

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Jennifer McCoy, Circuit Court Judge

Case No. 2019-CP-02-0516

Jerry Lee Shaeffer,

Petitioner,

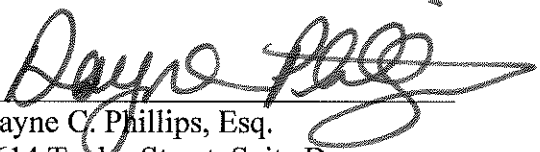
v.

State of South Carolina,

Respondent.

NOTICE OF APPEAL

Petitioner Jerry Lee Shaeffer appeals the Honorable Jennifer McCoy's Order Denying his Application for Post-Conviction Relief filed on **September 7, 2021**, and the Court's Order Denying Applicant's Motion to Alter or Amend Judgment (Rule 59(e), SCRCP) filed on **October 5, 2021**. The undersigned Counsel received notice of the filed Order denying Applicant's Motion to Alter or Amend on **October 8, 2021**.


Dayne C. Phillips, Esq.
1614 Taylor Street, Suite D.
Columbia, SC 29201

ATTORNEY FOR PETITIONER

October 13, 2021

Other Counsel of Record:

Lindsey McCallister, Assistant Attorney General
South Carolina Attorney General's Office
1000 Assembly Street, Room 519
Columbia, SC 29201

cc:

Robert Harte, Aiken County Clerk of Court
Jerry Lee Shaeffer

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)
Jerry Lee Shaeffer,)
Applicant,)
vs.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT


CASE NO.: 2019-CP-02-0516

**ORDER DENYING APPLICANT'S MOTION
TO ALTER OR AMEND ORDER OF
DISMISSAL FILED SEPTEMBER 7, 2021**

Applicant Jerry Lee Shaeffer filed an application for post-conviction relief which was ultimately denied in an Order of Dismissal filed on September 7, 2021. Applicant filed a Motion to Alter or Amend the September 7, 2021 Order pursuant to Rule 59(E), SCRPC on September 17, 2021. Upon review of the record, this Court respectfully DENIES Applicant's Motion to Alter or Amend.

AND IT IS ORDERED.

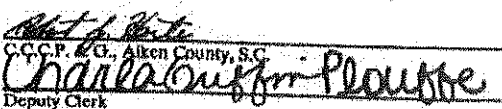
Aiken County, South Carolina
Dated: September 30, 2021

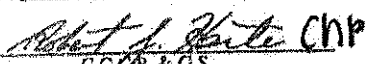

Jennifer B. McCoy
Presiding Judge, 9th Judicial Circuit

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert J. Harie, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

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C.C.C.P. & G.S., Aiken County, S.C.
Charlea Griffon Plouffe
Deputy Clerk


C.C.C.P. & G.S.
Charlea Griffon Plouffe
Deputy Clerk

STATE OF SOUTH CAROLINA)
 COUNTY OF AIKEN)
 Jerry Lee Shaeffer, #364166,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE SECOND JUDICIAL CIRCUIT

C.A. No. 2019-CP-02-00516

ORDER OF DISMISSAL

FILED 9-7 2021 9:21
 SP

 Robert J. Harte
 C.C.P. & G.S.

 Shadell Parks
 Deputy Clerk

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Jerry Lee Shaeffer (Applicant) on February 28, 2019, and amended on June 25, 2019, and July 10, 2020. Respondent made its Return on June 5, 2019, requesting the application be dismissed as untimely pursuant to section 17-27-45 of the South Carolina Code of Laws. Applicant requested a hearing to present evidence in support of his request for equitable tolling. A hearing on Respondent's motion to dismiss and whether Applicant was entitled to equitable tolling on the one-year statute of limitations pursuant to Ferguson v. State¹ convened on June 4, 2021, via Cisco WebEx Meetings in accordance with the Chief Justice's administrative memorandum, *Court Operations*, dated September 14, 2020.²

STATE OF SOUTH CAROLINA
 COUNTY OF AIKEN
 I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

SEP 07 2021

_____ SP
 Robert J. Harte
 C.C.P. & G., Aiken County, S.C.

 Shadell Parks
 Deputy Clerk

¹ 382 S.C. 615, 620, 677 S.E.2d 600, 602 (2009) (“[T]he proper remedy is a hearing as to whether [Applicant’s] mental incapacity prevented such an application in the one year following his... guilty plea. If the PCR court finds mental incompetence prevented his filing a PCR application, the court should determine the duration of the incompetence, and whether the application was filed within one year of... regaining competency.”)

