

STATE OF SOUTH CAROLINA)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
IN THE SEVENTH JUDICIAL CIRCUIT

Faren M. Gibbs, #222138,)
Applicant,)

Case No.: 2020-CP-42-0437

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

This matter comes before the Court by way of a post-conviction relief application filed by Applicant Faren M. Gibbs on February 3, 2020. Respondent made its return, requesting the application be summarily dismissed.

I. Procedural History

During the June 1993 term, the Spartanburg County Grand Jury indicted Applicant for carrying a pistol (1993-GS-42-3076), possession with intent to distribute (1993-GS-42-3077), armed robbery (1993-GS-42-3078), and murder (1993-GS-42-3079).¹ During the April 1994 term, the Spartanburg County Grand Jury indicted Applicant for assault and battery of a high and aggravated nature (1994-GS-42-1617), willful injury to jail (1994-GS-42-1618), and escape (1994-GS-42-1619). Charles E. Sanders and J. Michael Bartosh, Esquires, represented Applicant. Assistant Solicitor Anthony Mabry, Esquire prosecuted the case. On June 10, 13-15, 1994, Applicant proceeded to trial before the Honorable J. Derham Cole and a jury on his 1993 charges. Judge Cole sentenced Applicant to life imprisonment. On August 16, 1994, Applicant proceeded to trial on his 1994 charges before the Honorable Gary E. Clary, circuit court judge, and a jury. He was found guilty as indicted and sentenced to twelve years' imprisonment.

¹ All prior collateral actions were seemingly based upon the 1993 convictions alone.

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Applicant filed a timely notice of appeal from the June trial, which was perfected by Joseph L. Savitz, III, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Supreme Court dismissed the appeal. *State v. Gibbs*, Op. No. 95-MO-343 (S.C. Ct. App. filed Nov. 20, 1995). The remittitur was issued on December 6, 1995.

Applicant filed a timely notice of appeal from the August trial, which was perfected by Wanda Haile, Esquire, through filing a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). The South Carolina Court of Appeals dismissed the appeal. *State v. Gibbs*, Op. No. 96-MO-088 (S.C. Ct. App. filed April 10, 1996). The remittitur was issued on April 26, 1996.

First PCR Action: (1996-CP-42-1997)

Applicant subsequently filed his first PCR application on October 29, 1996, in which he alleged the following grounds for relief:

1. My attorneys failed to properly point out the discrepancies in the witness identification process and object to testimony regarding lineup.
2. My attorneys failed to properly show that the gun found in the co-defendants car belonged to me or was ever touched or fired by me.
3. My attorneys failed to adequately explore the facts that the victim died of an infection from medical malpractice and not from the bullet.
4. My attorney did not explain or raise the imperfect defense of self-defense.

Respondent made its return January 1997, amended on February 28, 1997. In the amended return, Respondent requested the matter be dismissed without prejudice because Applicant was confined in North Carolina for charges arising out of that State. On April 16, 1997, the Honorable Larry R. Patterson issued the order of dismissal without prejudice because Applicant was not housed in South Carolina or subject to the State's jurisdiction.

Second PCR Action: (2000-CP-42-0392)

Applicant subsequently filed his second PCR application on February 8, 2000, in which he alleged the following grounds for relief:

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5. My attorneys failed to properly point out the discrepancies in the witness identification process and object to testimony regarding lineup.
6. My attorneys failed to properly show that the gun found in the co-defendants car belonged to me or was ever touched or fired by me.
7. My attorneys failed to adequately explore the facts that the victim died of an infection from medical malpractice and not from the bullet.
8. My attorney did not explain or raise the imperfect defense of self-defense.

Respondent made their return on October 17, 2001. An evidentiary hearing into the matter was convened on November 8, 2011, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Mendel Davis, Esquire. Douglas Leadbitter, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On February 26, 2002, the Honorable Gary E. Clary, circuit court judge, issued the order of dismissal denying Applicant's PCR application.

Applicant made his notice of appeal on April 4, 2002. On January 12, 2003, by written order the Supreme Court of South Carolina dismissed the action for failure to serve and file the petition for writ of certiorari, pursuant to Rule 227(c), SCACR. The remittitur was issued on February 4, 2003.

