

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS
) IN THE THIRTEENTH JUDICIAL CIRCUIT
)
)

Charles Earl Richey, #301029,
Applicant,

) Case No.: 2019-CP-23-0812
)
)

v.

) **FINAL ORDER OF DISMISSAL**
)
)

State of South Carolina,
Respondent.

) **ENTERED COMPUTER**
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S.C. SUPREME COURT

This matter comes before this Court by way of an application for post-conviction relief filed by Charles Earl Richey (“Applicant”) on July 8, 2019, and by way of the State’s (“Respondent”) return and motion to dismiss, filed on September 2, 2020.

PROCEDURAL HISTORY

Applicant is presently incarcerated in the South Carolina Department of Corrections. During its February of 2003 term, the Greenville County Grand Jury indicted Applicant for armed robbery (2003-GS-23-001054), pointing and presenting a firearm (2003-GS-23-001057), kidnapping (2003-GS-23-001058), possession of a firearm by a person convicted of a crime of violence (2003-GS-23-001108), and resisting arrest (2003-GS-23-001056). Applicant was represented by Daniel J. Farnsworth (“trial counsel”), Esquire, and Assistant Solicitor L. Mark Moyer of the Thirteenth Circuit Solicitor’s Office prosecuted the case. On April 5-6, 2004, Applicant proceeded to a jury trial with the Honorable Larry R. Patterson presiding. At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Patterson sentenced Applicant to imprisonment for life without the possibility of parole for armed robbery and for kidnapping, for five years for possession of a weapon, and for one year for resisting arrest and for pointing and presenting a firearm, with all sentences running concurrently.

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BRIAN C. WENGER, CLERK

Trial counsel filed a timely notice of appeal. Chief Appellate Defender Robert M. Dudek of the South Carolina Commission on Indigent defense represented Applicant on appeal. Dudek filed a motion to be relieved as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), arguing therein that Judge Patterson erred in admitting a witness's identification of Applicant after ruling that the "show-up" did not present a substantial chance of irreparable misidentification. Applicant filed a pro se *Anders* brief, arguing that Judge Patterson erred in admitting Applicant's statements to police without adequately determining their voluntariness. The South Carolina Court of Appeals dismissed the appeal. *State v. Richey*, Op. No. 2008-UP-686 (S.C. Ct. App. filed December 11, 2008) (per curiam). The remittitur was issued on December 31, 2008.

2009-CP-23-0702

Applicant filed his first application for post-conviction relief on January 28, 2009, claiming therein that he was entitled to post-conviction relief because he received the constitutionally ineffective assistance of counsel when trial counsel (1) failed to argue at the suppression hearing that Applicant asserted his right to remain silent during interrogation, (2) failed to cross-examine officers as to their conflicting assertions about whether Applicant invoked his right to remain silent, (3) failed to contest at the suppression hearing the voluntariness of Applicant's statement, (4) failed to impeach a witness regarding the State's "distortion of the evidence design to facilitate witness testimony involving identification of Applicant clothing," (5) failed to object to Judge Patterson's decision to allow a potentially biased juror to remain on the jury panel, (6) failed to discover videotape evidence, (7) failed to preserve for appellate review the issue of Judge Patterson's admission of a witness's in-court identification of Applicant, (8) failed to object to testimony regarding "money capsule allegedly taken off Applicant where evidence was never disclose or available for inspection, and because Applicant was denied the equal protection of the law when

(9) he was not prosecuted in the same manner as another similarly situated individual and (10) trial counsel represented the similarly situated individual. Respondent made its return on April 17, 2009. Applicant filed an amended application on November 10, 2009, alleging he was entitled to relief because he received the ineffective assistance of counsel when trial counsel (1) failed to argue that Applicant's right to remain silent was violated, (2) failed to impeach witnesses with regard to discrepancies in Applicant's clothing, (3) failed to argue that Judge Patterson should have addressed juror bias on the record, (4) failed to adequately investigate the videotape of the incident, (5) failed to object to testimony about money capsules that were taken from the crime scene but never produced to the defense, (6) failed to object to the State's selective prosecution of Applicant under the "two-strikes" statute, (7) failed to argue that Applicant's right to the equal protection of the law had been violated, and (8) had a conflict of interest.