² See S.C. Sup. Ct. Memorandum dated September 14, 2020 (“Judges . . . have discretion to determine whether it is appropriate to conduct a hearing using remote communication technology. *Consent of the parties or counsel is not required.* Please use WebEx, the conferencing platform supported by the Judicial Branch.” (emphasis added)). Nonetheless, this Court questioned

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Dayne C. Phillips, Esquire, represented Applicant. Assistant Deputy Attorney General Lindsey A. McCallister represented Respondent. Respondent renewed its motion to dismiss based on the failure to comply with the statute of limitations set forth in section 17-27-45, and joined Applicant's request that the Court hear evidence to determine if Applicant was entitled to equitable tolling pursuant to Ferguson.

Applicant presented Dr. Geoffrey R. McKee as an expert in forensic psychology to testify as to Applicant's competency. Respondent called Applicant's plea counsel, Michael Routzong. At the close of all the evidence and after hearing arguments from counsel, the Court requested proposed orders from both sides.

After a review of the record and all evidence and testimony presented, this Court finds Applicant has failed to meet his requisite burden of proof for equitable tolling of the statute of limitations pursuant to section 17-27-45 and grants the State's motion to dismiss this application with prejudice.

PROCEDURAL HISTORY

Applicant is present confined in the South Carolina Department of Corrections. During its April 2014 term, the Aiken County Grand Jury indicted Applicant for four counts of second-degree criminal sexual conduct with a minor (2014-GS-02-00576, -0577, -0578, 0579). Assistant Public Defender Michael D. Routzong of the Second Circuit Public Defender's Office represented him. Assistant Solicitor Ashley A. Hammack of the Second Circuit Solicitor's Office prosecuted the case.

Applicant at the beginning of the hearing, and Applicant indicated his consent to the use of the WebEx platform.

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On May 18, 2015, Applicant appeared before the Honorable R. Knox McMahan and pleaded guilty as indicted to all four counts, without no negotiation or recommendation as to the sentence. Judge McMahan sentenced Applicant to imprisonment for twenty years for each offense, with three of the sentences to be served concurrently and the final sentence for indictment 2014-GS-02-0579 to be served consecutively.

Applicant did not appeal his conviction or his sentence.

SUMMARY OF FACTS TO SUPPORT GUILTY PLEA

During the plea proceeding, the prosecutor gave the following factual recitation in support of the pleas:

On New Year's Eve of 2013 there was a family gathering. The defendant is related to the victim and his family in this case. At that family gathering, the victim's mother was looking at the defendant's cell phone and observed several naked pictures of her son on his cell phone. She talked to her son about it and he disclosed that after the defendant moved down to Aiken County from Ohio in May of 2013, that he did begin molesting the victim.

The defendant would keep the victim on the weekends and during that time, he would perform oral sex on the victim, as well as anal intercourse. The victim disclosed that that would be both penile and with various sexual devices and toys. Law enforcement conducted a search warrant of the home. They were able to recover the devices that the victim disclosed that had been used to include but not limited to handcuffs and vibrators and things of the like.

In speaking to the defendant, the defendant did confess to law enforcement to engaging in oral sex and anal intercourse with the victim over that time period. The indictments are for each of the months that this behavior occurred at the defendant's home in Aiken County.

(Tr. p. 13-14). During his plea, Applicant admitted he was guilty of the indicted conduct and later apologized to the victim and acknowledged his behavior was wrong.

ALLEGATIONS FOR POST-CONVICTION RELIEF

In his original application for post-conviction relief, Applicant alleges he is being held in

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custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel

- a. "Applicant did not knowingly, intelligently, or voluntarily plead guilty"
- b. "Plea counsel failed to conduct a reasonable investigation and to develop all available, relevant, and admissible mitigating evidence in preparation of Applicant's defense. Specifically, Plea counsel failed to consult with an expert witness to evaluate whether Applicant was competent to stand trial or had the requisite mental capacity when it was reasonable and necessary in his defense."
- c. "Plea counsel failed to move for a Blair hearing prior to trial to determine Applicant's competency to stand trial."
- d. "Plea counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence. Specifically, plea counsel failed to call an expert witness to testify regarding Applicant; mental health background and competency to stand trial when it was reasonable and necessary to present this critical mitigation evidence."

