STATE OF SOUTH CAROLINA COUNTY OF BEAUFORT	)	IN THE COURT OF COMMON PLEAS IN THE FOURTEENTH JUDICIAL CIRCUIT
	)	2024 JAN -5 PM 1:52
Charles W. McCormick, #326467 Applicant,	)	Case No.: 2022-CP-07-00474
	)	JEREMY ANN MCBRIDE BEAUFORT COUNTY CLERK OF COURT
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by Charles W. McCormick (Applicant) on March 17, 2022. Respondent made its return[1] and requested the action be summarily dismissed. After consideration, this Court **GRANTS** Respondent's motion.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In January 2006, the Beaufort County Grand Jury indicted Applicant for murder (2006-GS-07-00168), arson in the second degree (2006-GS-07-00169), and possession of a weapon during the commission of a violent crime (2006-GS-07-00170). These charges arose from the fatal shooting of Applicant's wife, Ellen McCormick (Victim), on January 1, 2006. After Victim was shot, the house was set on fire. Applicant was arrested the next day.

From January 28 to 30, 2008, Applicant proceeded to a jury trial before the Honorable Carmen T. Mullen. Samuel C. Bauer, Esquire, represented Applicant, and Solicitor Issac McDuffie

[1] Respondent's return was due to be filed within 90 days of service. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial."). Now, having completed the return, and in light of no demonstrable prejudice to Applicant, this Court accepts this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Stone, III, prosecuted the case. The jury found Applicant guilty as indicted. Judge Mullen sentenced Applicant to consecutive sentences of life for murder, twenty-five years for arson, and five years for the weapons charge.

Applicant filed a timely notice of appeal. Chief Appellate Defender Joseph L. Savitz, III represented Applicant and perfected Applicant's appeal through an Anders[2] brief. Applicant also filed a *pro se* response. The South Carolina Court of Appeals dismissed the appeal pursuant to Anders. State v. McCormick, Op. No. 2010-UP-100 (S.C. Ct. App. filed February 4, 2010). The remittitur was sent February 22, 2010.

FIRST POST-CONVICTION RELIEF APPLICATION (2010-CP-07-2483)

On May 20, 2010, Applicant timely filed an application for PCR, alleging:

1. Ineffective assistance of counsel [4th, 5th, 14th Amendments] in that counsel:
    a. Did not request a jury instruction on alibi
    b. Told Applicant two weeks before trial that he needed two attorneys
    c. Did not object to solicitor's improper comments
2. Unreliable DNA test procedure
    a. Disposable gloves were not worn when DNA samples were taken
3. GSR test unreliable results – testimony of SLED agents was false and misleading
4. Inadmissible evidence – statements
    a. Statements being allowed in the jury room created prejudice in the juror's minds
5. Blood evidence
    a. Presumptive testing on the blood on Applicant's pants is not allowed
    b. Burden of proof shifted to Applicant
6. False testimony – Captain Bromage
    a. Applicant was not bleeding, nor did he have any blood on him when he was arrested
7. Search warrant
    a. The note found in Applicant's truck should have been excluded with the search warrant

[2] 386 U.S. 738 (1967).

8. False testimony – autopsy
    a. Attorney failed to question firemen who dropped Victim's body when they exited the house
9. Miranda rights – 6th amendment
    a. Applicant was intoxicated, tired, upset, and confused when being interrogated by police
    b. Did not get an attorney when Applicant requested an attorney three times
10. Solicitor's improper comments
    a. My attorney should have objected when the solicitor said Applicant was controlling and a mean drunk
11. Firearm and arson charge
    a. No evidence Applicant possessed firearm
    b. No evidence Applicant smelt like gasoline or smoke
12. Evidence
    a. Counsel told Applicant there were two different human brains found at the scene, but counsel failed to argue this at trial

On August 2, 2011, Applicant filed an amended application reasserting his claims against trial counsel and raising the following claim against Appellate Counsel:

1. Counsel was ineffective for filing an Anders brief and not raising the issue that the court erred in finding Applicant's statements admissible when he was intoxicated when he spoke to police.

On August 30, 2011, an evidentiary hearing was held before the Honorable D. Craig Brown. Mary Fran Quindlen, Esquire, represented Applicant. Assistant Attorney General Matthew J. Friedman represented Respondent. On October 17, 2011, Judge Brown issued an order of dismissal that denied relief and dismissed the application with prejudice. Applicant filed a Rule 59(e) motion, which Judge Brwon denied on December 28, 2011.

Applicant appealed the denial of his first PCR, and Appellate Defender Susan B. Hackett filed a petition for *writ of certiorari* on his behalf raising the following issue:

1. Ineffective assistance of appellate counsel for:
    a. Failing to appeal the admission of Applicant's statements during his custodial interrogation because Applicant was not afforded appropriate safeguards and

was unable to give a free and voluntary statement due to his intoxication.