An evidentiary hearing was held at the Greenville County Courthouse on November 10, 2009, with the Honorable G. Edward Welmaker presiding. Applicant was present and represented by Carolina Horlbeck, Esquire. After the conclusion of the hearing, Judge Welmaker issued an order of dismissal on December 22, 2009, in which he denied the application and dismissed it with prejudice.

Horlbeck filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Hudgins filed a petition for a writ of certiorari arguing that: (1) Judge Welmaker erred in refusing to find that trial counsel was constitutionally ineffective for failing to preserve for appellate review the trial court's admission of identification testimony from the convenience store clerk because the identification resulted from an unduly suggestive "show-up" identification process and the prosecution failed to prove that the identification was reliable despite the suggestiveness of the process; and (2) Judge

Welmaker erred in refusing to find that trial counsel was constitutionally ineffective for failing to argue that Applicant's second statement to police should have been suppressed because the questioning of Applicant continued after Applicant invoked his right to remain silent. The Supreme Court transferred the appeal to the Court of Appeals, which subsequently denied Applicant's petition for a writ of certiorari. *Richey v. State*, S.C. Ct. App. Order filed January 25, 2013. The remittitur was issued on February 11, 2013.

5:13-cv-01329-MGL-KDW

On May 20, 2013, Applicant filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina, claiming therein that he was entitled to relief because (1) Judge Welmaker erred in failing to properly determine whether trial counsel was constitutionally ineffective for failing to argue for the suppression of Applicant's second statement to police, because Applicant received the constitutionally ineffective assistance of counsel when trial counsel (2) failed to discover and argue for the suppression of Applicant's third statement to police on the basis that it was obtained of Applicant's Sixth Amendment right to counsel, (3) failed to preserve for appellate review the issue of the trial court's admission of the convenience store clerk's identification of Applicant, and (4) failed to conduct an adequate investigation into alternative lines of defense. Applicant amended his petition, with the court's leave, to include a fifth claim that he was entitled to relief because (5) Horlbeck failed to argue during Applicant's first PCR action in state court that trial counsel was constitutionally ineffective for failing to preserve for appellate review the trial court's admission of identification testimony that resulted from a suggestive show-up procedure. Respondent moved for summary judgment on or about September 13, 2013. Applicant filed a return to Respondent's motion for summary judgment on October 21, 2013.

On April 22, 2014, United States Magistrate Judge Kaymani D. West issued a report and recommendation, recommending that Respondent's motion for summary judgment be granted and that Applicant's petition be dismissed with prejudice. In an order issued on September 5, 2014, United States District Judge Mary G. Lewis adopted Judge West's report and recommendation over Applicant's objection, granting Respondent's motion for summary judgment, denying Applicant's petition for a writ of habeas corpus and dismissing it with prejudice, and declining to issue a certificate of appealability.

Applicant filed a notice of appeal. In an order issued filed on July 28, 2015, the United States Court of Appeals for the Fourth Circuit granted Applicant a certificate of appealability regarding the issue of whether Judge Lewis erred in denying relief on Applicant's claims that he received the constitutionally ineffective assistance of counsel. Applicant was represented on appeal by Milligan J. G. Goldsmith, Esquire, and Matthew Allen Fitzgerald, Esquire; they argued that Judge Lewis erred in failing to grant relief to Applicant on his claims that trial counsel was constitutionally ineffective for failing to move to suppress Applicant's statements to police, and that Judge Lewis erred in failing to find Applicant was entitled to relief based upon his claim that his post-bond statement should have been suppressed due to his request for counsel and that the default in his not raising the issue should be excused due to the ineffective assistance of Applicant's PCR counsel. In an unpublished opinion filed on June 23, 2016, the Fourth Circuit affirmed, finding that Applicant failed to demonstrate that he was prejudiced by trial counsel's performance, among other things.