In response to question nine as to why he did not pursue a direct appeal, Applicant indicated, "Applicant was not competent to knowingly, intelligently, and voluntarily plead guilty, and did not knowingly waive his right to appellate review."

In his amended application, Applicant further alleges:

1. Applicant did not knowingly, intelligently, and voluntarily plead guilty because he was not competent to stand trial. Therefore, Applicant could not have knowingly waived his right to direct appellate review of his involuntary guilty plea. However, Applicant acknowledges that the issue of whether he knowingly, intelligently, and voluntarily pled guilty is not preserved for appellate review because it was never raised by Plea Counsel or ruled on by the Plea Court at the hearing.
2. Plea Counsel denied Applicant's right to effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution. . . . Plea Counsel's unreasonable deficient performance fell below an objective standard of reasonableness "under prevailing professional norms" and prejudiced Applicant because there is a reasonable probability that, but for Plea Counsel's errors, Applicant would not have pled guilty and went to trial. . . .
 - a. Applicant did not knowingly, intelligently, and voluntarily plead guilty based on Plea Counsel's failure to request a competency to stand trial and criminal responsibility evaluations and a Blair hearing prior to the plea hearing. . . .

- b. Plea Counsel failed to move for the Chief Administrative Judge or presiding judge to sign Orders for Competency to Stand Trial and Criminal Responsibility and Capacity to Conform Evaluations based on Applicant's mental health history and records when it was reasonable and necessary to do so in Applicant's defense. . . .
- c. Plea Counsel failed to have Applicant evaluated by an independent qualified medical professional to conduct a forensic physiological competency to stand trial and criminal responsibility evaluations, or to determine whether Applicant had the requisite mental capacity prior to the plea hearing based on Applicant's mental health history when it was reasonable and necessary to do so in Applicant's defense.
 - i. Geoffrey R. McKee... conducted a forensic psychological Competency to Stand Trial Evaluation of Applicant on December 7, 2018. Dr. McKee provided the following finding in his report dated December 9, 2018: "It is my opinion, based on my clinical review and psychological testing described in this report, that Mr. Shaeffer *does not currently* have a sufficient factual and rational understanding of the proceedings against him and is not now capable of assisting his attorney in his defense due to Mild to Moderate Intellectual Disability." (emphasis in original).
- d. Plea Counsel failed to move for a Blair hearing prior to the plea hearing for the Plea Court to determine Applicant's competency to stand trial based on Applicant's mental health history and records. . . .
- e. Plea Counsel failed to call an expert witness to testify regarding Applicant's mental health history during the sentencing phase of the plea hearing (competency to stand trial, criminal responsibility, and mitigation) when it was reasonable and necessary to present this critical defense and mitigation evidence.
- f. Plea Counsel failed to conduct a reasonable investigation to develop all available, relevant, and admissible mitigating evidence in preparation of Applicant's defense. . . . Specifically, Plea Counsel failed to obtain all necessary records and speak with witnesses regarding Applicant's mental health history to assist in determining competency and capacity to conform (criminal responsibility).
- g. Plea Counsel failed to present all reasonable and necessary evidence to the judge during the sentencing phase in mitigation of Applicant's potential sentence.
- h. Plea Counsel failed to review all potential defenses prior to Applicant's guilty plea. . . .

SUMMARY OF TESTIMONY

At the hearing, Applicant presented Dr. Geoffrey McKee as an expert in forensic psychology. Dr. McKee testified he has practiced in forensic psychology since 1976. McKee testified he has practiced in South Carolina since 1985. He stated he is the cofounder of the forensic

JEM/S

psychology program at the Medical University of South Carolina. McKee further testified he was the chief psychologist at the South Carolina Department of Mental Health for twenty-seven years and for fifteen years was chief psychologist in the forensic psychology unit. He testified he was asked to join the sexually violent predator program and worked there until 2011. He stated he has conducted 3500 evaluations and has testified in South Carolina state court 200-250 times and has been qualified as an expert every time he testified.

