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May 13, 2024

T. Cruise Mitchell
Office of the Attorney General
PO Box 11549
Columbia SC 29211

RE: Samual Johnican VS State of South Carolina
Case NO: 2022CP0600382

Dear Mr. Mitchell:

Please find enclosed a clocked and certified copy of the Conditional Order of Dismissal for PCR case 2022CP0600382. I also mailed Mr. Johnican a copy as well. If you have any questions, please contact our Clerk of Court office.

Sincerely,

Ami M. Still

Ami M. Still
Common Pleas Clerk for Barnwell County

/AMS
Enclosures

STATE OF SOUTH CAROLINA COUNTY OF BARNWELL	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
Samual B. Johnican, #340693, Applicant, v.	)	Case No.: 2022-CP-06-00382 **CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of a successive application for post-conviction relief filed by Applicant Samual B. Johnican on December 13, 2022. Respondent made its return requesting the application be summarily dismissed as procedurally barred as successive, untimely pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014), and barred by the doctrine of *res judicata*.

PROCEDURAL HISTORY

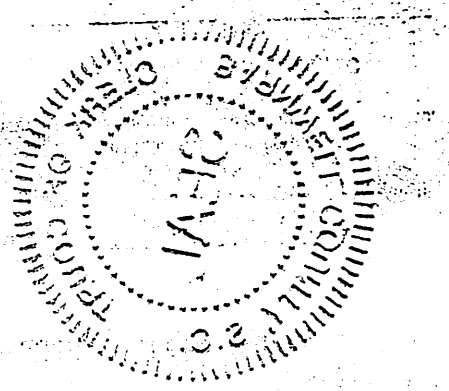
Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Barnwell County. Applicant was true bill indicted at the February 2009 term of the Barnwell County Grand Jury for murder (2010-GS-00105). Applicant was represented by DeGrant Gibbons, Esquire.

On May 11, 2010, Applicant pleaded guilty before the Honorable Doyet A. Early, III. Judge Early sentenced Applicant to life imprisonment. Applicant did not appeal his guilty plea or sentence.

First PCR Application (2010-CP-06-00179)

Subsequently, Applicant filed a PCR on August 2, 2010. In his application, he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel.



2. Involuntary Guilty Plea
3. Due Process violation, equal protection of law.

Applicant filed various amendments dated January 13, 2014, February 10, 2014, February 21, 2014, November 11, 2014, November 25, 2014, and April 29, 2015.

An evidentiary hearing was convened on January 20, 2015, before the Honorable Diane S. Goodstein. Judge Goodstein issued a Final Order of Dismissal signed on March 7, 2016, and filed on March 18, 2016.

Applicant filed a timely notice of appeal. The appeal was perfected by Appellate Defender Robert M. Pachak by filing a Johnson Petition for Writ of Certiorari in the Supreme Court. On December 2, 2016, by written order, the South Carolina Supreme Court denied Applicant's Petition for a Writ of Certiorari. The Remittitur was issued December 20, 2016.

CURRENT ACTION BEFORE COURT

In his current, second Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Austin v. State (1990) I was denied appellate review of my PCR application by attorney Lance Boozer. 59(e) motion, competency, etc.
    a. Attorney Lance Boozer refused to file 59 (e) motion. Competency denying my fair bite of apple. All other reasons etc.
2. Involuntary guilty plea.
3. Due process violation and equal protection.
4. Ineffective Assistance of Counsel
    a. I was not informed of my right to an appeal of my 5-11-10 conviction one was filed (51) days after I was sentenced, by my attorney.
    b. I had no idea that my first attorney Grant Gibbons filed a motion to reconsider sentence. I did not know of any motion to reconsider sentence until the day came to the reconsideration hearing.
    c. The court did not set a date for a competency hearing which is to take place after an evaluation has been held under S.C. Code laws 44-23-410. S.C. code of laws 44-23-430 says a hearing "shall" be held after an evaluation has been ordered under S.C. code of laws 44-23-410. I had the court ordered evaluation but not the statutory, mandatory hearing.
    d. Grant Gibbons never tried to negotiate plea bargain.

