013 PCR proceeding is not a cognizable claim for relief.

Applicant speculates "Brenda was likely suffering from psychotic delusions when she testified at the PCR hearing. Therefore, information concerning Brenda's mental illness is relevant to evaluate her testimony." Mot. P. 12.

Applicant has failed to offer any facts demonstrating Ms. Sanders exhibited signs of mental illness during the August 2013 hearing. The actual record of the PCR hearing demonstrates Ms. Sanders was competent to provide testimony in August 2013 as during her testimony she recounts the facts and circumstances of a trial occurring twelve years prior with appropriate recollection and coherent explanation. App. pp. 645-88. She appears to be a competent witness within the rules of evidence. See Rule 601, SCRE. Further, even assuming Ms. Sanders was suffering from mental illness during the August 2013 PCR hearing, at most this would constitute impeaching evidence of Applicant's own PCR witness, assuming evidence of her mental health at the time of the hearing would pass muster under Rules 401 thru 403, SCRE. Further, the claim constitutes a collateral attack on a PCR proceeding, not a collateral attack on a conviction as required under section 17-27-45. To the extent Applicant alleges he is entitled to a new PCR hearing because Ms. Sanders suffered from a mental illness during the August 2013 hearing, the claim is not a cognizable PCR claim.

Further, to the extent it is conceivable that Ms. Sanders' PCR testimony could have been impacted by an unseen mental health problem in August 2013, four months prior to her December 2013 letter to the US attorney, Judge Early's order of dismissal did not rely on her testimony to deny Applicant's claim that he did not freely and voluntarily waive his right to a jury trial. Judge Early found the following in denying this claim:

> This Court finds that Applicant knowingly and voluntarily chose a bench trial in lieu of a jury trial. This Court finds that Applicant understood the differences between a jury trial and a bench trial. He was advised by Judge Barber that Judge Barber would decide the facts of the case instead of a jury if electing a bench trial. Further, Applicant's experience at the first trial decries any contention that he did not understand the pros and cons of a jury trial. This Court finds that Applicant's contention that he did not understand what "unanimous" meant is not credible. Especially given that he admitted recalling the trial court using this term in its instructions to the jury at Applicant's first trial. **This Court also rejects Counsel Sanders' contention that the decision to waive the jury trial was her decision and not her brother's. This Court also believes that her testimony was biased in favor of her brother.** However, this Court notes that to the extent that Applicant was not given an opportunity to decide prior to trial whether he wanted to choose a bench trial instead of a jury trial, this oversight would have been cured by the trial court's colloquy with Applicant that ensured a bench trial was what Applicant sought.

App. p. 768 (order p. 31).

In reaching this finding, Judge Early found, "[T]he trial court had a lengthy and detailed discussion with Applicant about his waiver of a jury trial." App. p. 765 (order p. 28). Judge Early further noted local counsel Williams testified he opposed a bench trial and discussed this with Applicant, although Williams did not remember the specifics. Williams testified as to his normal procedure in advising clients. App. p. 766. Further, Judge Early noted Applicant testified he remembered Judge Barber advised the jury several times that they needed to reach a unanimous verdict. App. p. 767. Judge Early did not recount any of Ms. Sanders' testimony in his discussion of the issue. Therefore, it is clear Judge Early did not rely on Ms. Sanders' testimony to deny relief on this issue and further, denied relief *despite* Ms. Sanders' PCR testimony.

Therefore, evidence of Ms. Sanders' mental illness was not needed by Judge Early to evaluate her credibility since Judge Early did not rely on her testimony to deny the PCR application.

Applicant's federal pleadings

As outlined in the procedural history in this Court's order of dismissal, Applicant filed a habeas corpus petition that was ultimately denied. In that petition, Applicant asserted positions contrary to the pleadings in this state proceeding, for instance: "Petitioner asserts that the after discovered evidence motion was filed to damage the reputation of his sister and had no evidentiary value to add to the PCR hearing wherein the Petitioner's sister testified about her representation of her brother at the trial." Pet. Resp. in Opposition CA#: 2.17-cv-17-01819-DCN-MGB (Filed 3/16/18 Entry No. 51-1) p. 59 (emphasis added). While this Court's dismissal is not based on Applicant's federal pleadings, the pleadings and the explanation offered for Applicant's pleadings merit attention. Counsel for Applicant attempted to explain the contrary federal pleadings as pleadings ghost-written by Brenda Sanders based on the district court's concerns expressed in several footnotes that this might be occurring. Applicant's counsel then asserted, "The Federal habeas corpus proceeding appears to be Brenda Sanders yet again controlling Tunzy Sanders and engaging in the ghost writing of the pleadings and shows her continued influence and control over him." Rule 59 motion transcript, p. 28, lines 6-9. If Applicant was "controlled" by Brenda Sanders, then Applicant was allowing her to control him.