McKee testified he conducted a competency evaluation of Applicant on December 7, 2018.³ He testified he met with Applicant for an hour and twenty minutes, and asked Applicant about Applicant's educational history, family history, drug and alcohol history, criminal history, mental health history, and personal history. McKee further testified he used methods to assess mental functioning and literacy to determine competency to stand trial.

McKee testified he felt it was particularly relevant that Applicant was in special education programs beginning in elementary school, which he explained indicated that school personnel identified him as a person who needed extra help in school at a young age. McKee testified Applicant reported he finished six or seven grades before leaving school, after which he held a series of menial labor jobs. McKee opined this also suggests lower intellectual functioning.

McKee testified he administer the Wexler abbreviated scale of intelligence test to Applicant, which is used to assess competency to stand trial. McKee explained the test looks at basic vocabulary and level of abstract reasoning. According to McKee, the higher the abstract reasoning score, the higher the subject's IQ likely is. McKee testified regarding the similarity

³ McKee's reported was entered into evidence as Applicant's Exhibit 2.

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subtest which is administered by asking the subject to indicate in which way two different things are alike. McKee stated when this test was administered to Applicant, his scores were in the lowest 1% of the population. McKee testified Applicant had a low score on a reading subtest which shows he has a difficulty reading.

McKee further testified he evaluated Applicant for evidence of malingering and found none. McKee concluded, based on Applicant's scores on the Wexler test, Applicant has mild-to-moderate intellectual disability. McKee opined Applicant's IQ is around 60-65, and stated below 70 is the red line for mental disability.

McKee also testified regarding his findings as to competence to stand trial. McKee stated Applicant was able to approximate the type of charge against him, though he did not specify the number of counts or any more than a "sexual charge with a minor." McKee reported Applicant had a factual understanding that he had been sentenced to forty years in prison. McKee also testified Applicant did not know who the defendant was, he was unable to place the location of the solicitor and witness in a drawing of a courtroom, Applicant did not know who his attorney was other than a public defender, and Applicant did not know who to ask if he needed more information. McKee testified Applicant also showed deficits in rational understanding, noting Applicant was unable to say what he wanted the judge to know about him if he were asked. McKee stated Applicant was unable to understand why talking to solicitor without his public defender would be bad. McKee further stated Applicant could not understand the concept of plea bargaining and did not know if he could be forced to plead guilty. McKee stated he had concerns that if Applicant decided to testify that he would have great difficulty understanding the questions directed towards him, specifically on cross-examination.

McKee concluded that in December 2018, Applicant lacked the capacity to assist his attorney and lacked an understanding of the proceedings against him. McKee further testified intellectual disability begins in childhood and persists through adulthood. McKee stated he believes that because Applicant's principal conflict is intellectual disability, he likely had this disability at the time of his plea and it likely still persists. McKee testified intellectual disability is permanent and generally is not "treatable" in the same way as other mental illnesses.

Finally, McKee testified there is a reasonable probability that Applicant was incompetent at the time of his plea. McKee stated he believes that Applicant does not have the ability to converse with his lawyer and have a reasonable understanding of the proceedings. McKee further stated he believes it would have been prudent to request a Blair hearing prior to Applicant's plea.

On cross-examination, McKee testified Applicant has some capacity to learn. McKee stated if he had examined Applicant in 2014 and found him incompetent, McKee would have tried to educate Applicant to see if competence could be restored. McKee stated that while he believes it is unlikely that competence would have been restored, it is possible. McKee explained if there had been a Blair hearing, he would have tested Applicant at the hearing to see if he retained any information. McKee testified he could not provide a specific date when Applicant would have become incompetent, but based on his experience, it is his expert opinion that it is unlikely Applicant's competence could have been restored.

McKee testified he based his analysis and testimony on his evaluation from 2018. McKee testified he did not look at any prior information or school records.

McKee agreed Applicant was able to maintain a job for a number of years. McKee further agreed that while Applicant was unable to place a solicitor in the right place on a drawing of a

courtroom drawing, that did not limit his ability to understand what a solicitor is. McKee testified Applicant understood the charges against him and the factual basis for the charges, and Applicant understood that he had pleaded guilty and been sentenced to forty years' imprisonment.

Following McKee's testimony, Respondent presented the testimony of plea counsel. Counsel testified he handled Applicant's case from the time of incarceration until Applicant pleaded guilty. Counsel testified Applicant was able to discuss the case with him, including the particular facts of the case, and Applicant responded to their discussions in an intelligent manner. Counsel testified, overall, his conversations with Applicant were normal, and he believed Applicant understood the charges and the possible outcomes.