e. Guilty plea attorney Grant Gibbons failed to undertake any meaningful trial preparation of any kind.
f. Guilty plea attorney coerced me to plead guilty saying that my prior convictions from 1984 and 1990 would be used as inhancements. I found out after I was sentenced that these none felony offenses could not be used as inhancements. I was coerced to plead guilty.
g. Counsel never requested an independent competency evaluation, even though I requested one.
h. Attorney Grant Gibbons never discussed, informed me of the court ordered competency to stand trial evaluation which is mandatory.
i. I did not know I was being charged with murder until the day I was sentenced, 5-11-10.
j. Attorney Grant Gibbons never showed me my Rule 5, even though I asked for it. I never knew what the state of S.C. had against me.
k. I did not get a (10) day notice that the state was seeking a sentence.
l. Attorney Grant Gibbons never mentioned to the court that while I at Morgan County, GA jail the officers stated in their hand written report that I was banging my head on the jail cell wall. This was a suicide cell which was monitored by video.
m. Judge Doyet Early III, did not ask me if I was pleading guilty freely and voluntarily.
n. I was not aware of any pictures of the crime scene which were in my Rule 5 motion of discovery.
o. Attorney Grant Gibbons never asked me if I had any character witnesses, such as family, ect.
p. Attorney Grant Gibbons did not discuss the difference between murder and manslaughter.
q. I never seen my indictment which showed indicated what I was being charged with.
r. Grant Gibbons attitude was like an adversary not attorney see transcript page 27 lines 8 through 10.
s. Violation by attorney Grant Gibbons of Rule 1.2, scope of representation by not obeying my decision to go to trial.
t. Plea transcript does not contain a factual basis for pleading guilty.
u. Indictment lacked subject matter jurisdiction by not indicating the time of death of the deceased. Attorney Grant Gibbons should have objected to the indictment because it lacked the above information.
v. Attorney Grant Gibbons stated on the guilty plea transcript that he did not understand what happened or motivated it. This proves their was no malice aforethought proven in the guilty plea transcript.

On October 13, 2023, Applicant amended his application to include the following allegations:

1. "The judge Diane Shafer Goodstein, in the P.C.R. case #2010-CP-06-0179, heard on 1-20-16 in Aiken S.C. did not rule with findings of fact and conclusions of law, pursuant to 17-27-80, which reads in part, 'The court shall make specific findings of fact and state

expressly its conclusions of law to each issue presented. Pruitt v. State, 423 SE2d 127 (1992) Mr. Johnican the defendant presented to court he did not get a competency hearing pursuant to S.C. code of law 44-23-430, which reads, (A) upon receiving the report of the designated examiners the court "shall" set a date for and notify the person and his counsel of a hearing on the issue of his fitness to stand trial if in the judgment of the designated examiners or the superintendent of the facility if the person has been detained the person is in need of hospitalization, the court with criminal jurisdiction over the person may authorize his detention in a suitable facility until the hearing. The person shall be entitled to be present at the hearing and be represented by counsel. If upon the completion of the hearing and consideration of the evidence, the court finds that: (1) the person is fit to stand trial, it shall order the criminal proceedings resumed. Defendant, Johnican addressed this issue to the court, along with his attorney see Tr. pg 35 lines 8-17. Plea attorney agreed there was no hearing after the court ordered evaluation, see Tr. pg. 82, lines 21-25. The wording in S.C. code of law 44-23-430 used mandatory wording "shall" which means the hearing was mandatory, after Mr. Johnican was evaluated pursuant to S.C. code of law 44-23-410. The term shall in a South Carolina statute means the action is mandatory. See Johnston v. S.C. Dept of Labor & Licensing, 617 SE 2d 363 (2005). Also Bradley v. Doe 649 SE 2d 153 (2007). The competency hearing was mandatory after Johnican's court ordered evaluation pursuant to S.C. Code of Law 44-23-410. Statute 44-23-430 used mandatory wording, which reads in part, the court "shall" set a date for and notify the person and his counsel of a hearing . . The court and opposing counsel had a copy of the evaluation order at the P.C.R hearing, but the judge ignored this issue even though it was proven and explained to the court. The statute is designed to protect the accuseds right to a fair trial by due process determination of his competency and fitness to stand trial. 2) Violation of S.C. Code of law, 17-25-45(A)(H). Attorney failed to get a 10 day seek life without parole. Johnican's plea transcript page 19, line 25. "Judge he has prior records out of California, at page 20, line 1. 1984 conviction for selling and transporting marijuana, line 4 burglary. These were misdemeanors. The court had proof. So did counsel and opposing counsel. Both counsel and the attorney general had seen the NCIS to enhance his sentence, just as plea attorney Grant Gibbons coerced defendant to plead guilty because of his past convictions. These two pages contain just two of the issues that were not ruled on with fact and conclusion of law (correction) one of the issues here was not ruled on at all. That would be #(1) being denied a competency hearing pursuant to S.C. Code of law 44-23-430."

