STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT
James Mackey, SCDC No. 177328, Applicant, v. State of South Carolina, Respondent.	2015-CP-10-6474 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by James Mackey (Applicant) on December 1, 2015. The State (Respondent) made its return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Clerk of Court for Charleston County. The Applicant was indicted at the March 1991 term of the Charleston County Grand Jury for murder (1991-GS-10-1313). Lori Proctor, Esquire, and Sebastian Gaeta, Esquire represented the Applicant. The Applicant proceeded to trial on May 6, 1991 and was convicted of murder. On May 7, 1991, the Honorable Richard E. Fields sentenced the Applicant to confinement for life.

The Applicant timely filed Notice of Appeal, and the South Carolina Office of Appellate Defense perfected an appeal on his behalf. After the filing of briefs from both sides, the South Carolina Supreme Court affirmed the conviction and sentence. State v. Mackey, Memo. Op. No. 92-MO-250 (S.C. Sup. Ct. filed September 25, 1992). The Remittitur was issued on October 13, 1992.

First PCR Application: 1995-CP-10-0159

Thereafter, the Applicant filed an application for post-conviction relief (PCR) dated May 1, 1995, in which he made the following allegations:

1. Denial of effective assistance of counsel
2. Denial of effective assistance of appellate counsel
3. Denial of due process of law

The Respondent made its Return on June 16, 1995, requesting an evidentiary hearing be held. A hearing into the matter was convened on August 12, 1996, in the Charleston County Courthouse before the Honorable A. Victor Rawl. The Applicant was present in court and represented by David Adams, Esquire. Matthew M. McGuire, Esquire, represented the State. By Order dated October 3, 1996, Judge Rawl denied and dismissed the application. The Applicant filed a timely Notice of Appeal to the Order of Dismissal. The South Carolina Supreme Court denied certiorari by Order dated March 6, 1998. The Remittitur was issued on March 24, 1998.

Federal Habeas Corpus: 6:99-360-11AK

On August 26, 1998, the Applicant filed a Writ for Habeas Corpus. The State made its Return and Motion to Dismiss on December 16, 1999. By Order dated December 21, 1999, the Honorable A. Victor Rawl denied and dismissed the Applicant's petition.

Second PCR Application: 2001-CP-10-4691

Thereafter, the Applicant filed a second application for PCR on December 6, 2001, in which he raised the following allegations:

1. Lack of jurisdiction
2. Ineffective assistance of PCR counsel

The application was filed *pro se*. Dale T. Cobb, Jr., Esquire, was appointed to represent the Applicant on January 28, 2002. The Respondent submitted its Return and Motion to Dismiss on December 20, 2002. On March 12, 2003, the Honorable R. Markley Dennis, Jr. issued an Order granting summary judgment for the Respondent and dismissed the application for post-conviction relief.

Third PCR Application: 2007-CP-10-1676

On April 23, 2007, the Applicant filed a third PCR application. The application was later supplemented on May 25, 2007. The application raised the following allegations:

1. Ineffective appellate counsel in that counsel did not submit all issues that could have reasonably overturned his conviction
2. Ineffective trial counsel in that counsel did not object to comments by the prosecution and the judge
3. Newly discovered evidence in that Applicant has "recently received information...concerning the 'Plain Error' of Law...and violation of 'Golden Rule' by both the Solicitor and the Court"

The Respondent made its Return and Motion to Dismiss on January 31, 2008. The Honorable Roger M. Young, Sr. issued a Conditional Order dated February 2, 2008. A Final Order was issued March 25, 2008, dismissing the application.

Applicant subsequently filed a Notice of Appeal by Order dated April 29, 2008. The South Carolina Supreme Court dismissed the appeal for the Applicant's failure to provide written explanation as to why the lower court's determination was improper. The Remittitur was issued on May 21, 2008 by the Honorable Chief Justice Jean H. Toal.

Current PCR Application: 2015-CP-10-6474

In his *fourth* and current application for post-conviction relief, the Applicant alleges that he is being held unlawfully for the following reasons:

1. Newly Discovered Evidence
    a. Unconstitutional Statute § 1-7-330

Before this Court are the Charleston County Clerk of Court records regarding the subject convictions, South Carolina Department of Corrections records, the Applicant's previous and current PCR applications, and appellate records.

FINDINGS AND CONCLUSIONS OF LAW

Statute of Limitations

This Court finds this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to –160. S.C. Code Ann. §17-27-45(a) reads as follows:

> 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.

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). The Applicant was convicted of the offenses he challenges in this Application on May 7, 1991. The Supreme Court affirmed the conviction and sentence on September 25, 1992, and the remittitur was issued on October 13, 1992. The Applicant was therefore required to file a PCR application by October 14, 1993. This application was filed on December 1, 2015, which was ***twenty-two years*** after the one-year statutory filing period had expired.

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). In addition, S.C. Code Ann. § 17-27-70(c) (1985) 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." Therefore, this Court finds it must be summarily dismiss this application for failure to file within the time mandated by the Post-Conviction Procedure Act.

Successiveness

This Court finds the current PCR application must be summarily dismissed because it is successive to the Applicant's ***three previous*** PCR applications. 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 earlier 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 (2014) states:

> All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

The Respondent submits that the current allegations were or could have been raised in the proceedings based on the Applicant's *three* prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code § 17-27-90. The Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992). Accordingly, this Court finds that this application is summarily dismissed for being successive.

Newly Discovered Evidence

This Court finds the Applicant's allegation that newly discovered evidence exists without merit. This contention is vague and general in its terms. The Applicant has failed to set forth any specific allegations of the nature of the evidence. An Applicant requesting a new trial based on after discovered evidence must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. Therefore, this Court summarily dismisses this allegation.

CONCLUSION

Pursuant to Section 17-27-70(b) of the South Carolina Code, this Court intends to dismiss this application with prejudice unless the Applicant provides specific reasons, factual or legal,

why the application should not be dismissed in its entirety. The Applicant is granted twenty days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
J. Rutledge Johnson, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 27th day of July, 2016.

ROGER M. YOUNG, SR.
Chief Administrative Judge
Ninth Judicial Circuit

Charleston, South Carolina