Counsel further testified that while he thought there were psychological issues with Applicant, he never thought Applicant had an issue with competency. Counsel testified he has been practicing as an attorney since 2005, and in that time he has handled hundreds of cases. Counsel stated competency is a fairly common issue, and he has had at least one case per year in which he had a client evaluated for competency. Counsel acknowledged he was aware of Applicant's history in special education, but he did not seek any further mental health issues or pursue a competency evaluation.

Counsel stated Applicant knew he was in legal trouble, knew Counsel was there to help him, and knew that the police were looking to uphold the law. Counsel also testified Applicant even offered a defense - when confronted with the pictures, Applicant said the victim took them himself. Counsel explained people who are "slow" or have limited mental ability are not necessarily incompetent to stand trial. Counsel stated that simply because a person is not functioning at a level to complete high school, they can still understand what they are doing and

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understand the role of their attorney. Counsel testified, in his opinion, he felt Applicant knew that he was wrong, particularly based on Applicant's conversation with victim's mother wherein Applicant placed blame for photos on the victim and Applicant's knowledge the police were coming to serve a search warrant on him. Counsel also noted Applicant was able to hold a job at a General Motors facility for many years, until he retired to South Carolina from Ohio.

Counsel testified he never had any concerns about Applicant's ability to understand the charges, Counsel's role as his lawyer, or the State's role in the legal process. Counsel also testified it was his general practice to look for issues with mental competency in his clients, and he would investigate further if there were any concerns in his mind. However, he stated he did not do so in this case because he felt Applicant was competent to enter a plea.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses, evaluated their credibility, and weighed the testimony and evidence accordingly in its discussion below. This Court finds the combined record from the criminal case and the testimony and evidence presented the hearing establishes Applicant failed to prove he is entitled to equitable tolling to excuse his failure comply with the statute of limitations, and therefore, the State's motion to dismiss should be granted. Set forth below are the relevant findings of fact and conclusion of law as required by section 17-27-80 of the South Carolina Code of Laws.

Generally, an application for post-conviction relief 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). However, “[w]here a statute sets a limitation period for action, courts have invoked the equitable tolling doctrine to suspend or extend the statutory period to ensure fundamental practicality and fairness.” Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009). One of those recognized situations is when an applicant asserts he was unable to comply with the statute of limitations due to mental incapacity. In such a case, the South Carolina Supreme Court has held

the proper remedy is... a hearing as to whether [Applicant’s] mental incapacity prevented such an application in the one year following his... guilty plea. If the PCR court finds mental incompetence prevented his filing a PCR application, the court should determine the duration of the incompetence, and whether the application was filed within one year of [Applicant] regaining competency.

Ferguson v. State, 382 S.C. 615, 620, 677 S.E.2d 600, 602 (2009).

Here, Applicant argues he is entitled to equitable tolling because he is incompetent due to mild-to-moderate intellectual disability, which he alleges would likely have been present at the time of trial and continues today. In support of this contention, Applicant presented the testimony of Dr. McKee, along with McKee’s report of the evaluation he performed in December 2018.

This Court finds, however, this is insufficient to meet Applicant’s burden of proving his incapacity prevented him from timely filing a post-conviction relief application within one year of his guilty plea as required by section 17-27-45 of the South Carolina Code. This Court finds persuasive Counsel’s credible testimony regarding his interactions with Applicant at the time of the plea. Counsel is an experienced practitioner of criminal defense, and he credibly testified he had no indication Applicant was incompetent during the course of his representation. Counsel testified, in particular, that Applicant was able to discuss the facts of the case with him and even offered a possible defense – that the victim

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had taken the pictures himself. Counsel further testified Applicant had a clear understanding that his conduct was wrong, and he believed Applicant knew what he was doing in entering the guilty plea. Also of significance is the fact that the plea court specifically asked Applicant if he knew of any issues which would prevent him from understanding the plea process; Applicant coherently answered the plea court's questions without prompting or help from Counsel; and Applicant told the plea court he understood the questions asked of him. Tr. pp. 5, 13, 24-25.