Applicant seeks the following relief:

a. "I want this sentence vacated because this sentence was given to me illegally."

Before this Court are the records from the Barnwell County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction relief action, and appellate records.

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 S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Summary Dismissal of Austin Claim

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Where an Applicant is denied an opportunity to properly appeal an adverse final ruling of a court in a post-conviction relief action, he or she may seek limited relief in a subsequent action to correct the unfairness. Austin v. State, 305 S.C. 453, 454, 409 S.E.2d 395, 396 (1991). "A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived." Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (citing King v. State, 308 S.C. 348, 348-49, 417 S.E.2d 868 (1992)). If the PCR court finds an applicant was denied his or her right to appeal, the applicant can petition for certiorari and the South Carolina Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. Id. "The one-year statute of limitations for PCR applications is not applicable to appeals filed pursuant to Austin v. State." Id., 337 S.C. at 263, 523 S.E.2d at 756.

Applicant alleges his prior PCR counsel, Lance Boozer, did not file an appeal of the denial of his previous PCR action. This Court finds this allegation is without merit and shall be dismissed. The records before this Court show Applicant's PCR Counsel filed a notice of appeal on April 14, 2016. Applicant's appeal was perfected by Appellate Defender Robert Pachak, who filed a Johnson Petition for Writ of Certiorari. After careful consideration of the record, the South Carolina

Supreme Court denied Application Petition for Writ of Certiorari. Applicant was clearly not denied his right to appeal the denial of his first PCR action. Thus, this Court finds this allegation shall be summarily dismissed.

Summary Dismissal based on Statute of Limitations

This Court finds this Application for Post-Conviction Relief shall 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 requires as follows:

> (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). Based on Section 17-27-45(a), Applicant needed to file an application for post-conviction relief

based on claims that he knew or should have known within one year after his sentencing date. This Application was filed on December 13, 2022, well after the expiration of the statutory filing period.

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 summarily dismisses this application for post-conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

Summary Dismissal based on Successiveness

This Court finds this application shall be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) 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 point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have

been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. 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. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980). Applicant raises allegations that were or could have been raised in his previous post-conviction relief application and thus is barred from raising these claims in a successive application.

Accordingly, this Court summarily dismisses this application because it is successive to Applicant's prior post-conviction relief application.

Summary Dismissal Based on *Res Judicata*

This Court further finds this application is barred by the doctrine of *res judicata*. "*Res judicata* applies where there is identify of parties, identity of subject matter, and adjudication of the issue in the former suit." Bell v. Bennett, 307 S.C. 286, 292, 414 S.E.2d 786, 789-90 (Ct. App. 1992). "Under the doctrine of *res judicata*, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 190-91, 427 S.E.2d 918, 919 (Ct. App. 1993); see also Foxworth v. State, 275 S.C. 615, 617, 274 S.E.2d 415, 415-16 (1981) (agreeing with circuit court that post-conviction relief claims that were or could have been raised in prior petition for habeas corpus in federal court were barred by *res judicata*).

Applicant had a full opportunity to litigate all his allegations in his prior actions. In this current action, Applicant makes allegations that are identical or similar to the allegations raised in his first post-conviction relief action. The Court denied and dismissed this prior application with

prejudice. (See Order of Dismissal, filed March 18, 2016). The finality of the previous Court rulings should be respected, and this Court finds this application shall be summarily dismissed as barred by the doctrine of *res judicata*.

CONCLUSION

Pursuant to South Carolina Code Annotated § 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 fine any reasons he may have with the Barnwell County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: T. Cruise Mitchell, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 6 day of May, 2024.

COURTNEY CLYBURN POPE
Chief Administrative Judge
Second Judicial Circuit

Aiken, South Carolina.