The Court of Appeals denied certiorari, and the remittitur was sent July 14, 2014.

FEDERAL *HABEAS CORPUS* PETITION: 0:14-CV-03176-RBH

On August 1, 2014, Applicant filed a *pro se* petition for a *writ of habeas corpus*. Within this petition Applicant alleged four grounds for relief:

1. Ineffective assistance of counsel, no alibi defense.
    a. I was in a different place at the time of crime. I was at my sister's house and a restaurant-bar. The small dot of blood was old. I was never bleeding at any time. My sister could confirm this and the witness at the bar. My clothes never smelled like smoke or gasoline. Police verified I was at bar. No blood on sister's couch, no blood at bar, no blood on officers
2. Ineffective assistance of counsel for relying on the State's Evidence.
    a. DNA – I asked my attorney Mr. Bauer to retest. Mr. Bauer told me this was an appeal issue. For not having my clothes tested. SLED test only two pieces that were cut out and found to be inconclusive. For not raising the issue that the blood spot was old. Mr. Bauer first said my clothes were not going to be allowed. But then the Judge changed her mind. Without retesting [sic] the sample DNA (which was destored [sic]) and retesting my clothes. I was left to relie on states evidence. The DNA Expert also Relied on states Evidence.
3. Miranda Rights violated.
    a. I was being detained and questioned as a suspect by law enforcement and a working agent of the State. I was intoxicated, tired and emotional due to what was told to me. My mind was in a spin. I'd been with my family all day and most of all night. That being a Holiday.
4. Ineffective assistance of appellate counsel for not appealing trial judge's error in allowing statements.
    a. Trial judge admitted statements made by myself during custodial interrogation without proper safeguards. I was intoxicated and did not or consider or able to give a free and voluntary statement. I did not understand at all what was happening. Even more so, to what I was being told, I was falling asleep at the time or perhaps passing out.

On December 9, 2014, Respondent issued its return and memorandum in support of motion for summary judgment. On June 3, 2015, Judge Gossett filed a report and recommendation for summary dismissal. On August 12, 2015, the Honorable R. Bryan Harwell issued an order accepting the recommendations of the Magistrate, granting Respondent's motion for summary judgment, dismissing Applicant's petition *writ for habeas corpus* with prejudice, and denying a certificate of appealability.

Applicant appealed. (15-CV-7496-RBH). On May 18, 2016, the Fourth Circuit Court of Appeals denied a certificate of appealability and dismissed the appeal in an unpublished opinion. McCormick v. McFadden, 639 F. App'x 953, 954 (4th Cir. 2016). On June 6, 2016, Applicant filed a petition for rehearing and rehearing *en banc*, which was also denied.

CURRENT POST-CONVICTION RELIEF APPLICATION: 2022-CP-07-00474

Applicant filed his current PCR application on March 17, 2022, alleging:

1. "DNA Testing- Preservation of Evidence, Alibi Defense, Defult [sic]"
    a. "Article 3 statue 19-28-320 (A)(B)(C) Weldon v. State 2021 Alibi defence [sic] New Law."
2. "Solicitor's violation of statue [sic] section 17-25-45(f)(g)(h)"
    a. "17-25-45(H) Solicitor must [give] written notice to defendant seeking life."
3. "Motion to vacate, resentence, set aside. Al."
    a. "Sentencing wrong 17-25-50 must have prior or previous on separate occasions."
4. Newly Recognized Case Law:
    a. "New Law- Weldon v. State 10/6/21"[3]

As for relief requested, Applicant requests his sentence be vacated. Before this Court are the Beaufort County Clerk of Court records of the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's record on appeal, and records of

[3] Although Applicant listed this answer in response to Question 16 on his application, Respondent interprets this as a claim of newly recognized case law.

Applicant's federal *habeas corpus* action and prior PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent moved for summary dismissal pursuant to Section 17-27-70(b) of the South Carolina Code asserting no genuine issues of material fact would necessitate an evidentiary hearing. Because there are no questions of law or fact to necessitate a hearing, Respondent requested this Court issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for doing so. See S.C. Code Ann. § 17-27-70(b) (establishing procedures 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); See Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court, S.C. Sup. Ct. Order filed October 6, 2008 ("If the Attorney General asserts that the [PCR] application is barred as being successive or being untimely, under the statute of limitations, counsel will not be appointed except upon written order of the Chief Judge for the Administrative Purposes for the Court of Common Pleas in the circuit."); Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court has reviewed the application and the record in this case and finds there are no genuine issues of material fact. Therefore, summary dismissal is appropriate. Set forth below are the Court's findings:

Statute of Limitations

This action should be summarily dismissed as untimely. "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...." S.C. Code Ann. § 17-27-45(A). The statute of limitations applies 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. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). The circuit court may "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." § 17-27-70(c).