Finally, while Dr. McKee testified, in his opinion, Applicant was likely incompetent at the time of the plea, Dr. McKee did not evaluate Applicant at that time, and he conceded he could not provide a date on which Applicant's incompetency began. Additionally, Dr. McKee McKee testified he based his analysis and testimony on his evaluation from 2018. McKee testified he did not look at any of Applicant's prior mental health information or school records. McKee further agreed Applicant understood the charges against him and the factual basis for the charges, and Applicant understood that he had pleaded guilty and been sentenced to forty years' imprisonment.

This Court therefore finds Applicant has failed to establish he is entitled to equitable tolling due to an incompetency that prevented him from timely filing this application. "[A] defendant's low IQ alone does not determine whether he is competent to stand trial, or to enter a guilty plea." Commonwealth v. Cano, 87 Mass. App. Ct. 238, 242, 28 N.E.3d 491, 495 (2015). Rather, the test is "whether the defendant has the sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational, as well as a factual, understanding of the proceedings against him." State v. Bell, 293 S.C. 391, 395-96, 360 S.E.2d 706, 708 (1987) (citing Dusky v. United States, 362 U.S. 402 (1960)).

As discussed above, Counsel's testimony combined with the record of the plea hearing establish Applicant had a reasonable degree of understanding at the time of the plea, and clearly understood the proceedings against him. See, e.g., Atkins v. Virginia, 536 U.S. 304, 306 (2002) ("Those mentally retarded persons who meet the law's requirements for criminal responsibility should be tried and punished when they commit crimes."); see also State v. Davis, 309 S.C. 326, 338, 422 S.E.2d 133, 141 (1992) (affirming the circuit court judge's determination that Davis, who was mentally retarded, was competent to stand trial where the circuit court judge considered the testimony of conflicting experts before making his competency finding), overruled on other grounds by Brightman v. State, 336 S.C. 348, 520 S.E.2d 614 (1999). Moreover, the Court is not bound solely by an expert witness's determination and may properly consider other testimony. "The very nature of the inquiry as to a defendant's competency to stand trial demands that a court not be bound strictly by the views of experts." Bell, 293 S.C. 396, 360 S.E.2d at 708 (finding trial judge's determination of competency, defense counsel's testimony and its own observations of the defendant's behavior, in addition to expert testimony, was supported by the evidence).

The Court does not question Dr. McKee's finding that Applicant was incompetent in December 2018. However, it is ultimately not dispositive to the issue before this Court—whether Applicant was prevented from timely filing his application for post-conviction relief due to incompetency in the proscribed period for filing as set forth in Section 17-27-45. It is Applicant's burden to prove he was incompetent during the time in which the statute of limitations was running and that incompetency prevented him from timely filing an application for post-conviction relief. This Court finds Applicant has failed to meet this burden. Significantly, even Dr. McKee acknowledged Applicant understood the charges against him, the factual basis for the charges, that he had pleaded guilty and been sentenced to forty years.

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This Court finds Applicant failed to prove when Applicant's incompetency started. Further, even if Applicant first became incompetent in December 2018, the statute of limitations in this case expired on May 15, 2016, and Applicant did not file this application until February 28, 2019, almost three years beyond the filing deadline.

CONCLUSION

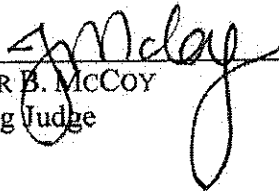
Based on all the foregoing, this Court finds and concludes Applicant has not established any mental incapacity prevented him from complying with the one-year statute of limitations. Therefore, the State's motion to dismiss this application for post-conviction relief with prejudice is granted.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR (providing the appropriate procedure to perfect an appeal). Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Further, Rule 71.1(g), SCRCR, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for the appropriate procedures for appealing a judgment in a PCR action.

IT IS THEREFORE ORDERED:

1. the Application for Post-Conviction Relief is dismissed with prejudice;
and
2. Applicant shall be remanded to the custody of the Respondent.

AND IT IS SO ORDERED.