2018-001127

On June 18, 2018, Applicant filed in the South Carolina Supreme Court a petition in its original jurisdiction for a writ of habeas corpus. Applicant alleged in that petition: (1) that he had

been denied the right to counsel because his lawyer had a conflict of interest; and (2) that he had been denied the right to counsel in a previous case in which the resulting conviction was being used illegally to enhance his current sentence. Applicant prayed in the petition that the court would vacate his sentence and/or conviction or, in the alternative, remand for a hearing on the petition. By an order issued on August 29, 2018, the Supreme Court denied the petition, finding that Applicant had not yet exhausted all of the post-conviction relief remedies available to him.

CURRENT APPLICATION

In his second and current application for post-conviction relief, filed on February 18, 2019, Applicant claims he is entitled to relief because: (1) Judge Welmaker abused his discretion when he allowed trial counsel to testify as the first witness at Applicant's PCR hearing in order to accommodate counsel's work schedule; (2) Applicant's attorney in his first PCR action was constitutionally ineffective for failing to object when Judge Welmaker allowed trial counsel to testify first at Applicant's PCR hearing; and (3) trial counsel was constitutionally ineffective for having a conflict of interest in representing both Applicant and a similarly situated individual, which resulted in a miscarriage of justice. Applicant prays that the Court would grant post-conviction relief and award him a new trial or resentencing where he can be represented by an attorney who does not have a conflict of interest.

On September 2, 2020, this Court issued a conditional order of dismissal that conditionally granted Respondent's motion to dismiss based upon the grounds that the application was not timely filed, the application is impermissibly successive, and the application raises claims that are barred by the doctrine of res judicata. The order gave Applicant twenty days upon the service of the order upon him in which to file a response providing reasons, factual or legal, that the dismissal should not become final. The order was filed with the Greenville County Clerk of Court on September 9,

2020, and was mailed to Applicant by the Clerk of Court on that same date. The order was served on Applicant personally on October 12, 2020, as is shown by the attached affidavit of personal service, which is incorporated into this order.

Applicant filed a response to the conditional order of dismissal on September 23, 2020, in which he argued as follows: (1) Applicant did not receive the effective assistance of trial counsel during plea negotiations because trial counsel had a conflict of interest; (2) Applicant was deprived of his right to a full and fair hearing in his previous PCR action because his PCR counsel in that case failed to raise properly the claim that trial counsel was constitutionally ineffective for having a conflict of interest in order to preserve the issue for appellate review; (3) Applicant has given sufficient reason that his claims in this successive application were not raised in his first application; (4) the “irregular procedure” used at the evidentiary hearing in Applicant’s first PCR action, coupled with the “egregious conduct” of the lawyer appointed to represent Applicant at that hearing, deprived Applicant of a full and fair hearing; (5) the South Carolina Supreme Court held in *Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991), that an applicant can challenge “PCR conduct” in a successive application.

On October 20, 2020, Applicant filed a motion for relief from judgment pursuant to Rule 60(b)(3), SCRCPP, praying for relief from the conditional order of dismissal. Applicant argued therein that: (1) Respondent’s proposed order, which this Court adopted by signing it, contained a misrepresentation of facts that constitutes fraud upon the court; (2) Respondent’s misrepresentation itself was a sufficient basis for this Court to convene a hearing on Applicant’s second application; (3) this Court’s order gave no indication that this Court considered the genuine issues of material fact presented in the second application; (4) this Court’s order gave no indication that the Court weighed Applicant’s allegations that he has newly discovered evidence against the discovery rule

exception to the statute of limitations application in post-conviction relief cases; and (5) Applicant's allegation that he has newly discovered evidence raises a question of fact that cannot be dismissed summarily, but can only be resolved after a hearing. Applicant alleged that some of his claims raised in the application are not, in his argument, grounds upon which the court is required to grant post-conviction relief to him, but are grounds upon which the court should convene an evidentiary hearing on his second application.

