

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Frank Furtick, Jr., #231663,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

) CASE NO. 2023-CP-40-3716

) **CONDITIONAL ORDER OF DISMISSAL**

RICHLAND COUNTY
FILED
2023 DEC 13 AM 9:45
JEANETTE W. McJIDE
CLERK, G.S., & F.I.

This matter is before the Court based on Frank Furtick, Jr.'s (Applicant) application for post-conviction relief (PCR), commenced on July 18, 2023. Respondent, the State of South Carolina, made its return and moves to summarily dismiss this application as untimely, barred by the statute of limitations, successive to Applicant's previous PCR action, barred by the doctrine of *res judicata*, for failure to state a cognizable claim for relief pursuant to S.C. Code Ann. § 17-27-20, § 17-27-45, and § 17-27-90, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the June 2006 term, the Richland County Grand Jury indicted Applicant for murder (2009-GS-40-3911); three counts of kidnapping (2006-GS-40-3568; -3572; -3576); two counts of assault and battery of a highly aggravated nature (ABHAN) (2006-GS-40-3575; -3576); one count of grand larceny (2006-GS-40-3567); and two counts of armed robbery (2006-GS-40-3569; -3573). Fifth Circuit Public Defenders Danielle F. Payne and Lauren H. Mobley represented Applicant. Fifth Circuit Assistant Solicitors K. Luck Campbell and Scott J. Hayes prosecuted the case.

Applicant proceeded to trial on October 22-25, 2007, before the Honorable G. Thomas Cooper, Jr., and a jury.¹ The jury found Applicant guilty of all charges except the three kidnapping offenses. Judge Cooper sentenced Applicant to life in prison without parole for murder, ten years imprisonment for each ABHAN charge, and thirty years imprisonment for each armed robbery conviction.

Applicant did not appeal his convictions or sentences.

FIRST PCR ACTION AND SUBSEQUENT APPEAL (2008-CP-40-4869)

Applicant subsequently filed an application for PCR on July 7, 2008, in which he alleged the following grounds for relief:

1. "Ineffective assistance of counsel for not perfecting a direct appeal. Counsel failed to file an appeal from conviction."
2. "Will amend at a later date five issues or less."

Respondent made its return on March 4, 2009. An evidentiary hearing into the matter was convened on April 1, 2009, at the Richland County Courthouse before the Honorable L. Casey Manning. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Both Applicant and PCR Counsel moved to have PCR Counsel relieved and a new PCR attorney appointed. Respondent consented to the belated direct appeal as the only specific allegation pled in Applicant's action. Judge Manning granted the relief of PCR Counsel and ordered new counsel be appointed. Judge Manning additionally counseled Applicant that if Applicant proceeded, the only issue that would be addressed was trial counsels' ineffectiveness for failing to perfect a direct appeal, and all other issues would be waived. Applicant stated he understood and indicated he wished to proceed. On August 26, 2009, Charlie J. Johnson, Jr., Esquire, was appointed to

¹ The indictments for grand larceny and one count of kidnapping (2006-GS-40-3572) were *nolle prossed*.

represent Applicant.

On April 26, 2010, Judge Manning filed a Consent Order Granting Belated Direct appeal pursuant to White v. State² and instructed collateral counsel to file a notice of appeal within thirty days of the date of the Order to secure an appropriate review of Applicant's convictions and found that Applicant had "waived his right to raise any other PCR allegations."

Applicant, through Mark Schnee, Esquire, filed a Motion to Reconsider Order Granted Belated Appeal, in which Applicant argued he did not wish to waive his right to raise other PCR grounds after completing the belated appeal process. Respondent moved to dismiss the pleading on May 25, 2010. On August 2, 2010, Judge Manning issued a Form 4 Order denying Applicant's motion to reconsider the order.

Applicant filed a notice of appeal perfected by Deputy Chief Appellate Defender Wanda H. Cater of the South Carolina Office of Appellate Defense. On April 6, 2011, Applicant filed his Petition for Writ of Certiorari raising the following:

The PCR Court properly ruled that petitioner did not voluntarily and intelligently waive his right to a direct appeal in the ease.

Applicant subsequently filed a brief pursuant to White v. State on June 20, 2011, in which he raised the following issues for appeal:

1. The trial judge erred in denying counsel's motion to suppress appellant's statement given to police since it was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981), because appellant gave several answers indicating that he desired counsel's presence during the custodial interrogation in question.
2. The trial judge erred in failing to direct a verdict of acquittal on one of the state's armed robbery charges against him in the case because the beer can found at that particular crime scene did not qualify as a deadly weapon.

² 263 S.C. 110, 108 S.E.2d 35 (1974).

On November 7, 2012, the South Carolina Supreme Court filed an opinion granting certiorari on the White claim that Applicant was entitled to a belated appeal. Following its review of the two issues presented, the Court confirmed Applicant's convictions and sentence. Furtick v. State, No. 2012-MO-045 (S.C. Nov. 7, 2012). The Remittitur was returned to the lower court on November 27, 2012.