JENNIFER B. MCCOY
Presiding Judge

JBM/14

Aug. 24, 2021

Second Judicial Circuit

Jram/15



Dayne Phillips <dayne@pricebenowitz.com>

Jerry Shaeffer: Motion to Alter or Amend Judgment

Dayne Phillips <dayne@pricebenowitz.com>

Fri, Sep 17, 2021 at 11:37 AM

To: "McCoy, Jennifer Law Clerk (English Maully)" <jmccoyle@sccourts.org>

Cc: "McCoy, Jennifer B. Secretary (Kathryn B. Stone)" <jmccoysc@sccourts.org>, "McCoy, Jennifer B." <jmccoyle@sccourts.org>,
Lindsey McCallister <lmccallister@scag.gov>, Courtney Powers <courtney@pricebenowitz.com>Bcc: "Clio Maildrop Jerry.Shaeffer.2019.02.00003" <800ca9c17+matter1167892579@maildrop.clio.com>, "Clio Maildrop
Jerry.Shaeffer.2018.08.00001" <800ca9c17+matter1149191374@maildrop.clio.com>

Good morning, Ms. Tuten:

I hope you are doing well. For Judge McCoy's review and consideration, I have attached the Motion to Alter or Amend in Jerry Shaeffer's PCR action in Aiken County. I have also copied opposing counsel Lindsay McCallister.

Please let me know if you have any questions.

Have a good weekend,



PRICE BENOWITZ LLP

Dayne Phillips

Attorney at Law

Criminal Defense | Appeals |
Professional License Defense

1614 Taylor Street, Suite D, Columbia, SC 29201

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[Dayne Phillips Attorney at Law](#) in Google Maps.

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Rule 59(e) Motion to Alter or Amend - Shaeffer.pdf
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THE STATE OF SOUTH CAROLINA)
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COUNTY OF AIKEN)
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Jerry Lee Shaeffer,)
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Applicant,)
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v.)
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State of South Carolina,)
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Respondent.)

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT
Case No.: 2019-CP-02-0516

**MOTION TO ALTER OR AMEND
PURSUANT TO RULE 59(E), SCRPC**

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SEP 20 2021

AIKEN COUNTY
CLERK OF COURT

TO: The Honorable Jennifer B. McCoy

The Applicant, by and through the undersigned Counsel, moves this Court to alter or amend the Order of Dismissal filed on September 7, 2021, in the above-captioned case pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. Rule 59(e), SCRE; U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6). In support of this motion, Applicant submits the following arguments and does not abandon or waive any previous arguments or issues raised in the prior pleadings, proposed orders, and evidentiary hearing in this PCR action:

- (1) Applicant incorporates by reference Applicant's Proposed Order Denying Respondents Motion to Dismiss and Granting Tolling of the Statute of Limitations as if fully set forth verbatim into this motion. Notably, the facts and arguments contained in that memorandum necessitate the granting the tolling of the statute of limitations and an evidentiary hearing on the merits of Applicant's PCR action.
- (2) Respectfully, although the Court allowed the parties to submit Proposed Orders, the procedure followed by this Court denied Applicant an opportunity to have the PCR tolling issue adjudicated by an independent judicial officer in violation of the

separation of powers doctrine. See S.C. Art. I, § 8. Specifically, the Court did not provide the State with any basis for denying Applicant's claims other than delegating the responsibility of drafting a proposed order of dismissal to the parties. The Court adopted the State's adversarial proposed Order of Dismissal despite that this independent judicial function cannot be delegated to an executive agency without providing specific instructions and rationale for omitting findings of fact and/or denying each claim. See generally *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266 (2007) (holding, "Pursuant to S.C. Code Ann. § 17-27-80 . . . , the PCR judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented.").

- (3) The Order of Dismissal fails to properly address Applicant's claim that it is reasonable and necessary to toll the statute of limitations in this matter based on Applicant's demonstration that his failure to timely file the PCR action was due to mental incompetency. See *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (finding the statute of limitations will be tolled where the applicant demonstrates the failure to timely file a PCR application was due to mental incompetency); *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 620-621 (Ct. App. 2008) (summarizing the doctrine of equitable tolling: "The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant

facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.”); *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001).