On November 6, 2020, Respondent filed a return to Applicant's motion for relief from judgment, arguing that: (1) Rule 60(b) does not authorize a party to move for relief from an order that is not a final one; and (2) that the conditional order of dismissal afforded Applicant the opportunity to make arguments against the summary dismissal of his application and that a response to that order would be the proper avenue for Applicant to make his arguments against Respondent's and this Court's characterizations of his claims.

On November 13, 2020, Applicant filed a notice of appeal, wherein he asked the Supreme Court to grant his petition for a writ of certiorari and reverse this Court's conditional order of dismissal. On November 17, 2020, the Supreme Court issued an order dismissing the notice of appeal without prejudice because the order at issue was not an appealable order. The remittitur was issued on December 14, 2020.

Meanwhile, on December 9, 2020, Applicant filed a reply to Respondent's return to the motion for relief from judgment. Applicant apparently conceded that Respondent was correct that the Rule 60(b) motion did not apply with respect to the conditional order of dismissal, but urged this Court to be flexible in his application of the rule since Applicant is a pro se litigant and because Respondent failed to prove that it had suffered any prejudice. Applicant repeated his allegation that Respondent had committed fraud upon the court by misrepresenting the application.

On March 17, 2021, Applicant filed a motion for leave to conduct discovery pursuant to S.C. Code Ann. § 17-27-150(A), praying for access to documents allegedly in possession of the Thirteenth Circuit Solicitor's Office and Daniel J. Farnsworth, Esquire, and for authorization to subpoena David Gosnell. On March 24, 2021, Respondent filed a return to Applicant's motion for discovery, noting that this Court's conditional order of dismissal included findings that Applicant's second application raises claims that are essentially identical to those raised his first application and is barred by the doctrine of res judicata and arguing that Applicant had failed to show that there was good cause for an order granting his motion.

On July 27, 2021, Applicant filed an amended or supplemental application, arguing that the combination of the "irregular procedure" and the ineffectiveness of the lawyer who represented him in the first PCR action prevented him from raising the claim that trial counsel was constitutionally ineffective for having an actual conflict of interest. Applicant alleges that he raised the claim in his application and amendment during his first PCR action but that his lawyer did not present the claim during the evidentiary hearing on his first application. Applicant raised claims that his previous PCR lawyer was ineffective for: (1) consenting to an abnormal procedure, which was apparently the questioning of trial counsel at the beginning of the evidentiary hearing and then his excusal; (2) failing to consult with Applicant concerning the procedure used at the evidentiary hearing; (3) failing to pursue substantial claims¹ despite Applicant's desire that he do so; (4) deliberately misleading Applicant by making him think that the conflict-of-interest claim had been raised; and (5) failing to seek a post-hearing remedy due to the fact that Judge Welmaker's order denying the first application did not address the conflict-of-interest issue. Applicant raised claims that Judge

¹ Applicant writes that the claims were that trial counsel was constitutionally ineffective for having an actual conflict of interest and that the prosecution used an invalid prior conviction to enhance his sentence illegally.

Welmaker abused his discretion by: (1) authorizing a “rule change” that prejudiced Applicant’s right to a fair hearing; and (2) authorizing a rule change that interfered with Applicant’s right to confrontation. Applicant raised claims that there had been a miscarriage of justice because there was a denial of fundamental fairness. Applicant alleges that he filed his application within one year of discovering the foregoing.

On August 2, 2022, Applicant filed a motion to withdraw his motion for relief from judgement, which he had filed on November 6, 2020. Additionally, Applicant amended his discovery motion filed on March 17, 2021, to say that he would offer to depose David Gosnell as an alternative to requiring him to testify at a hearing.

