

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
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 Barry Rhodes, #121117, )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2021-CP-42-01093

**ORDER OF DISMISSAL**

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 ANDY W. COLE

This matter comes before this Court by way of Applicant’s post-conviction relief application filed April 5, 2021. Respondent made its return and motion to dismiss on April 30, 2021. A hearing on the State’s motion to dismiss was held on June 18, 2021, virtually via WebEx. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

After reviewing all records and evidence before this Court, this Court finds Applicant’s PCR application shall be summarily dismissed without a full evidentiary hearing because of untimeliness, successiveness, and as barred by the doctrine of *res judicata*. Findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment 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 March 1984 term, the Spartanburg County Grand Jury indicted Applicant for kidnapping (1984-GS-42-767), after he kidnapped a girl in Spartanburg County, drove her across county lines, and raped her in Laurens County. Charles Sanders, Esquire, (hereafter “Counsel”) represented Applicant. On March 21, 1984, Applicant appeared before the Honorable Wylie H.

Caldwell, circuit court judge, and pled guilty as indicted. Judge Caldwell sentenced Applicant to life in prison. Applicant did not pursue a direct appeal.

***First PCR Action: (1995-CP-42-640)***

Applicant filed his first PCR application on April 6, 1995, alleging ineffective assistance of counsel, denial of right to preliminary hearing, denial of Miranda warning, and insufficiency of evidence to support a conviction. Respondent filed a return and motion to dismiss based on the doctrine of laches on July 13, 1995. An evidentiary hearing was held on March 20, 1996, at the Spartanburg County Courthouse before the Honorable Paul M. Burch. Applicant was present at the hearing and was represented by Robert S. French, Esquire. Judge Burch dismissed Applicant's application by written order dated April 26, 1996. Applicant appealed the denial of his PCR application and was represented by Appellate Defender Robert Dudek, Esquire, who filed a petition for writ of certiorari pursuant to *Johnson v. State*, 294 S.C.310, 364 S.E.2d 201 (1988), and a petition to be relieved as counsel on Applicant's behalf. The South Carolina Supreme Court dismissed the appeal and granted counsel's motion to withdraw by written Order dated January 23, 1997. The remittitur was issued on February 10, 1997.

***Second PCR Action: (1997-CP-42-1323)***

Applicant subsequently filed an application for PCR dated May 27, 1997, alleging he was not previously informed the indictment was constitutionally defective. Respondent filed a return and motion to dismiss alleging the successive nature of the application and statute of limitations on September 16, 1998. A hearing was convened in the Spartanburg County Courthouse on November 9, 1999 before the Honorable J. Derham Cole,<sup>1</sup> at which Applicant was present and

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<sup>1</sup> Judge Cole is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit and the Honorable J. Mark Hayes, II, is currently Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit. However, because they oversaw Applicant's

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represented by Sterling Laney, Esquire. Judge Cole denied and dismissed Applicant's application with prejudice by written order on December 14, 1999. Applicant did not appeal the denial of his PCR application.

***First Habeas Corpus Action***

Applicant subsequently filed a *pro se* petition for writ of habeas corpus with the South Carolina Supreme Court dated January 27, 1999. By written order dated February 9, 1999, the Court denied Applicant's petition.

***Third PCR Action: (2006-CP-42-3587)***

Applicant filed a third PCR application on October 30, 2006. In his application, he alleged ineffective assistance of counsel, involuntarily guilty plea, and violation of due process. Respondent filed a return and motion to dismiss the application on April 4, 2007, as successive, barred by the statute of limitations and barred by the doctrine of laches. A hearing on the State's motion to dismiss was held at the Spartanburg County Courthouse on July 17, 2007, before Judge Cole. Applicant was present and represented by Stephanie Livesay, Esquire. At the hearing, Applicant and his attorney informed the court that Applicant wished to withdraw his application for PCR with prejudice. The Honorable J. Derham Cole questioned Applicant regarding his request and determined that the decision was made voluntary and with knowledge of the implications. Judge Cole executed a final order of dismissal on September 11, 2007.

***Second Habeas Corpus Action***

Applicant filed another *pro se* petition for writ of habeas corpus on December 11, 2007, which the State interpreted as a PCR application. Respondent filed its return and motion to

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prior proceedings, the motion to dismiss and proposed conditional order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Seventh Circuit Court Judge.

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dismiss on August 7, 2008. Applicant filed an amendment to his PCR application on November 24, 2008, which alleged ineffective assistance of counsel based on thirty-one allegations detailed in his application. A hearing on the matter was held on December 10, 2008, at the Spartanburg County Courthouse before Judge Cole. Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. Judge Cole executed a final order of dismissal on January 10, 2009.

***Fourth PCR Action: (2009-CP-42-3260)***

He filed another PCR application June 10, 2009, alleging that he is being held in custody unlawfully because his of violations concerning his constitutional rights, procedural due process rights, and of rule 5. Respondent moved to dismiss on October 9, 2009, based on successiveness, laches, statute of limitations, and *res judicata*. The Honorable J. Mark Hayes II executed a final order of dismissal on August 13, 2010.

***Fifth PCR Action: (2010-CP-42-0268)***

Applicant filed a fifth PCR application on January 15, 2010, alleging invalid indictment, due process violations, and failure to investigate. A return was signed on February 23, 2010, alleging successiveness, failure to comply with filing procedures, laches, and *res judicata*. Judge Hayes executed a final order of dismissal on June 6, 2011.

***Sixth PCR Action: (2017-CP-42-1786)***

Applicant subsequently filed his sixth PCR application on May 19, 2017. In this application, Applicant did not state he was being detained unlawfully but, instead, requests a sentencing reduction. Respondent made its return on or about March 19, 2020. The Honorable R. Keith Kelly, acting in his capacity as chief administrative judge, requested the matter be set for hearing on Respondent's motion to dismiss. A hearing occurred on September 9, 2020, remotely.

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via Webex, with the Honorable Jocelyn Newman, presiding. Judge Newman denied and dismissed the application by written order dated September 16, 2020. This matter was not appealed.

### **Current Action Before this Court**

In his current PCR application, Applicant alleges he is being held in custody unlawfully because:

1. "The Court error in its exercise discretion to sentence Applicant to life imprisonment when sentencing him was not within the limits provide by statute for discretion of the trial court. S.C. Code Ann. § 16-3-910."
  - a. "Applicant plead guilty and was sentenced to imprisonment while the Applicant was sentence to a term not within the limits set by legislature, the judgment in this particular should be corrected. This oversight on the part of the circuit court, however, is not such as to require a new trial. *Gary v. State*, 2020 WL 6122127; 235 U.S. 55."

A hearing on the State's motion to dismiss was heard and procedural bars against the application were the only issues before this Court at that motion hearing.

### **Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the record in its entirety and has heard the arguments presented at the PCR hearing. Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections records, the current PCR application, and prior PCR and habeas corpus records. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

### ***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:

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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). In addition, 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 pled guilty to all charges on March 21, 1984. The application was therefore due on March 22, 1985. This application was filed on April 5, 2021, 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:

All grounds for relief available to an applicant under this chapter must be raised in

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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 proceedings based on Applicant's prior PCR application; 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 application. 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, 314 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.*, 31 F.3d 189,

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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. Like in his last application, Applicant is now seeking a sentencing reduction after this court denied this request the last time. 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

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

### **IT IS THEREFORE ORDERED:**

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

**AND IT IS SO ORDERED** this 2d day of November, 2022.

s/ R. Keith Kelly  
R. KEITH KELLY  
Presiding Judge  
Seventh Judicial Circuit

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