STATE OF SOUTH CAROLINA COUNTY OF ANDERSON	)	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
Steven C. McElrath, #328413, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–04–01390 **CONDITIONAL ORDER OF DISMISSAL**

This matter is before the Court based on a successive application for post-conviction relief (PCR) filed by Steven C. McElrath (Applicant) on July 3, 2023. In response, Respondent made its return[1] and moved to summarily dismiss the action as procedurally barred as untimely, barred by the statute of limitations, successive to Applicant's previous PCR applications, barred by the doctrine of *res judicata*, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq*. (2014). After a review of the record and pleadings, this Court agrees this application should be summarily dismissed and provisionally dismisses the action based on the following:

[1] Respondent's return to the application was due to be filed within sixty days of receipt. 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 required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts these returns 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.).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Anderson County Clerk of Court. On February 8, 2007, Applicant was indicted at the June 2017 term of the Anderson County Grand Jury for one count of Kidnapping (2007-GS-04-1896) and Criminal Sexual Conduct – First Degree (2007-GS-04-1897). Applicant was represented by Scott D. Robinson, Esquire. Tenth Circuit Assistant Solicitor Kristin W. Reeves prosecuted the case.

On May 19, 2008, Applicant appeared before the Honorable J.C. Nicholson, Jr., and pled guilty as indicted to all charges. Judge Nicholson sentenced Applicant to confinement for a period of thirty (30) years for Kidnapping and ten (10) years for Criminal Sexual Conduct, to be served consecutively.

A Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals dismissed the appeal on September 23, 2008, for lack of any showing that there was an issue preserved for appellate review. The Remittitur was returned to the circuit court on October 9, 2008.

FIRST PCR ACTION: 2009–CP–04–0012

Applicant filed his *first* PCR application on January 2, 2009, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel
   a. "Counsel was ineffective in failing to object to the sentence given to Applicant."
   b. "Counsel was ineffective for failing to provide Applicant with knowledge of a viable defense that was available to him, causing him to accept his guilty plea without full knowledge of the consequences of that plea."
   c. "Counsel was ineffective for failing to investigate the mental capacity of the Applicant to plead guilty causing

Applicant to enter into a plea of guilty without full understanding of the nature of the plea."

2. Involuntary Guilty Plea

Respondent made its return on April 3, 2009. A hearing was convened into the matter before the Honorable R. Lawton McIntosh on June 15, 2010. Applicant was present and represented by George Sands, Esquire. The State was represented by Assistant Attorney General A. West Lee. On August 13, 2010, Judge McIntosh issued an Order denying and dismissing he application with prejudice. Applicant did not appeal.

SECOND PCR ACTION: 2011-CP-04-02710

Applicant filed his *second* PCR application on September 9, 2021, and alleged he was being held in custody unlawfully, for the following reasons:

1. Violation of the 5th and 14th Amendments Per the Federal, U.S., and S.C. Constitutions.
2. Ineffective Assistance of PCR Counsel
   a. Failure to File rule 59 Motion.
   b. Failure to File Appeal.

Respondent made its return and partial motion to dismiss on February 10, 2012. On April 30, 2015, the Honorable Edgar W. Dickson issued an Order of Dismissal, granting Applicant's request for belated appeal of his PCR pursuant to Austin v. State[2] and denying all other allegations.

Applicant filed a notice of appeal on May 12, 2015, appealing Judge Dickson's Order of Dismissal and seeking *certiorari* of Judge McIntosh's Order (App. Case No. 2015-001081). Appellate Defender Katherine H. Hudgins perfected Applicant's appeal by filing a Johnson[3]

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[2] Austin v. State, 305 S.C. 435, 409 S.E.2d 395 (1991).
[3] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1998).

Petition and Austin[4] Petition on May 18, 2016. The Supreme Court of South Carolina issued an Order on February 10, 2017, granting Applicant's Petition for a *Writ* of *Certiorari* from Judge Dickson's Order, and denying Applicant's Petition for a *Writ* of *Certiorari* of Judge McIntosh's Order. The Remittitur was issued February 28, 2017.

FEDERAL HABEAS CORPUS ACTION: 5:17-CV-01569-JMC

Applicant filed a Petition for *Writ* of *Habeas Corpus* on June 22, 2017, under 28 U.S.C. § 2254. In his petition, Applicant alleged ineffective assistance of counsel and involuntary guilty plea. Respondent made its Return and Motion to Dismiss on September 20, 2017. United States Magistrate Judge Kaymani D. West issued a Report and Recommendation on February 16, 2018, recommending Respondent's motion for summary judgment be granted. On May 23, 2018, United States District Judge J. Michelle Childs issued an Order accepting Magistrate West's Report and Recommendation and dismissing Applicant's Petition for *Writ* of *Habeas Corpus*. Applicant did not appeal.

CURRENT ACTION BEFORE THIS COURT

On July 3, 2023, Applicant *untimely* filed his *third* application for PCR in which he alleges the following (verbatim):[5]

1. "Procedural Due Process Violation of 5th and 14th U.S. Const. Amend and State Applicable."
2. "Due Process Violation 5th, 6th, 14th U.S. Const. Amend and State Applicable."
3. Involuntary, unknowing Guilty Plea unintelligently entered."

Applicant seeks relief in the form of "vacate conviction sentence."

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[4] *supra.*

[5] Applicant attached a "Memorandum of law and Apendix Exhibits in Support of Post Conviction Application" in support of his allegations listed in Question 10.

Attached to this Return and Motion to Dismiss are the Anderson County Clerk of Court records regarding the subject's convictions; Applicant's records from SCDC; Applicant's records from his direct appeal; Applicant's records from his *first* PCR action; Applicant's records from his *second* PCR and subsequent appeal; Applicant's records from his Petition for *Writ* of *Habeas Corpus*; and the records of the current PCR action. Respondent reserves the right to amend this return upon receiving any relevant materials.

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 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 this application for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.[6] Specifically, the Act requires as follows:

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[6] S.C. Code Ann. § 17-27-10 to -160.

(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 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 trial counsel was ineffective and his constitutional rights were violated.

However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant pleaded guilty and was sentenced on May 19, 2008. Applicant appealed and the Remittitur was issued on October 9, 2008. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before October 9, 2009. Applicant did not file this PCR application until July 3, 2023, *thirteen years, and eight months, and twenty-four days* beyond the statute of limitations.

Accordingly, this Court finds 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 Applicant is unable to show that these claims could not have been raised in his initial application, as his claims were known and easily could have and should have been raised in his initial post-conviction relief action.

Accordingly, this Court finds the application should be dismissed as successive to Applicant's prior post-conviction relief actions.

SUMMARY DISMISSAL BASED ON THE DOCTRINE OF RES JUDICATA

Additionally, this 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 PCR action. The prior PCR Courts issued final judgments on the merits of the same or similar issues Applicant raises in this successive action. This Court finds the finality of the previous court's rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

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 Schneckloth 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

Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 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 Anderson County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 10th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Anderson 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 28 **day of** March **, 2024.**

THE HONORABLE R. LAWTON MCINTOSH
Chief Administrative Judge
Tenth Judicial Circuit

Anderson, South Carolina