



STATE OF SOUTH CAROLINA )  
 COUNTY OF RICHLAND )  
 )  
 Gary A. White, Jr., #309726 )  
                                   Applicant, )  
                                   ) )  
                                   v. )  
 State of South Carolina. )  
                                   Respondent. )

IN THE COURT OF COMMON PLEAS  
 IN THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-0514

**CONDITIONAL ORDER OF  
 DISMISSAL**

RICHLAND COUNTY  
 FILED  
 2020 JUN 26 AM 10:29  
 COURT REPORTER, ETC.

This matter comes before the Court by way of an application for post-conviction relief filed by Gary A. White, Jr. (Applicant) on January 24, 2018. The State made its Return, requesting the application be summarily dismissed.

**PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Richland County Clerk of Court. In July 2004, the Richland County Grand Jury indicted Applicant for two counts of armed robbery (2004-GS-40-3016; 3018 and kidnapping (2004-GS-40-3017). Public Defenders Lanelle Durant and Stacey Owings represented Applicant. Assistant Solicitors Vanessa Cooper and Dolly Garfield prosecuted the case. On June 14-16, 2005, Applicant proceeded to trial before the Honorable James R. Barber. The jury found Applicant guilty as indicted. Judge Barber sentenced Applicant to imprisonment for life without parole.

Applicant filed a timely notice of appeal. Aileen P. Clare of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 16, 2007. On January 29, 2007, appellate counsel filed a petition for rehearing on Applicant's behalf. The Court of Appeals denied rehearing on March 22, 2007. Applicant appealed the Court of Appeals' decision.

On April 23, 2007, Appellate Defender Lanelle Durant filed a petition for writ of certiorari in our Supreme Court. The State filed a return on May 23, 2007. The South Carolina Supreme Court granted certiorari on November 19, 2007. The South Carolina Supreme Court heard argument on February 4, 2009, and on April 27, 2009, the court issued an opinion affirming in result the court of appeals. On May 12, 2009, appellate counsel filed a petition for rehearing, which our Supreme Court denied on May 28, 2009. The case was remitted back to the circuit court on May 28, 2009.

i. First PCR (2009-CP-40-5549)

Applicant subsequently filed an application for PCR on August 5, 2009, in which he alleged the following grounds for relief:

1. New Discovered Evidence
2. Ineffective Assistance of Trial Counsel
3. Ineffective Assistance of Trial Counsel
4. Co-defendant Anthony Morris retracted his trial testimony by way of a sworn statement. The statement itself weakens the States case against Mr. White.
5. Trial Counsel was ineffective by allowing the State to present evidence in case on a charge that was dismissed at the start of trial.
6. Trial counsel was ineffective by failing to pursue objection of jury charge hand of one hand of all. By fail to pursue objection, counsel allowed the jury to give the charge without making a ruling on objected charged.

The State filed its return on May 10, 2010. An evidentiary hearing into the matter convened on October 18, 2010, at the Richland County Courthouse before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and represented by Mark E. Schnee, Esquire. Assistant Attorney General Brian Petrano, of the South Carolina Attorney General's Office, represented the State. On August 31, 2011, Judge Hayes issued the order of dismissal denying Applicant's application for post-conviction relief. Applicant appealed.

Appellate Defender David Alexander perfected the appeal by filing a *Johnson* petition for a writ of certiorari on September 12, 2012. On December 19, 2013, by written order the Supreme

Court of South Carolina denied the petition. The remittitur was issued on January 6, 2014. Petitioner submitted a letter to the court on January 2, 2014, which the court construed as a motion to recall the remittitur. The court granted the motion to recall the remittitur on January 16, 2014. Thereafter, Petitioner submitted a *pro se* brief. In an order dated May 7, 2014, the court indicated that “[a]fter careful consideration of petitioner’s *pro se* petition, we adhere to our previous ruling.” The court reissued the remittitur on May 21, 2014.

ii. Federal Habeas Action (1:15-cv-365-DCN-SVH)

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on January 21, 2015. Applicant set forth the following grounds for relief:

Ground One: The Trial Court Erred by denying Appellants objection to the States Expert Witness, a dog-handler, without requiring the State to Establish the Underlying Reliability of dog tracking as a scientific or technical field.

Supporting Facts: See Attached Argument Ground 1 A, B, C.

Ground Two: Newly discovered Evidence

Supporting Facts: See: App. p. 634 – 676 which Petitioner re-argue See A-1 – D

Ground Three: Ineffective Assistance of Counsel

Supporting Facts: See Attached Arguments A, B, C, D Etc.

Ground Four: Newly discovered Evidence

Supporting Facts: (2.) Refer Back to Ground #2 I am arguing Ground 2 to support Ground 4, and I further argue that due to *Martinez v. Ryan* 132 S.Ct 1309 P.C.R. Counsel Ineffectiveness in failing to subpoena co-defendant Anthony Morris and Trial Counsel Lanelle Durant.

The State filed its Return and Motion for Summary Judgment on March 30, 2015. On June 23, 2015, the Honorable Shiva V. Hodges issued the Report and Recommendation that the State’s motion for summary judgment be granted and Applicant’s petition be denied. Applicant filed his objection to the Report and Recommendation on July 10, 2015.