On August 30, 2022, Applicant filed a motion to amend his application and an amended application. Applicant raised a claim that trial counsel had a conflict of interest that interfered with Applicant’s ability to contest the prosecution’s decision in selecting who can participate in pre-trial intervention. Applicant alleged that he was selectively prosecuted when compared to a similarly situated white defendant, but that trial counsel did not contest that selective prosecution because he had a conflict of interest.

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant’s convictions and sentences, the records from Applicant’s direct appeal, the records from Applicant’s first application for post-conviction relief and its appeal, the records from Applicant’s petition for a writ of habeas corpus in federal court and its appeal, the records from Applicant’s petition for a writ of habeas corpus in the South Carolina Supreme Court’s original jurisdiction, Applicant’s records from the South Carolina Department of Corrections, and the filings in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), this Court makes the following findings of fact and conclusions of law:

The application is not timely

In its return filed on September 2, 2020, Respondent moved to dismiss the application with prejudice on the ground that it was not timely filed. In the conditional order of dismissal issued on September 2, 2020, this Court conditionally granted Respondent's motion on that ground, finding that the application was not timely filed, and giving Applicant twenty days in which to file a response providing reasons, factual or legal, that the dismissal should not become final. Respondent has filed responses to the conditional order of dismissal, so this Court shall consider below whether those responses are such that they can be dismissed summarily pursuant to Respondent's motion.

Pursuant to S.C. Code Ann. § 17-27-70(c), a 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)). The court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by the applicant as true and view them in the light most favorable to him. *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)).

The Uniform Post-Conviction Procedure Act (“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). The remittitur was issued in Applicant’s direct appeal on December 31, 2008. His application was due, therefore, on or before January 1, 2010. He filed his current application on July 8, 2019, more than nine years too late. For that reason, this Court conditionally granted Respondent’s motion to dismiss.

Applicant admits that his application is filed late according to the time window provided in the Act, but asserts that the discovery rule exception applies so as to excuse his late filing. The Act does allow a person to institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If an applicant contends there is evidence of a material fact not previously presented, the application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). In his filings, Applicant argues that his application cannot be dismissed summarily because the record does not conclusively refute his allegations; however, by Applicant’s own admissions, he wanted to argue at the November 10, 2009, hearing before Judge Welmaker, which concerned the first application, that trial counsel had a conflict of interest. Even if Applicant’s assertions about the alleged conflict of interest are true, his “discovery” of the conflict would have had to have occurred November 10, 2009. The discovery rule exception to the statute of limitations is, therefore, of no use to Applicant,

who did not file his second application until July 8, 2019, almost ten years after that date. This Court finds that Applicant has failed to provide a reason, factual or legal, that the conditional dismissal of his application based on its untimeliness should not become final. Respondent's motion to dismiss is granted on this ground.

The application is impermissibly successive

In its return filed on September 2, 2020, Respondent moved to dismiss the application with prejudice on the ground that it was impermissibly successive. In the conditional order of dismissal issued on September 2, 2020, this Court conditionally granted Respondent's motion on that ground, finding that the claims raised in the second application could have been, and were, raised in the first 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 raised in a previous one. *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 applications are forbidden unless an applicant can indicate a "sufficient reason" that new grounds were not raised or were not properly raised in previous applications. *Aice*. 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.* 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).

All of the claims that Applicant has raised in this second application are those that he could have raised in his first application. In fact, Applicant did raise them or substantially similar claims in his previous application. Most of the argument and allegations that Applicant has put forth in this second application concern his contention that trial counsel had a conflict of interest that prevented him from raising an argument at trial regarding the allegedly disparate treatment on the part of the prosecution between Applicant and someone named David Gosnell. Applicant raised that same claim in his pro se application filed in his first PCR action on January 28, 2009. Applicant, through counsel, raised the same argument again in his amended application filed in his first PCR action on November 10, 2009. During the November 10, 2009, evidentiary hearing on Applicant's first application, Applicant cross-examined trial counsel about Gosnell, trial counsel's representation of Gosnell, and the life sentence that Applicant received; additionally, Applicant testified that he believed that trial counsel's representation of him had been affected by a conflict of interest. In the order of dismissal issued in the first PCR action on December 22, 2009, Judge Welmaker found that Applicant had failed generally to prove that there were any deficiencies in trial counsel's performance and found specifically that Applicant had failed to prove that trial counsel had failed to protect Applicant's Equal Protection rights. Applicant has failed to give a sufficient reason, factual or legal, that he should be allowed to raise this claim again.

