

THE STATE OF SOUTH CAROLINA
In The Supreme Court

From Spartanburg County
Court of Common Pleas
Honorable J. Derham Cole, Circuit Court Judge

APPELLATE NO# 2022-000097

Kenneth J. Craig #310521 Petitioner

Vs

STATE OF SOUTH CAROLINA Respondent

Appellate Written Explanation

The petitioner comes byway submitting written explanation in support Post-conviction Relief Application that should not been Denial by the circuit court Honorable Judge J. Derham Cole as a successive PCR Application untimely filed pursuant to the Post-conviction Relief statute of Limitations Rule.

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S.C. SUPREME COURT

The above petitioner moves before South Carolina Supreme Court Requesting for Relief that petitioner should be entitled to a review and the Respondent's final order of dismissal should be denied because there is a genuine issue of material facts for the Court's consideration, Respondent is not entitled to Judgment as a matter of law, and the interests of Justice require an evidentiary hearing on this matter, see S.C. Code of Law Ann § 17-27-70(b) and (c) (providing, in relevant part "disposition on the pleadings and records is not proper if there exists a material issue of fact."); see generally Leamon v. State, 363 S.C. 432 434, 611 SE2d 494 495 (2005) Noting the standard of review to determine whether summary dismissal is appropriate

is as follows: "summary dismissal of a PER Application without a hearing is appropriate only 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. ... when considering the state's motion for summary dismissal of an application, where no evidentiary hearing has been held, the Circuit Court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.

Similarly, when reviewing the propriety of a dismissal, this court must view the facts in the same fashion (citations omitted) (emphasis added).

(2) The Court must assume the facts presented by the applicant are true because no evidentiary hearing has been held to develop a record for the court to weight the credibility of the evidence and arguments presented in his pro, se PER application and memorandum of law support.

See generally Leamon 363 S.C. at 484, 611 S.E.2d at 495 ("[w]here no evidentiary hearing has been held, the Circuit Court must assume facts presented by an applicant are true []"). See also S.C. Code Ann § 17-27-80, 2003) (PCR actions are governed by usual rules of civil procedure).

(3) "Extraordinary circumstances" exist in this matter because applicant has alleged that their newly discovered evidence, allegation concerning the missing copy of a supplemental record concerning GSR residue, and a chain of custody report, and that an expert witness was involved in the case at one point is material, would have changed the results of the proceedings, is not cumulative or impeaching, and was discovered within a year of the application being filed.

Applicant also states that counsel was ineffective for failing to investigate applicant's mental health background.

see generally S.C. Code § 17-27-20 (A)(4) providing "[a]ny person who has been convicted of, or sentenced for a crime and who claims ... that there exists evidence of material facts, not previously presented and heard; that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief) Emphasis added.

(2) Applicant has alleged that he and his trial counsel had no knowledge of the missing copy of a supplemental record concerning GDR Residue, and a chain

of custody report, that an expert witness was involved in the case at one point is material, would have changed the results of the proceedings, is not cumulative or impeaching, and was discovered within a year of the application be filed.

Applicant also states that counsel was ineffective for failing to investigate applicant's mental health background.

(1) Supplement record concerning BSR residue, and a chain of custody report, and that an expert witness information is such a weight and quality that, under the facts and circumstances of this case, the "interest of justice" requires to vacate applicant's convictions and sentences if applicant can satisfy his burden of

proving the Newly discovered evidence
Never exists to the applicant in his
Discovery Rule (5) Brady material.

The applicant contends that counsel
was ineffective assistance of counsel
failure to investigate applicant
Mental Health background, a serious
issue which counsel should had
look into, both issue does re-
quire an evidentiary hearing).

see S.C. Code § 17-27-45(C) pro-
viding "[I]f 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
could be ascertained by the
exercise of reasonable diligence;
" (emphasis added).

(2) a genuine issue of material fact exists because of this alleged Newly discovered evidence that Applicant argues, Applicant claims that the Newly discovered evidence allegation concerning the missing copy of a supplemental record concerning GSR residue, and a chain of custody report, and that an Expert Witness was involved in the case at one point is material, would have changed the results of the proceedings, is not cumulative or impeaching, and was discovered within a year of the application being filed.

Applicant states that Counsel was ineffective for failing to investigate Applicant's mental health background.

In the light most favorable to Applicant, an evidentiary hearing is reasonable and necessary to deve-

Top Facts and present Evidence
for the courts consideration
is determining whether to toll
the statute of limitations based
on applicant's arguments of "ex-
traordinary circumstances" and
wrong doing by the state, "see
generally Leamon, 363 S.C. at
434, 611 SE2d at 495" [W] There
no evidentiary hearing has been
held, the circuit court must...
view those facts in light most
favorable to the applicant"; see
S.C. Code Ann § 17-27-80 (citat-
ions omitted); see generally Pelzer,
378 S.C. at 521 662 SE2d at 620-
621 (Summarizing the doctrine
of equitable tolling. "The time
requirements in law suits between
private litigants are customarily
subject to equitable tolling is
such tolling is necessary to
prevent unfairness to a diligent
Plaintiff.

However equitable tolling, which allow 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, the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine," (citations omitted) (emphasis added).

(3) Notably Respondent did not timely file a return within ninety (90) days as required by Rule (12) (a) of the South Carolina Rule of civil procedure, Rule 12 SCRPC; see also S.C. Code § 17-27-70(b) (providing, in relevant part, "with- in thirty days after the docketing

Of the application, or within any further time the Court may fix the State shall respond by answer or by motion which may be supported by affidavit.")...

On June 1, 2020 Applicant filed for Post-conviction relief. Respondent moved to summarily dismiss the application on Feb 18, 2021. Respondent's issue conditional order of dismissal on Sept 7, 2021. The applicant has filed two responses to the return and motion to dismiss and Conditional order of dismissal, on March 10, 2021 applicant made his first response entitled "applicant's refute and reply to respondent's conditional order of dismissal. THE respondent's issue final order of dismissal signed and dated by Honorable Judge J. Derham Cole on ~~Jan 11~~ Jan 11, 2022.

Conclusion

Based on the foregoing reasons
this written explanation should
be granted

s/ [Signature] Craig

Dated FEB. 10, 2022