Here, Applicant was sentenced on January 30, 2008. The remittitur from Applicant's direct appeal was sent on February 22, 2010. Applicant had one year from the sending of the remittitur to file his PCR application. This PCR application was filed on March 17, 2022—over twelve years after the requisite filing period expired. Accordingly, this Court finds this action should be summarily dismissed as untimely.

Newly Recognized Case Law

Additionally, Applicant asserts a change of law exists entitling him to post-conviction relief. Applicant looks to Weldon v. State, 436 S.C. 69, 870 S.E.2d 183 (2021) as the substantive standard not previously recognized at the time of his trial entitling him to such relief. This Court finds Weldon v. State does not create a new constitutional standard, but rather expounds on already existing grounds of ineffective assistance of counsel.

In South Carolina, PCR actions 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." § 17-27-45(A). However, an applicant may file an application beyond this one year statute of limitations in certain circumstances, such as "when a court whose decisions are binding upon 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." § 17-27-45(B). In those narrow circumstances, an application for PCR must be filed within one year of the date on which the right or standard was determined to exist.

For a case to announce a new rule, it must "break[] new ground or impose[] a new obligation on the states or the Federal Government." Teague v. Lane, 489 U.S. 288, 301 (1989). Put differently, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id.

In Weldon, the Court of Appeals determined the defendant's trial counsel was ineffective for failing to call alibi witnesses because counsel repeatedly stated at the PCR hearing he did know why he made this decision, and there was no valid trial strategy behind counsel's decision. 436 S.C. at 83-4, 870 S.E.2d at 190. The Court's holding was reached by comparing the facts in Weldon to South Carolina case law to arrive at a conclusion. See Id.; see Martin v. State, 427 S.C. 450, 832 S.E.2d 277 (2019). The Court of Appeals further found the defendant's single piece of DNA on duct tape from the victim did not "constitute 'overwhelming evidence' such that it precludes a finding of prejudice." Id. at 84, 870 S.E.2d at 191. Specifically, the Court determined the defendant was not a suspect in the case until the DNA match occurred, and this DNA match could have been reasonably explained. Id. The Court cited State v. Smalls, which held that overwhelming evidence must be conclusive evidence to preclude a finding of prejudice under Strickland. 422 S.C. 174, 191, 810 S.E.2d 836, 845 (2018). This type of conclusive evidence could be found in the form of "a confession, DNA evidence demonstrating guilt, or a combination of physical and corroborating evidence." Id. The Weldon court's determination that the evidence was not overwhelming evidence that could preclude a finding of prejudice did not form a new rule but rather distinguished the circumstances where the Smalls standard was not met. Based on the simple and unequivocal

language in Weldon, the Court's ruling was not intended to create a new rule or apply a rule retroactively.

Here, Applicant has failed to show that a new standard was created by the Weldon court's ruling or that this ruling should be applied retroactively. Therefore, Applicant cannot show he is entitled to relief under section 17-27-45(B). Accordingly, this Court finds Applicant's claim should be summarily dismissed for failing to show a new standard or right applies retroactively to warrant a PCR application.

Successive

This application should be summarily dismissed as 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 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. 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 PCR; thus, the current application is successive and barred under 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, Applicant has failed to meet the burden imposed upon him, and this action shall be summarily dismissed as successive.

Res Judicata

Finally, this Court finds this action is barred by the doctrine of *res judicata*. *"Res judicata* bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. Conway, 334 S.C. 30, 512 S.E.2d 106 (1999). *Res judicata* also bars any issues that were raised or could have been raised in the former action. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)). "To establish res judicata, the defendant must prove the following: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id.

In this current action, Applicant alleges improper DNA testing and denial of the ability to present an alibi defense. Applicant presented these same claims in his first PCR application in 2010. After a hearing, all of Applicant's allegations were denied and dismissed with prejudice. Applicant also raised these same allegations in his federal *habeas corpus* petition, which was dismissed. All of Applicant's allegations stem from the same conviction challenged in his prior actions. Although Applicant did not raise all of his current allegations previously, he could have

raised them in his previous PCR application. This Court finds Applicant had a full opportunity to litigate these allegations and his failure to do so prevents him from raising them now. Accordingly, this Court finds this application should be dismissed as barred by *res judicata*.

CONCLUSION

WHEREFORE, pursuant to section 17-27-70 of the South Carolina Code, 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, factual or legal, with the Beaufort County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Danielle Dixon, Esquire
PCR Division – Fourteenth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Beaufort County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, 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 21 day of Dec, 2023.

ROBERT J. BONDS
Chief Administrative Judge
Fourteenth Judicial Circuit

Walterboro, South Carolina