

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

Christopher L. Grate, SCDC No. 232524

Applicant,

v.

State of South Carolina

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2021-CP-22-00700

CONDITIONAL ORDER OF DISMISSAL

ARIMA Y. WHITE
CLERK OF COURT

2022 FEB 14 AM 11:21

FILED
GEORGETOWN COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief filed by Christopher L. Grate (“Applicant”) on August 20, 2021. Respondent made its return and requested that the application be summarily dismissed. This Court has reviewed the record and pleadings and finds as follows:

I. PROCEDURAL HISTORY

The records before this Court show that Applicant is presently incarcerated in the South Carolina Department of Corrections. Applicant was indicted by the Georgetown County Grand Jury for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime. (2005-GS-22-0935; -1219). Applicant was represented by Attorney J. Eric Fox and Assistant Solicitors Dorie Biagianti and Matthew Modica, of the Fifteenth Circuit Solicitor’s Office, prosecuted the case. On February 28, 2006 Applicant proceeded to a jury trial before the Honorable Steven H. John. On March 1, 2006 the jury found Applicant guilty of both offenses, as indicted. Judge John sentenced Applicant to life without parole for the assault and battery with intent to kill and five years’ imprisonment for the weapons charge, to be served concurrently.¹

¹ Applicant’s sentence was enhanced to life without parole because of a prior “most serious” conviction for assault and battery with intent to kill. See S.C. Code Ann. §17-25-45(A).

¹ DCB
P-1099

Applicant appealed and the appeal was perfected by Attorney Eleanor Duffy Cleary. Applicant, through counsel, filed an *Anders* brief and presented the following issue.²

1. Was evidence from a state's witness that appellant, on trial for assault and battery with intent to kill, stabbed someone prior to stabbing the witness was inadmissible evidence of prior bad acts and the admission of this evidence prejudiced appellant?

Applicant subsequently filed a *pro se* brief pursuant to the *Anders* procedures and he presented the following issue:

1. Did the trial judge err in misleading the jury on the law of self-defense and did the omission prejudiced appellant?

The Court of Appeals affirmed the convictions on October 9, 2008 (2008-UP-556). The Applicant's *pro se* petition for rehearing was denied on December 19, 2008. Applicant then submitted a petition for writ of certiorari, which was denied by the South Carolina Supreme Court on February 11, 2009 because the petition was received after the remittitur was issued on January 26, 2009.

First PCR Application: 2009-CP-22-0809

Applicant filed his first application for post-conviction relief on June 2, 2009. In his application he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel
 - a. Counsel failed to object to evidence from a State's witness that the Applicant, on trial for assault and battery with intent to kill, had previously stabbed someone, since this was inadmissible bad act evidence which prejudiced the Applicant; (Trial Transcript p. 36, lines 1-3).
 - b. Counsel failed to object when the prosecutor repeatedly vouched for the credibility of witnesses and placed his personal opinions before the jury; (Trial transcript, p. 176, lines 3-8)
 - c. Counsel failed to object when the prosecutor repeatedly stated her personal opinions regarding the credibility of Garris Hughes

² *Anders v. California*, 386 U.S. 738 (1967).

2 DCR
P 2079

(defense witness) and the defense theory of the case; (Trial Transcript p. 172-178).

- d. Counsel failed to object to the State's failing to properly serve the Applicant with the required written notice of the State's intention to seek sentence of life imprisonment without parole;
- e. Counsel failed to request a lesser-included offense of assault and battery of a high and aggravated nature, where there was evidence presented at trial supporting this lesser-included offense;
- f. Failure to object to the charge on self-defense and failing to ask for a curative instruction as to self-defense:
 - i. Failure to request a charge that the victim's right to lawfully defend himself ended when he became the aggressor, and
 - ii. Failure to request a charge that a person should not be forced to act in a humiliating or cowardly manner.