This Court would note that Applicant's counsel presented testimony during the hearing from Applicant's prior PCR appeal attorney, Mr. Strom. Further, Applicant was present during the Web-X proceeding. Therefore, Applicant's counsel was in a position to question Applicant and give him an opportunity to explain and disavow his federal pleadings, but did not do so. The

inescapable conclusion is Applicant has not refuted any pleading possibly written or even submitted by Brenda Sanders and has acquiesced to Brenda Sanders assistance in the federal pleadings. Certainly, it was incumbent of Applicant to speak up if he disagreed with the election of a bench trial, the selection of PCR counsel, or the content of his habeas pleadings. If Brenda Sanders is controlling Applicant, it is because Applicant has allowed it.

One year requirement of section 17-27-45(C)

Applicant claims to have filed the instant application within one year of discovering the current claims. To be clear, this Court thus far, in the above analysis, has examined the pleadings under the presumption that Applicant is raising these claims within one year of discovery of Brenda Sanders' mental illness. However, this Court is not convinced that Applicant has met the one year requirement of paragraph (C). Applicant knew of the alleged conflict of interest at the time of the August 2013 hearing at the latest. Further, this Court believes Applicant was on notice of disciplinary proceedings and potential mental health issues when they were discussed in Ms. Shurling's December 2014 letter. App. p. 784. Nonetheless, Applicant did not file the instant application until July 1, 2016, which was beyond one year of when Applicant was on notice of Ms. Sanders' mental and disciplinary difficulties.

To avoid the strictures of the one-year time frame, Applicant cites when Ms. Sanders was finally removed from office, on July 1, 2015, as the operative date because it is "the date on which the matter shifted from investigation to official action." Rule 59 motion, p. 6. However, Applicant's ability to raise a claim was not contingent upon Michigan authorities taking "official action" but on when Applicant was on notice of the existence of facts supporting his own legal action, which occurred with Ms. Shurling's December 2014 letter to the Supreme Court.

It is simply incongruous to argue that Applicant and his appellate counsel could not have discovered evidence of Brenda Sanders' mental illness prior to July 2015, despite Ms. Shurling's December 2014 letter, and claim that it was not discovered by Ms. Shurling prior to the August 2013 hearing because she was "not motivated."

This court finds that even if the proper discovery date was July 1, 2015, the allegations are insufficient to implicate paragraph C for reasons previously stated. However, this Court additionally finds that the facts could have been discovered and were discovered as of Ms. Shurling's December 2014 letter. This timeframe represents when Applicant's PCR appeal was pending, hence the State's Rule 12(b)(8) motion at the time. However, this Court is unaware of any authority by our Supreme Court for equitable tolling for this situation, so this Court does not believe Applicant met the one-year provision of paragraph C.

CONCLUSION

In summary, the conflict of interest claim was addressed in the prior PCR hearing and does not entitle Applicant to a successive PCR application. As to the after-discovered evidence claim of Ms. Sanders' mental health issues emerging after the August 2013 PCR hearing, those facts have no bearing on the underlying issue of whether Applicant freely and voluntarily waived his right to a jury trial and freely chose a bench trial, the issue addressed in the PCR order. It does not constitute evidence that Brenda Sanders suffered from mental illness in 2001. The after-discovered information in 2014 is not information constituting facts that would require vacation of a conviction or sentence as required by section 17-27-45(C). Because Applicant is not entitled to yet another bite at the apple, this Court finds it should deny Applicant's motion. Aice.

Based on the foregoing, this Court denies Applicant's motion to alter or amend the judgment. This Court advises Applicant that a notice of intent to appeal must be filed within thirty days from receipt of this Order in order to secure appropriate review.

AND IT IS SO ORDERED this 10th day of November, 2020.

Clifton Newman
Presiding Judge

Aiken, South Carolina

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