

STATE OF SOUTH CAROLINA)
 COUNTY OF SPARTANBURG)
)
)
 Johnny R. Wilkins, #244320,)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-04433

CONDITIONAL ORDER OF DISMISSAL


FILED
 2020 OCT 14 4 28 05 PM
 CLERK OF COURT
 SPARTANBURG COUNTY
 ANY W. BOX

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Johnny R. Wilkins on December 17, 2019. Respondent made its Return, requesting the application be summarily dismissed.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Spartanburg County Clerk of Court. During its February 2008 term, the Spartanburg County Grand Jury indicted Applicant for Armed Robbery (2008-GS-42-1183). Applicant was represented by Timothy Ray, Esquire. Solicitor Barry Barnette of the Seventh Circuit Solicitor's Office prosecuted the case. On March 9-10, 2008, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury. Applicant was found guilty as indicted and Judge Cole sentenced Applicant to life imprisonment.

Applicant filed a timely Notice of Appeal on that was perfected by Katherine H. Hudgins, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) and a motion to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's motion to be relieved by unpublished opinion. *State v. Wilkins*, 2011-UP-482 (S.C. Ct. App. Oct. 28, 2011). The Remittitur was issued on November 15, 2011.


 Page 1 of 8

First PCR Application (2012-CP-11-0453)

Applicant filed his first PCR application on June 27, 2012, alleging:

1. "Ineffective assistance of counsel."
 - a. "Fail to call witnesses."
 - b. "Indemnification."
2. "Violation of due process of law, equal protection."

Respondent submitted a return and motion to dismiss, dated May 29, 2013, for untimeliness and failure to file his application in the proper county. The final order of dismissal, signed by the Honorable Roger L. Couch, was filed on August 28, 2013, summarily dismissing the case for untimeliness and failure to file in the proper jurisdiction.

Second and Third PCR Applications (2013-CP-42-2657 and 2013-CP-42-2847)

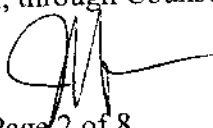
Applicant subsequently filed a second PCR application on June 13, 2013 (2013-CP-42-2657) and filed his third PCR application in July 3, 2013 (2013-GS-42-2847). In his application,

Applicant alleged:

1. Ineffective assistance of counsel
 - a. Failure to call defense witnesses
2. Violation of Due Process and Equal Protection.
 - a. "Indentification."

Respondent made its motion for merger on March 18, 2014, and its return on March 28, 2014. An evidentiary hearing into the matter was convened on March 25, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Leah B. Moody, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On May 17, 2018, the Honorable Roger L. Couch issued the order of dismissal denying Applicant's PCR application.

On June 21, 2018, Leah B. Moody, Esquire filed notice of appeal. This was perfected through filing a petition for writ of certiorari, through Counsel Wanda H. Carter, in the Supreme


Page 2 of 8

FILED
2023 OCT 14 1:05 PM
CLERK OF COURTS
SPARTANBURG COUNTY
MAYNOR COX

Court of South Carolina on behalf of Applicant on December 5, 2018, pursuant to *Johnson v. State*, 204 S.C. 310, 364 S.E.2d 201 (1988), along with a petition to be relieved as counsel. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the petition for writ of certiorari and granted Counsel's request to withdraw, through written order filed on July 14, 2020. The Remittitur was issued on August 5, 2020.

II. Current Action before this Court

In his *pro se* PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Ineffective assistance of counsel."
2. "Conspiracy to violate civil rights."
3. "Violation of Due Process and Equal Protection."
4. "Indemnification."¹
5. "Newly Discovered Evidence."

Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, this PCR Action's Records, and prior PCR and Appellate Records by reference.

III. 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 South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Newly Discovered Evidence

This Court finds Applicant's claim of newly discovered evidence must be summarily

¹ The court interprets this to be "indemnification."

dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. 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). To prevail, Applicant must show the newly-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.