2. Trial judge error – misled the jury regarding the law of self-defense.

An evidentiary hearing was convened on February 11, 2010 before the Honorable Benjamin H. Culbertson at the Georgetown County Courthouse in Georgetown, South Carolina. Applicant was represented by Attorney Paul Archer and Assistant Attorney General Christina J. Catoe, of the South Carolina Attorney General's Office, prosecuted the case. Applicant was present and testified at the hearing. Trial Counsel Eric Fox also testified. Judge Culbertson denied and dismissed the application on March 11, 2010, via written order.

Applicant appealed and the appeal was perfected by Attorney Wanda H. Carter. Applicant, through counsel, filed a *Johnson* petition and presented the following issues:³

1. Trial counsel erred in failing to object to prior bad act evidence introduced at trial regarding a previous stabbing allegedly committed by petitioner because this was similar to the instant charge of assault and battery with intent to kill, which involved a stabbing also, for which he was on trial.

Applicant then filed a *pro se* petition for writ of certiorari pursuant to the *Johnson* procedure and raised the following issues:

1. Trial counsel erred in failing to object to prior bad act evidence introduced at trial regarding a previous stabbing allegedly committed by Petitioner

³ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

because this was similar to the instant charge of assault and battery with intent to kill, which involved a stabbing also, for which he was on trial.

2. Self-defense charge, counsel should have objected to the self-defense charge.
3. Trial court's error, misleading jury on self-defense that trial courts error may have violated petitioner's Fourteenth Amend right to due process of law.

The matter was transferred to the Court of Appeals, which dismissed the petition on September 4, 2012. The remittitur was sent on September 21, 2012.

Federal Habeas Corpus Petition: C/A No. 4:13-215-JFA-TER

Applicant filed a petition for habeas corpus in the United States District Court for the District of South Carolina on January 16, 2013. In his petition he alleged he was being held in custody unlawfully for the following reasons:

1. Inadmissible evidence of prior bad acts was received from a state's witness.
 - a. Frederick Gibbs testified he had known Petitioner all his life. Gibbs testified that during the fight with Petitioner [he] "wasn't going to go walking up on him with empty-myself because I know that he stabbed somebody before." The jury should not have been permitted to hear this testimony.
2. The trial judge erred in misleading the jury on the law of self-defense.
 - a. Gibbs testified that during the argument with Petitioner he armed himself by going "back to the trunk and got my chain." The judge misled the jury on the elements of self-defense where witness testimony indicated evidence of self-defense. The law to be charged is from the evidence at trial.
3. Trial counsel failed to object to prior bad act evidence.
 - a. Trial counsel failed to object to evidence from Gibbs that Petitioner had previously stabbed another person.
4. Trial counsel failed to object to the solicitor vouching for a state witness and interjecting personal opinions.
 - a. The solicitor's closing argument was improper and prejudicial where it vouched for the credibility of Gibbs' testimony.

5. Trial counsel failed to object to an improper burden shifting malice instruction.

a. Trial counsel failed to object to the court's improper burden-shifting instruction on malice and the inference from the use of a deadly weapon, which was intertwined with the court's charge on self-defense and the court's re-charge upon the jury's request.

The State moved for summary dismissal of the petition on May 1, 2013. On December 18, 2013 United States Magistrate Judge Thomas E. Rogers, III issued a report and recommendation that the matter be dismissed. United States District Judge Joseph F. Anderson, Jr., issued a written order on March 25, 2014 granting Respondent's motion for summary judgment, dismissing the petition, and denying a certificate of appealability.

Applicant appealed. On September 25, 2014 the United States Court of Appeals for the Fourth Circuit dismissed the matter via unpublished, per curiam written opinion. Petitioner then sought a petition for writ of certiorari from the Supreme Court of the United States. That petition was denied on March 23, 2015.

II. FACTUAL HISTORY

On September 12, 2005, Petitioner stabbed Fred Gibbs twelve to thirteen times with a knife. The victim was rushed to a local fire department and then to the hospital. He survived after emergency surgery. He sustained stab wounds to his ribs, abdomen, arms, and back.