Applicant's argument that he was unable to raise it previously, or at least to have it reviewed on appeal, fails because Applicant is not allowed to challenge through his second application the performance of his lawyer during the first PCR action. The Sixth Amendment right to the effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*,

501 U.S. 722 (1991). The “contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90.” *Aice*, at 451, 409 S.E.2d at 394. The only recognized exception to the rule barring claims of ineffective assistance of PCR counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* provides for a belated appeal where prior post-conviction relief counsel fails to timely appeal the denial of an application for post-conviction relief. *Id.* at 454, 409 S.E.2d at 396; S.C. Code Ann. § 17-27-100 (concerning the right to appeal a final judgment issued by a post-conviction relief court). Pursuant to *Austin*, an evidentiary hearing may be conducted in a successive PCR action “on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” *Austin*, at 454, 409 S.E.2d at 396. Even if Applicant’s allegations about the quality of his prior PCR lawyer’s representation are correct, he cannot challenge that representation now through a successive application and cannot use that allegation to cover again claims already raised.

Applicant also raises an additional claim now that trial counsel was constitutionally ineffective for not objecting to the enhancement of Applicant’s sentence on the basis of an allegedly illegal prior conviction. Applicant has failed to give a sufficient reason, factual or legal, that he could not have raised this claim during his first PCR action.

This Court finds that Applicant has failed to provide reasons, factual or legal, that the conditional dismissal of his application based on its impermissible successiveness should not become final. Respondent’s motion to dismiss is granted on that ground.

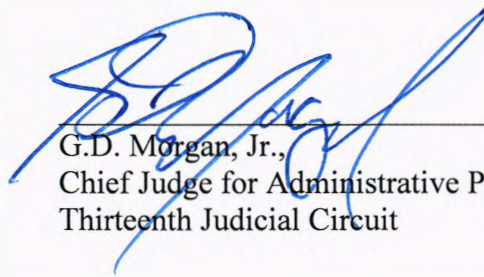
The application is barred by the doctrine of res judicata

In its return filed on September 2, 2020, Respondent moved to dismiss the application with prejudice on the ground that it was barred by the doctrine of res judicata. In the conditional order

of dismissal issued on September 2, 2020, this Court conditionally granted Respondent's motion on that ground, finding that the application raised claims that were or could have been addressed in the first PCR action. Res judicata prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). "To establish res judicata, the defendant must prove the following three elements: (1) the identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Carpenter v. Dep't of Corr.*, 431 S.C. 512, 525-26, 848 S.E.2d 346, 353 (Ct. App. 2020) (quoting *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 512 S.E.2d 106 (1999)). Res judicata also bars any issues that could have been raised in the former action. *Foran* at 191, 427 S.E.2d at 919; *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 noted above, the claims that Applicant is raising are those that have been addressed previously or else could have been. Applicant has failed to provide reasons, factual or legal, that Respondent's motion should not be granted based on res judicata.

IT IS THEREFORE ORDERED that the application for post-conviction relief is hereby denied and dismissed with prejudice because it is untimely, it is impermissibly successive, and it is barred by the doctrine of res judicata. If Applicant wishes to appeal this order, he must serve and file a notice of appeal within thirty days of the service of this order upon him. Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 20th day of November, 2023.



G.D. Morgan, Jr.,
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greenville, South Carolina.

general / applicant
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