HABEAS CORPUS ACTION (8:13-079-MGL-JDA)

Applicant thereafter filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on January 2, 2013. In his petition, Applicant set forth the following grounds for relief:

GROUND ONE: A beer can is not a deadly weapon.

SUPPORTING FACTS: A [beer] can [doesn't] qualify as a deadly weapon. Trial judge having private [communications] with deliberating jury by notes. Not done in open court.

GROUND TWO: Petitioner did not voluntarily [and] intelligently waive his right to [a] direct appeal.

SUPPORTING FACTS: I have a right to appeal. I told my appeal counsel [but] she did not raise the issue.

GROUND THREE: Trial judge erred in denying motion to [suppress] statement.

SUPPORTING FACTS: I gave several answers indicating that I want[ed] counsel [present] during interrogation. Trial lawyer fail[ed] to interview[] witnesses from police report listed. Trial lawyer fail[ed] to motion for victim's medical records.

GROUND FOUR: The [was] no evidence to support the murder charge.

SUPPORTING FACTS: [The] State failed to prove element of murder. The pathologist [said] she die[d] from cardiac arrest due to complications of beating. And the pathologist also [said] she [developed] a blood clot that move[d] into her lungs and cause[d] cardiac arrest. Trial lawyer told jury defendant was guilt[y].

Applicant additionally filed an "Open Statement" on February 25, 2013, asserting additional claims A-L. Respondent filed its return and motion for summary judgment on June 7, 2013. The

Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued the Report and Recommendation on February 21, 2014, recommending Respondent's motion for summary judgment be granted and Applicant's petition denied. On March 19, 2014, the Honorable Mary G. Lewis, United States District Judge, accepted the Report and Recommendation, dismissing Applicant's petition with prejudice and denying a certificate of appealability. Furtick v. Warden of Lee Corr. Inst., No. 8:13-79-MGL (D.S.C. Mar. 19, 2014).

Applicant then appealed the district court's decision. The United States Court of Appeals for the Fourth Circuit dismissed Applicant's appeal and denied a certificate of appealability on September 3, 2014, finding no substantial showing of a denial of a constitutional right. Furtick v. Warden of Lee Corr. Inst., 583 F. App'x 78 (4th Cir. 2014).

SECOND PCR ACTION AND SUBSEQUENT APPEAL (2015-CP-40-2382)

Applicant filed a second application for PCR on April 17, 2015, in which he alleged the following grounds for relief:

1. "Trial Judge deprived petitioner due process"
2. "Trial counsel deprived petitioner due process"
3. "Petitioner conviction was unconstitutional"
4. "Belated conviction application"
5. "White v. State, 208 S.E.2d 35"
6. "Austin v. State, 409 S.E.2d 395"

Respondent made its Return and motion to dismiss on April 20, 2016. On May 2, 2016, the Honorable Alison Renee Lee, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed several objections to the Order. After reviewing Applicant's objections, on July 14, 2017, Judge L. Casey Manning, issued the Final Order of Dismissal, denying and dismissing the PCR action with prejudice.

Applicant timely filed a notice of appeal. On October 18, 2017, the South Carolina

Supreme Court dismissed the appeal for failure to show an arguable basis for asserting the lower court determination was improper pursuant to Rule 243(c), SCACR. The Remittitur was returned on November 3, 2017.

THIRD PCR ACTION (2020-CP-40-1941)

On April 13, 2020, Applicant filed his *third* application for PCR alleging he was being held in custody unlawfully on the following grounds:

1. "My due process was deprived"
 - a. "the due process guaranteed a fair hearing and a fair trial and a right to a full appeal."
2. "Conviction was unconstitutional"

Respondent made its Return and motion to dismiss on October 8, 2021. On October 20, 2020, the Honorable L. Casey Manning, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response to the Order on November 1, 2020. After reviewing Applicant's response, on December 1, 2020, Judge Manning issued the Final Order of Dismissal, denying and dismissing the PCR action with prejudice.

Applicant timely filed a notice of appeal however Applicant failed to file it with the Supreme Court of South Carolina. Instead, Applicant filed the notice of appeal with the Richland County Clerk of Court. Applicant filed a motion to reopen this case. On May 26, 2023, the Supreme Court issued a letter to Applicant informing him that the motion was filed with the Richland County Clerk of Court and that the Supreme Court of South Carolina would not take any action on the motion.

CURRENT ACTION BEFORE THE COURT

On July 18, 2023, Applicant *untimely* filed his *fourth* application for PCR in which he alleges the following:

1. "I did not get a direct appeal or a PCR hearing."
2. "My Constitutional right was violated."
3. "Fifth Amendment guarantees an adequate opportunity to present one claim fairly."
4. "Defendant have a guaranteed right to direct appeal."