On July 15, 2015, the Honorable David C. Norton, United States District Judge reversed the Magistrate's Report and Recommendation granting the State's Motion for Summary Judgement and remanded the case. On January 29, 2016, the Honorable Shiva V. Hodges issued another Report and Recommendation that the State's motion for summary judgment be granted and Applicant's petition be denied. On March 15, 2016, the Applicant filed his objection to the Report and Recommendation. On March 21, 2016, the Honorable David C. Norton, United States District Judge adopted the Magistrate's Report and Recommendation granting the State's motion for summary judgement and dismissing the Applicant's petition.

### CURRENT APPLICATION

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

1. Ineffective Assistance of Counsel for not investigating sentence enhancement"
  - a. "According to state law conviction from Kentucky could not be used for enhancement"

On March 30, 2020, Applicant filed an amended application for post-conviction relief. In his amended application, Applicant raised the following additional grounds:

2. Newly discovered evidence such that "an actual conflict of interest existed and was not disclosed to [Applicant]."
  - a. Counsel was ineffective for failure to disclose this
  - b. PCR Counsel was ineffective for failure to investigate and present this claim
3. Fraud upon the court
  - c. "Sampson, Chehoski, Durant [and] Owings . . . . deliberately hid and refused to disclose the subject matter of [the conflict of interest] claim[.]"

Before this Court are the Richland County Clerk of Court records, Applicant's SCDC records, Applicant's prior post-conviction relief action records, Applicant's appellate records, Applicant's federal habeas corpus action records, and the records for this post-conviction relief action.

## DISCUSSION

This Court has reviewed the pleadings and all relevant supporting documents. Based upon its review, this Court finds there is no genuine issue of material fact necessitating an evidentiary hearing; therefore, summary judgment is appropriate. Pursuant to subsection 17-27-70(b) of the South Carolina Code (2014), this Court makes the following findings of fact and conclusions of law:

### *Motion to Dismiss*

The State moved for summary dismissal pursuant to section 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requested the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCF (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court finds the State is entitled to summary dismissal for the following reasons:

i. Statute of Limitations

This action shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act<sup>1</sup> (the Act). Specifically, the Act requires:

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<sup>1</sup> S.C. Code Ann. § 17-27-10 to -160.

An application for relief filed pursuant to this chapter *must* be filed within *one year after the entry of a judgment . . . within one year after the sending of the remittitur . . . .*

S.C. Code Ann. § 17-27-45(A) (emphasis added).

Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this 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.”

Here, Applicant was convicted on June 16, 2005. The remittitur from the direct appeal was issued on May 28, 2009. The application was therefore due on May 29, 2010. This application was filed on January 24, 2018, well beyond the statutory filing period. Accordingly, the allegations, except for newly discovered evidence, shall be summarily dismissed for failure to file within the time mandated by the Act.

ii. Successive

This Court further finds Applicant’s allegations, except for newly discovered evidence, must be summarily dismissed as successive to Applicant’s previous PCR action. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly,

voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Pursuant to section 12-27-90, successive post-conviction relief applications are barred unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant's current allegations, except for newly discovered evidence, were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, these allegations are successive and barred under section 17-27-90. Further, Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991).

This Court finds Applicant has failed to establish any sufficient reason why he could not have raised his current allegations, except for newly discovered evidence, in his previous

applications for post-conviction relief. Accordingly, Applicant has failed to meet his burden and the allegations, except for newly discovered evidence shall be summarily dismissed as successive.

iii. Newly Discovered Evidence

This Court finds Applicant's claim of newly discovered evidence must be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. The Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). In order to prevail, Applicant must show the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

*State v. Spann*, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant asserts that a newly discovered "Conflict Memorandum" that he obtained from trial counsel's defense file constitute grounds for being granted a new trial. Specifically, Applicant asserts the "Conflict Memorandum" shows that an actual conflict of interest existed at the time of trial: Applicant and his co-defendant were both represented by Public Defenders within the Fifth Circuit Public Defenders Office. This Court finds Applicant's newly discovered evidence claim is without merit.

“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.” *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Our Supreme Court has further stated that a conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993); *see also Burger v. Kemp*, 483 U.S. 776, 783 (1987)). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Here, Applicant’s claim is without merit because an actual conflict did not exist between trial counsel and Applicant’s co-defendant’s counsel. Rather, Applicant’s co-defendant, Anthony Morris, was represented by Hans Pauling, Esquire, of the private bar. Thus, no actual conflict existed because Pauling was employed outside of the Fifth Circuit Public Defender’s Office.

This Court finds Applicant has failed to make a *prima facie* showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Accordingly, Applicant’s newly discovered evidence claim shall be summarily dismissed with prejudice.

### CONCLUSION

Pursuant to section 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of

this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Michael Davidson, Esquire  
PCR Division – Fifth Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 26<sup>th</sup> day of June, 2020.

Alison Renee Lee  
ALISON RENEE LEE  
Chief Administrative Judge  
Fifth Judicial Circuit

Columbia, South Carolina