- (4) The Order of Dismissal fails to properly address Dr. Geoffrey McKee’s evaluation, testimony, findings, and opinions regarding his assessment of Applicant as an expert in forensic psychology. Specifically, the Order of Dismissal incorrectly finds that Dr. McKee’s expert opinion is insufficient to meet Applicant’s burden of proving “his incapacity prevented him from timely filing a post-conviction relief application within one year of his guilty plea as required by section 17-25-45 of the South Carolina Code.” Notably, the Order of Dismissal admits the following:
- a. Dr. McKee is an expert in forensic psychology.
 - b. Dr. McKee conducted a competency evaluation of Applicant.
 - c. Dr. McKee noted Applicant was in special education programs beginning in elementary school.
 - d. Dr. McKee conducted intelligence tests of Applicant and found Applicant’s “scores were in the lowest 1% of the population.”
 - e. Dr. McKee also found that Applicant had a difficulty reading.
 - f. Dr. McKee “evaluated Applicant for evidence of malingering and found none.”
 - g. Based on the Wexler test, “Applicant has mild-to-moderate intellectual disability” and “Applicant’s IQ is around 60-65, and stated below 70 is the red line for mental disability.”
 - h. Applicant “showed deficits in rational understanding”, “could not understand

the concept of plea bargaining", and "had concerns that if Applicant decided to testify that he would have great difficulty understanding the questions directed towards him, specifically on cross-examination."

- i. Dr. "McKee conducted that in December 2018, Applicant lacked the capacity to assist his attorney and lacked the understanding of the proceedings against him."
- j. Dr. "McKee further testified intellectual disability begins in childhood and persists through adulthood."
- k. Dr. McKee believes that Applicant "likely had this disability at the time of his plea and it likely still persists."
- l. Dr. "McKee testified there is a reasonable probability that Applicant was incompetent at the time of his plea."
- m. Dr. "McKee further stated he believes it would have been prudent to request a *Blair* hearing prior to Applicant's plea.
- n. "The Court does not question Dr. McKee's finding that Applicant was incompetent in December 2018."

(5) The Order of Dismissal fails to properly address Applicant's Proposed Order Denying Respondents Motion to Dismiss, and Granting Tolling of the Statute of Limitations also included the following:

- a. On cross-examination, Dr. McKee testified that it is unlikely for Applicant's competency to be "restored", but Applicant could be provided education regarding the legal system and procedure with inpatient treatment.
- b. Dr. McKee further noted during redirect examination that there is a

difference between the education provided by an attorney and medical professional.

- c. Notably, Dr. McKee reiterated and confirmed his prior finding that Applicant does not currently have a sufficient factual and rational understanding of the proceedings against him and is not now capable of assisting his attorney in his defense due to Mild to Moderate Intellectual Disability.

(6) The Order of Dismissal fails to properly address Plea Counsel's entire testimony regarding his interactions with Applicant. Specifically, Applicant's Proposed Order provided the following relevant testimony from the hearing:

- a. Plea Counsel testified that he knew Applicant had attended special education classes but never had Applicant evaluated to determine whether he was Competent to Stand Trial.
- b. Plea Counsel knew Applicant was "slow" but did not conduct any specific colloquy with Applicant to see if Applicant understood their conversations.
- c. Plea Counsel maintained that he had no recollection of having an issue communicating with Applicant.
- d. Notably, Plea Counsel admitted that his recollection of his conversations with Applicant was vague and that he had no specific notes regarding Applicant's understanding of his rights, discovery, or legal proceedings.

(7) Therefore, this Court should reconsider its Order of Dismissal (filed on September 7, 2021), withdraw that order, enter an Order Denying Respondents Motion to Dismiss and Granting Tolling of the Statute of Limitations, and order a hearing on the merits of the PCR action.

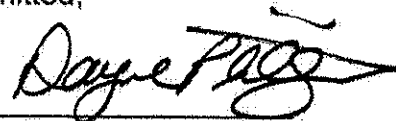
CONCLUSION

Based on the foregoing reasons, the undersigned Counsel respectfully requests this Court reconsider the Order of Dismissal because equitable tolling of the statute of limitations provided in the UPCPA is reasonable and necessary due to Applicant's mental incompetency. See *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009) (finding the statute of limitations will be tolled where the applicant demonstrates the failure to timely file a PCR application was due to mental incompetency. See Rule 59(e), SCRPC; U.S. Const. amends. V, VI, XIV; S.C. Const. art. I, §§ 3 and 14; S.C. Code § 17-27-20(A)(1), (4), and (6).

IT IS SO MOVED.

Respectfully submitted,

s/ Dayne Phillips



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ATTORNEY FOR THE APPLICANT

September 17, 2021

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within and foregoing **Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP**, by depositing a true and correct copy of the same via first-class mail, postage prepaid, upon all parties as follows:

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September 17, 2021