The incident began as Gibbs, a female friend of his, and Applicant were traveling from Georgetown to a Myrtle Beach Walmart. Applicant pulled a knife out of his pocket, threatened Gibbs, and was told to get out of the vehicle. He refused to exit the vehicle, and continued to threaten Gibbs throughout the duration of their trip. Upon their return Applicant exited the vehicle, grabbed the keys, and said that they were not going anywhere without him. Gibbs then grabbed a bike chain from his own vehicle to defend himself as Applicant was still armed with the knife. Gibbs asked for the keys, Applicant refused, and attempted to stab him. Gibbs hit Applicant with the bike chain

5 DCA
P. 575

before he was taken to the ground and stabbed repeatedly. Gibbs was eventually able to get the keys and escape in the vehicle to receive emergency medical treatment. (ROA 26 – ROA 124).

III. CURRENT APPLICATION

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

1. Counsel provided ineffective assistance of counsel by failing to investigate the applicant military mental health background due to a honorable discharge whereby the applicant suffer with PTSD.
 - a. The applicant contends that he was listed in the military in the year of 1985, and the applicant receive a honorable discharge in the year of 1986 which the applicant is going through mental health issue suffering with PTSD, and the applicant was suffering with flash-back from his 1991 assault and battery with intent to kill. The applicant contends that in the year of 2006, the applicant committed another assault and battery with intent to kill and the applicant had advise legal counsel that he had receive a honorable discharge in the year of 1986 from the military because he was having nightmares.
2. The petitioner argues his counsel was ineffective of counsel by failure to request for a mental examination which may have formed the basis of an insanity defense or a determination that he was not competent to stand trial.

Before the Court are Applicant's records from the South Carolina Department of Corrections, the Georgetown County Clerk of Court's Office, the records from his direct appeal, prior PCR, and prior federal habeas action, the trial transcript, and the current application for post-conviction relief.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to S.C. Code Ann. §§17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings⁴:

⁴ This conditional order of dismissal has been prepared and presented to the Honorable D. Craig Brown, Chief Administrative Judge of the Twelfth Judicial Circuit, because both the Honorable

Statute of limitations

The application shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160.

Specifically, the act requires as follows:

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

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996).

Applicant was convicted on March 1, 2006, and the remittitur from his direct appeal issued on January 26, 2009. The current application was not filed until August 20, 2021—over eleven years after the one-year statutory filing period expired. Therefore, the application shall be summarily dismissed as barred by the statute of limitations.

Successiveness

The application shall be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

Steven H. John and the Honorable Benjamin H. Culbertson, Chief Administrative Judges of the Fifteenth Judicial Circuit, are conflicted out due to their involvement in Applicant's prior proceedings.

7 DCB
P. 799

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

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* at 450, 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).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.


V. CONCLUSION

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

Office of the Attorney General
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Georgetown County Clerk of Court and opposing counsel within twenty (20) days from the date of 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 8th day of February, 2022.


D. CRAIG BROWN
Chief Administrative Judge
Twelfth Judicial Circuit

Florence, South Carolina

9 DCB
0.9.19



ALAN WILSON
ATTORNEY GENERAL

February 11, 2022

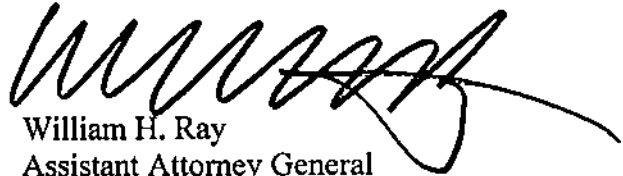
The Honorable Alma Y. White
Georgetown County Clerk of Court
PO Box 479
Georgetown, SC 29442-0479

Re: Christopher L. Grate, #232524 v. State of South Carolina
2021-CP-22-00700

Dear Ms. White:

Enclosed please find the Conditional Order of Dismissal signed by the Honorable D. Craig Brown, in the above-captioned case, for filing in your office. In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,



William H. Ray
Assistant Attorney General

WHR/em

cc: Christopher L. Grate, #232524