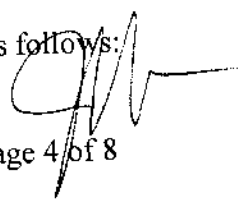
State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Beyond stating that newly discovered evidence exists, Applicant has offered nothing else to substantiate this claim. Specifically, he has not identified what the evidence is, how it would impact the case at trial, when it was discovered, why it is not cumulative or impeaching, or why he could not have discovered it through due diligence before. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court dismisses this claim for failure to make a *prima facie* case of Newly Discovered Evidence.

Statute of Limitations

The Court finds that this application must 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:

FILED
2020 OCT 14 PM 2:05
CLERK OF COURTY
SPARTANBURG COUNTY
AMY W. COX

Page 4 of 8


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). 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). Additionally, South Carolina Code Annotated Section 17-27-70(c) 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.”

Applicant was found guilty at trial on March 10, 2008, and the direct remittitur from his direct appeal was issued on November 15, 2011. The application was therefore due on November 16, 2012. This application was filed on December 17, 2019, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

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:



FILED
2020 OCT 14 PM 2:05
CLERK OF COURT
SPRINGFIELD COUNTY
AMY W. COX

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 PCR 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 proceeding based on Applicant's prior PCR applications; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR applications. 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.

Res Judicata

The application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189,

2020 OCT 4 PM 2:55
CLERK OF COURT
SPARTANBURG COUNTY
ADMIN. CX

FILED

427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Indeed, some of Applicant's allegations are identical to those raised to and ruled upon by the Court in the previous actions, including ineffective assistance of counsel, indemnification, and violation of due process and equal protection claims in his previous PCR applications. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

[conclusion and signature line on following page]

FILED
2020 OCT 14 PM 2:05
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX



Page 7 of 8

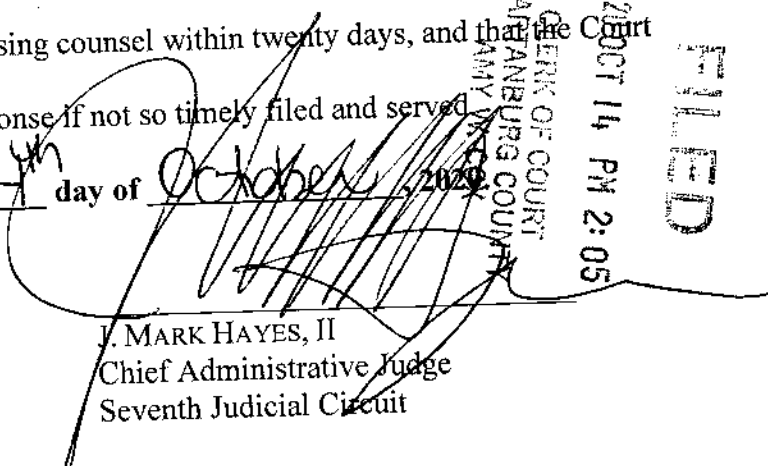
IV. Conclusion

Pursuant to South Carolina Code Annotated Section 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 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Chelsey F. Marto, Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty days, 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 14th day of October, 2020.


J. MARK HAYES, II
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

FILED
2020 OCT 14 PM 2:05
CLERK OF COURT
SPARTANBURG COUNTY
AMY D. KENNEDY



ALAN WILSON
ATTORNEY GENERAL

October 8, 2020

FILED
2020 OCT 14 PM 2:05
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX

The Honorable J. Mark Hayes, II
Chief Administrative Judge
180 Magnolia Street
Spartanburg, South Carolina 29306

Re: Johnny R. Wilkins, #244320 v. State of South Carolina
2020-CP-42-04433

Dear Judge Hayes:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. Respondent's return and motion to dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Spartanburg County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General

CFM/ec
Enclosure(s)

cc: Johnny R. Wilkins, #244320