Applicant seeks relief in the form of "one PCR hearing, one direct appeal, and exhaustion [of] state remedies."³

Before this Court are the Richland County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's trial transcript; Applicant's records from his *habeas* action; Applicant's records from his three prior PCR and two PCR appeal actions; and the records of the current PCR action.

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 §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application as there is no genuine issue of material fact which would necessitate an evidentiary hearing. 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); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled

³ In his prayer for relief, Applicant requests "one PCR hearing, one direct appeal, and exhaustion [of] state remedies." This relief is unavailable in a post-conviction relief action. If this Court finds a defect in the original proceedings, the appropriate relief would be a new trial on all of the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969); see also Grant v. MacDougall, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964) (relief of absolute release not available). Where an applicant seeks only relief to which he or she is not entitled, "it is not incumbent upon [the] court to pass upon what relief, if any, he [or she] might, perchance, be entitled to." Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968).

to relief before the court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

SUMMARY DISMISSAL BASED ON STATUTE OF LIMITATIONS

Respondent moved to summarily dismiss the application because Applicant failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.⁴ Specifically, the Act requires as follows:

- (A). 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 upon an appeal, whichever is later.
- (B). When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
- (C). If 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 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.

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

⁴ S.C. Code Ann. § 17-27-10 to -160.

motion for summary judgment may properly be used to raise the defense of the statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 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."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on allegations that his counsel was ineffective and his other constitutional rights were violated. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant proceeded to trial and was convicted on October 25, 2007. Applicant did not pursue a direct appeal. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before October 26, 2008. Applicant did not file this PCR application until July 18, 2023, *fourteen years, eight months, and twenty-two days* beyond the statute of limitations.

Accordingly, this application is *untimely* pursuant to S.C. Code Ann. § 17-27-45 and shall be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

SUMMARY DISMISSAL BASED ON SUCCESSIVENESS

Respondent moved to summarily dismiss the application because it is successive to the previous application(s) for post-conviction relief. 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). Importantly, S.C. Code

Ann. § 17-27-90 provides:

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 S.C. Code Ann. § 17-27-90, successive PCR actions 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). In Aice, the South Carolina Supreme Court held that PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Id. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 394.

Expressly, 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. Notably, the 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 *were or could have been* raised in Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. See Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008)



("Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.' A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application."). This Court finds that the record reflects Applicant has had a PCR hearing and a direct appeal. Thus, Applicant's allegations are without merit.

Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR application(s).

SUMMARY DISMISSAL BASED ON THE DOCTRINE OF RES JUDICATA

Additionally, this Court finds the application is 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 of a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 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 any and all his allegations in his prior *three* PCR actions. The prior PCR Courts issued final judgments on the merits of the same or similar issues Applicant raises in this successive action. The finality of the previous Courts' rulings should be respected, and the application should be summarily dismissed as barred by the doctrine of *res judicata*.

SUMMARY DISMISSAL BASED ON FAILURE TO STATE A COGNIZABLE PCR CLAIM



Respondent moved to summarily dismiss the application because it fails to state a claim cognizable under the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160.

An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. 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;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A). However, because an application for post-conviction relief is not a substitute for a direct appeal of trial court error, and because of the modern simplification of criminal jurisdiction jurisprudence in South Carolina, the *overwhelming* majority of cognizable claims fall under the broad umbrella of "ineffective assistance of counsel," a contention under the Sixth Amendment to the Constitution of the United States. See Roscoe v. State, 345 S.C. 16, 20, 546 S.E.2d 417, 419 (2001) ("Allegations of trial court error are not cognizable on PCR.").

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Post-conviction relief is only proper when the application collaterally attacks the validity of the conviction or sentence. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000). In his application for post-conviction relief, the only allegations Applicant asserts is that he has not had one PCR hear, one direct appeal, and has not exhausted all of his state remedies. Applicant offers no attack upon the conviction itself.



Accordingly, the application shall be dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

FRUSTRATION OF FINALITY OF CONVICTIONS

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in Aice explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. . . . [Here], Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.

305 S.C. at 451–52, 409 S.E.2d at 394–95 (citations omitted).

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.'" United States v. Fugit, 703 F.3d 248, 252 (4th Cir. 2012) (quoting Schneekloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring)). In his concurring and dissenting opinion in Mackey v. United States, Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law,

criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). Seven years after Mackey, the South Carolina Supreme Court quoted Justice Harlan's opinion with approval in Anderson v. Leeke, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to relitigate his convictions and sentences through this successive and time-barred application is contrary to the recognized need for finality of litigation.

| CONCLUSION PAGE FOLLOWS |



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CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific factual or legal reasons 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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 5th 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 days, and 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 December, 2023.



THE HONORABLE JOCELYN NEWMAN
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina