STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Antonio Calloway, #382668, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2021-CP-23-01952 **CONDITIONAL ORDER OF DISMISSAL**

The State of South Carolina ("Respondent"), making its return to the application for post-conviction relief filed by Antonio Calloway ("Applicant"), through counsel, on April 27, 2021. The State ("Respondent") made its return and motion to dismiss on or about July 28, 2021, moving for the summary dismissal of the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its July 2011 term, the Greenville County Grand Jury indicted Applicant for two counts of possession of a weapon during the commission of a violent crime (2010-GS-23-7919; -7932), armed robbery (2010-GS-23-7920), and attempted murder (2010-GS-23-7949). In the February 2012 term, the Greenville County Grand Jury returned additional indictments on the charges of attempted robbery (2010-GS-23-7923), kidnapping (2010-GS-23-7926), and armed robbery (2010-GS-23-7931); the Grand Jury also amended the indictments its earlier indictments for possession of a weapon during the commission of a violent crime (2010-GS-23-7919) and armed robbery (2010-GS-23-7920) so as to give them both a new number (2010-GS-23-07955). Applicant was represented by Christopher Todd Posey ("plea counsel"), Esquire, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor's office prosecuted the case. On May

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14, 2012, Applicant appeared with his co-defendant Daquan Seymour before the Honorable C. Victor Pyle, Jr., and pleaded guilty to two counts of possession of a weapon during the commission of a violent crime (2010-GS-23-7919; -7932), three counts of armed robbery (2010-GS-23-7920; -7931; -7955), attempted robbery (2010-GS-23-7923), attempted murder (2010-GS-23-7949), and kidnapping (2010-GS-23-7926). At Applicant's guilty plea hearing, the assistant solicitor provided the following recitation of facts, which Applicant affirmed represented "basically what happened":

> [T]hese charges that are before the Court all stem from three different armed robberies that occurred on the same night, July 25, 2010 between the hours of about 3:00 and 6:00 o'clock in the morning.
>
> These two defendants along with a third co-defendant that already pled guilty a while ago committed three robberies. The first incident occurred at an apartment on Cleveland Street in the City of Greenville. There were actually 10 victims in that case. They were all high school young people 16 to 17 years of age.
>
> One of the young persons lived at that apartment. Her mother was away for the night so a number of her friends came over to spend the night there with her. Between about 3:00 and 4:00 that morning, two of the victims went out into the parking lot. At that time the defendants were driving by in their automobile and they stopped.
>
> They all got out of the vehicle and one of them pulled out a pistol. We later determined that the person who pulled out the pistol was [Applicant] and he was the one that was armed during this robbery and the other two.
>
> The defendants told the victims to take them into the apartment where they were. So the victims, then at gunpoint, took the three defendants into the apartment. When they all entered, the defendants told all 10 victims to get on the floor and then asked them to give up drugs and money.
>
> Now it is apparent both from the defendants actions in the apartment that night and from what they later told me during interviews last week that the defendants realized—they thought they were going to be going into a different house than they ended up in. They were looking for an apartment of a drug dealer. After finding no drugs or money in the apartment, they realized they were in the wrong apartment. At that time, they took the victim's cell phones and a little bit of cash and then they made the victims go two by two into a back bedroom.
>
> They then talked to the victims, told them that they had the wrong apartment and gave all but three of the cell phones back to the victims. They kept three along with

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> the little bit of money and left with that. Before they left, they told the victims not to call the police. One of them also said that they would normally shoot the homeowner in the leg before leaving but because the victims cooperated with them, they wouldn't do so and they threatened the victims not to call the police and then they left.
>
> The next incident occurred outside a mobile home on Anderson Road. The victims in that case were Jose Massa and Francisco Cruz. They were returning home after being out at some bars that night.
>
> When they got out of their truck in front of their residence, they walked to the porch and at that time these two defendants approached them during this robbery. The third co-defendant was the driver. Again, [Applicant] had the pistol. They robbed the victims of some cash and a cell phone. Before they left, [Applicant] shot one of the victims in the leg just above the knee.
>
> The bullet went through the fleshy part of his leg. It did not break a bone, however, the victim was treated at the hospital and he told me that it still hurts him some to this day.
>
> The third incident took place at the convenience store, a Citgo on Piedmont Highway. This incident happened somewhere between 6:00 and 6:30 in the morning. On this occasion, defendant Daquan Seymour took over driving the car, and the third co-defendant stood by the door as a look out and [Applicant] was the one who entered the store with the gun again.
>
> [Applicant] approached the two clerk, pointed the pistol, made them go to the cash register, he robbed the store of somewhere around $75 cash. He took one of the lady's pocketbook and the other lady's truck keys.

App. 9-13.[1] Judge Pyle sentenced Applicant to imprisonment for twenty-five years for attempted murder, for twenty-five years for kidnapping, for twenty years for each count of armed robbery, for five years for each count of possession of a weapon during the commission of a violent crime, and for ten years for attempted armed robbery, with credit for time served and with all sentences running concurrently. In accordance with the plea agreement, the assistant solicitor dismissed the remaining charges of possession of a weapon during the commission of a violent crime (2010-GS-23-07955) and first-degree burglary (2010-GS-23-07950); the assistant solicitor also dismissed the

[1] Citations styled this way are to the appendix from Applicant's appeal from the denial of his first application for post-conviction relief.

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following charges: possession of a weapon during the commission of a violent crime (2010-GS-23-07915), attempted murder (2010-GS-23-07948), first-degree burglary (2010-GS-23-07947), six counts of armed robbery (2010-GS-23-07937; -07927; -07925; -07941; -07914; -07916), three counts of first-degree assault and battery (2010-GS-23-07935; -07922; -07939), four counts of attempted armed robbery (2010-GS-23-07934; -07929; -07951; -07942), three counts of conspiracy (2010-GS-23-07918; -07913; -07917), and nine counts of kidnapping (2010-GS-23-07936; -07933; -07930; -07928; -07921; -07924; -07938; -07940; -07943).

Applicant did not appeal his convictions and sentences.

2012-CP-23-06181

Applicant filed a pro se application for post-conviction relief on September 25, 2012, raising the following claims:

> (10) State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
>
> (a) "Hand of one/Hand of all Sentencing [sic] law violation"
> (b) "Due process of law"
> (c) "Ineffective Assistance of Counsel"
>
> (11) State concisely and in the same order the facts which support each of the grounds set out in (10):
>
> (a) "S.C. Statute eg: Hand of one/Hand of all law, by and through 'Equal protections' of the law U.S. Const, XIV, Sec. # 1, S.C. Const. Article I-Sec. # 3, and the U.S. Const. VI amendment." (errors in original).

Applicant, through counsel, filed an amended application on February 18, 2013, raising the following claims:

1. My defense attorney failed to conscientiously discharge his professional responsibilities while he was handling my case.

2. My defense attorney failed to effectively challenge the arrest and seizure of Applicant.

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3. My defense attorney failed to act as my diligent, conscientious advocate.

4. My defense attorney failed to give me his complete loyalty.

5. My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case.

6. My defense attorney failed to serve my cause in good faith.

7. My defense attorney neglected the necessary investigations and the preparation of my case.

8. My defense attorney did not do the necessary factual investigations on my behalf.

9. My defense attorney did not do the necessary legal research.

10. My defense attorney did not conscientiously gather any information to protect my rights.

11. My defense attorney did not try to have my case settled in a matter that would have been to my best advantage.

12. My defense attorney did not advise me of all my rights or take any of the actions that were necessary to protect preserve them; knowing that I was not versed in the law.

13. My defense attorney, knowing I was illiterate in the law, never properly ascertained whether or not I actually understood or comprehended all of the issues that were involved in my case.

14. My defense attorney never properly consulted with me or kept me informed with what was going on as far as my case was concerned.

15. My defense attorney never explained to me or discussed with me any of the elements of the crime charged.

16. My defense attorney never made any attempt to ascertain whether or not I actually knew what the elements of the crime charged were or whether or not I understood exactly what the term "criminal element" actually meant.

17. My defense attorney never explained to me or discussed with me how the elements of the crime charge and the evidence that the prosecution planned to introduce into evidence against me related to one another and did not discuss how the sentencing would be done especially as it related to the elements of the crime as in State v. Boyd.

18. My defense attorney never informed me of any of the defenses that were

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available to me.

19. My defense attorney never intended to offer any defense to the court on my behalf.

20. My defense attorney never explained to me or discussed with me any kind of defense strategy.

21. My defense attorney never explained to me or discussed with me any of the tactical choices that they either made or were planning to make.

22. My defense attorney dictated to me exactly how my case was going to be handled and offered no alternative options.

23. My defense attorney failed to properly acquaint themselves with the law and the facts surrounding my case and as a direct result of their intentional negligence, there was a very serious error in their assessment of both the law and the facts.

24. Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings.

25. My defense attorney did not subject the prosecution's case to any adversarial testing.

26. My defense attorney failed to oppose the prosecution's case with any adversarial litigation.

27. My defense attorney failed to function as the government's adversary in any sense of the word.

28. My defense attorney failed to pursue any of the legal recourse that were available to him.

29. The attorney that represented me on this charge in Court failed to function as the counsel that the Constitution's Sixth Amendment Guarantees.

30. My defense attorney failed to call alibi witnesses on my behalf which would have proven my innocence.

31. My defense attorney failed to appeal my case after I was convicted when I wanted to appeal.

On November 6, 2013, Petitioner filed a pro se memorandum, stating that "[t]rial counsel was ineffective for failing to obtain a mitigating investigator to otherwise adequately prepare and present powerful mitigating evidence during pretrial and plea negotiations."

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Applicant was represented by Rodney W. Richey, Esquire, and Karen C. Ratigan of the South Carolina Attorney General's Office represented Respondent. An evidentiary hearing was convened before the Honorable G. Edward Welmaker at the Greenville County Courthouse on December 18, 2013. On February 17, 2014, Judge Welmaker, finding that Petitioner failed to establish "any constitutional violations or deprivations before or during his guilty plea and sentencing proceedings," denied and dismissed the application with prejudice.

Richey filed a timely notice of appeal. Appellate Defender Wanda Carter of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Carter moved to be relieved as counsel and filed a petition for a writ of certiorari in accordance with Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), arguing that Applicant's guilty pleas were entered involuntarily based on Applicant's misunderstanding of sentencing consequences in the case because trial counsel erred in failing to explain to Applicant that his request for a ten-year sentence did not automatically result in a confirmed plea bargain where a negotiated ten-year sentence was guaranteed in exchange for his guilty pleas. On January 22, 2015, Applicant filed a pro se Johnson response, arguing that plea counsel was ineffective for failing to submit documents showing that Applicant suffered from mental disabilities. The South Carolina Supreme Court denied the petition for a writ of certiorari and granted appellate counsel's petition to be relieved as counsel. Calloway v. State, Sup. Ct. Order filed on March 4, 2015. The remittitur was issued on March 20, 2015.

4:15-2137-RMG-TER

On May 26, 2015, Applicant filed a pro se petition for a writ of habeas corpus in the United States District Court for the District of South Carolina, arguing that he was entitled to relief on the following grounds: (1) plea counsel was ineffective for failing to explain the plea terms to Applicant, (2) plea counsel was ineffective for failing to inform petitioner about all of his trial

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rights, including his right to confront a witness who had recanted their statement, (3) ineffective assistance of counsel for failure to present proper mitigating evidence concerning Applicant's background and mental health records. On August 10, 2015, Respondent filed a return to Applicant's petition, moving for summary judgment and for the dismissal of the petition.

On November 24, 2015, United States Magistrate Judge Thomas E. Rogers, III, issued a report and recommendation regarding Applicant's petition. Judge Rogers recommended that Respondent's motion for summary judgment be granted and the petition be dismissed without an evidentiary hearing. Despite the fact that Applicant filed an objection to the report and recommendation, United States District Court Judge Richard Mark Gergel issued an order on January 15, 2016, adopting Judge Rogers' report and recommendation, granting Respondent's motion for summary judgment, dismissing the petition, and denying a certificate of appealability.

CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons: (1) Applicant did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences, (2) plea counsel was constitutionally ineffective for inadequately investigating the mitigating circumstances for sentencing purposes, and (3) plea counsel was constitutionally ineffective for not requesting a competency evaluation of Applicant, plea counsel was constitutionally ineffective for inadequately investigating Applicant's intellectual disabilities and mental health. Applicant prays the Court reverse his convictions, "[v]acate conviction and sentence and remand for a new trial."

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant's convictions and sentences; the records from the Greenville County Clerk of Court

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regarding the charges dismissed after Applicant pleaded guilty; the records from Applicant's previous application for post-conviction relief, including any pleadings, substantive motions, and substantive court orders filed therein; the records from Applicant's appeal of the denial of relief in Applicant's first PCR action, including the Johnson petition for a writ of certiorari and appendix, Applicant's pro se Johnson response, and the dispositive opinion; the records from Applicant's petition for a writ of habeas corpus in federal court; and Applicant's records from the South Carolina Department of Corrections.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 17-27-70(c), this Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law. The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). This Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by Applicant as true and view then in the light most favorable to Applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)).

First, with the exception of Applicant's claim that he did not knowingly and voluntarily

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waive his right to direct appellate review,[2] all claims raised in this present application for post-conviction relief shall be dismissed summarily due to Applicant's failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 ("the Act"). 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). 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 offense 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 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 pleaded guilty on May 14, 2012. Applicant did not appeal his convictions and sentences. The application was, therefore, due to be filed on or before May 15, 2013. This application was not filed until April 27, 2021, almost eight years after the statutory filling period expired. Therefore, all claims raised in the application, with the exception of Applicant's claim that he did not knowingly and voluntarily waive his right to direct appellate review, shall be dismissed summarily.

Second, this Court shall dismiss all claims raised in the application because the application is impermissibly successive. 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 raised in a previous application. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992); Foxworth

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[2] Applicant's claim that he did not knowingly and voluntarily waive his right to direct appellate review is not subject to dismissal here because the one-year limitations period in which to file a petition for post-conviction relief does not apply where a defendant alleges he or she was denied a direct appeal due to ineffective assistance of counsel. Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

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v. State, 275 S.C. 615, 274 S.E.2d 415 (1981). 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 post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" that 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 the allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. An 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).

Not only could all of Applicant's claims have been raised in his first PCR action; indeed, all of them were so raised. Applicant raises a claim in this successive application that he did not knowingly and voluntarily waive his right to direct appellate review of his convictions and sentences. In the amended application that Applicant filed in his first PCR action through counsel on February 18, 2013, Applicant claimed, "My defense attorney failed to appeal my case after I was convicted when I wanted to appeal." Since Applicant did not present any evidence or argument in support of the claim at the evidentiary hearing held in Applicant's first PCR action before Judge Welmaker on December 18, 2013, Judge Welmaker found that Applicant abandoned the claim. App. 66.

Applicant raises a claim in this successive application that plea counsel was

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constitutionally ineffective for inadequately investigating the mitigating circumstances for sentencing purposes. Applicant raised identical, or highly similar, claims in his amended application that Applicant filed in the first PCR action through counsel on February 18, 2013, such as:

1. "My defense attorney did not have my best interest in mind while he was supposed to be investigating and preparing my case";
2. "My defense attorney neglected the necessary investigations and the preparation of my case";
3. "My defense attorney did not do the necessary factual investigations on my behalf"; and
4. "Because of my defense attorney's gross neglect and his many legal errors no defense at all was put in issue for me during the Court proceedings."

Applicant's pro se memorandum, filed in his first PCR action on November 6, 2013, raises the claim that plea "counsel was ineffective for failing to obtain a mitigating investigator to otherwise adequately prepare and present powerful mitigating evidence during pretrial and plea negotiations. Judge Welmaker's order denying relief to Applicant addressed Applicant's claim that plea counsel was constitutionally ineffective for not presenting adequate mitigation evidence at Applicant's guilty plea hearing, and included a finding that Applicant failed to prove that plea counsel should have done something that he should not and failed to prove that any further mitigation on plea counsel's part would have had any effect on Applicant's sentences. App. 65.

Applicant raises a claim in this application that plea counsel was constitutionally ineffective for not requesting a competency evaluation of Applicant, plea counsel was constitutionally ineffective for inadequately investigating Applicant's intellectual disabilities and mental health. At the evidentiary hearing before Judge Welmaker on December 18, 2013, the following exchange occurred between Applicant and Applicant's lawyer:

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Q: No. I need you to tell me what mitigation testimony that you wanted [plea counsel] to present?

A: My background and record.

Q: Okay. What does that consist of?

A: DJJ, DSS, social history, mental health.

Q: Okay. And how do you believe that that would have assisted him in your case? [Plea counsel]?

A: My diminished capacity of what I've experienced from birth, my early age, early childhood.

Q: And you believe if he had presented sufficient mitigation testimony your sentence would have been different or . . . .

A: Yes, sir. The outcome would have been different.

App. 41-42. Judge Welmaker found that plea counsel "presented a detailed mitigation argument to the plea judge . . . ." App. 65. Judge Welmaker also found that Applicant failed to prove that plea counsel should have done any further mitigation and failed to prove that any further mitigation would have had any effect on the sentence imposed. App. 65.

These repeat allegations are not only barred because they are put forth improperly in a successive application, but they are also 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 (S.C. 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, 427 S.E.2d 918 (S.C. 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) (approving of PCR court's finding that claims raised or that could have been raised in a prior federal habeas corpus proceeding were barred by res judicata). As previously noted, Applicant unsuccessfully raised two of these claims in his previous application, and Judge

Welmaker denied relief as to those claims; with regard to the other claim raised in this application, Applicant raised it in his first PCR action and then abandoned it. Applicant wholly fails to provide this Court with any reason he could not have raised these current allegations in one of his previous applications for post-conviction relief or why, if he did raise them previously, he should be allowed to raise then anew. Therefore, the application shall be dismissed summarily due to its impermissible successiveness and because the claims are barred by the doctrine of res judicata.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific reasons, factual or legal, that 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 provide reasons that this order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Taylor Zane Smith, Esquire
PCR Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville

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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 30th **day of** July, **2021.**

Perry H. Gravely
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney General/Applicant atty
on 8/3/2021.

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