Third PCR Action: (2000-CP-42-1695)

Applicant subsequently filed his third PCR application on June 13, 2000, in which he alleged he was entitled to post-conviction relief for ineffective assistance of counsel. Respondent made its return and motion to dismiss on August 13, 2004, requesting the court summarily dismiss the application for successiveness. An evidentiary hearing into the matter was convened on September 23, 2004, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Michael D. Hamrick, Esquire. Molly R. Crum, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. Respondent moved to dismiss the application for successiveness. Applicant moved to consolidate the prior PCR into

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the current application while amended the application to include an allegation that he was denied his right to appeal the denial of his prior PCR. On October 28, 2004, the Honorable Wyatt T. Saunders, Jr., circuit court judge, issued the order of dismissal, granting relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), while denying and dismissing all other allegations.

Applicant made his notice of appeal on December 14, 2004. On January 18, 2006, Wanda H. Carter, Esquire filed an *Austin* petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. Respondent made its return on June 5, 2006. The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On September 24, 2007, by written order the South Carolina Court of Appeals denied the petition. The remittitur was issued on October 10, 2007.

First Habeas Corpus Action: (8:04-cv-21846-CMC)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 9, 2004. Applicant set forth the following grounds for relief:

1. That his conviction was unconstitutionally obtained because the prosecution withheld medical evidence that would have shown that the victim's death was caused by "the non-existing medical treatment that victim received."
2. That his trial counsel was ineffective or failing to "object to impeach [sic] evidence regarding statements and testimony given by state[']s witnesses" and for not offering expert testimony.
3. That he was denied his right to appeal from the denial of his PCR application.

Respondent filed its return and motion for summary judgment on October 14, 2004. Petitioner made his "formal response to Respondent's motion for summary judgement" on December 13, 2004. On April 11, 2005, Magistrate Judge Bruce H. Hendricks issued the "report of Magistrate Judge" that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Gibbs v. McMaster*, Case No. 8:04-21846-CMC

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filed Apr. 11, 2005). Applicant's objection to the report was made on April 27, 2005.

On May 20, 2005, the United States District Judge Cameron M. Currie declined to adopt the Magistrate's report granting Respondent's motion for summary judgment and dismissed Applicant's petition citing concerns regarding whether the second PCR application was filed untimely and requesting Respondent file supplemental pleadings concerning that issue, but allowing Respondent to refile the motion for summary judgment, if appropriate. *Gibbs v. McMaster*, Case No. 8:04-21846-CMC-BHH (D.S.C. filed May 20, 2005).

Respondent made their amended return and memorandum in support of motion for summary judgment on June 14, 2005. Applicant made his "motion for stipulation & of voluntary dismissal of habeas corpus petition" on July 25, 2005. On August 25, 2005, Magistrate Judge Bruce H. Hendricks issued the "report of Magistrate Judge" that Petitioner's motion be granted and this action be dismissed without prejudice. *Gibbs v. McMaster*, Case No. 8:04-21846-CMC-BHH (D.S.C. filed August 25, 2005). On November 4, 2005, the United States District Judge Cameron M. Currie adopted the Magistrate's report recommending the action be dismissed without prejudice because Applicant's PCR application was timely and the habeas petition premature. *Gibbs v. McMaster*, Case No. 8:04-21846-CMC-BHH (D.S.C. filed Nov. 4, 2005).

Second Habeas Corpus Action: (8:07-3493-CMC-BHH)

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on November 29, 2007. Applicant set forth the following grounds for relief:

1. Petitioner was denied the effective assistance of counsel when counsel failed to move and quash the indictments as a police officer was the only sole witness before the grand jury.
2. Trial counsel rendered ineffective assistance of counsel when counsel failed to subpoena an expert medical pathologist to testify on petitioner's behalf concerning the cause of death.

Respondent made its return and motion for summary judgment on February 28, 2008.

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Applicant made its response to Respondent's return, which was received by the state on April 3, 2008. On June 25, 2008, Magistrate Judge Bruce H. Hendricks issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Gibbs v. Rushton*, Case No. 8:07-3493-CMC-BHH (D.S.C. filed June 25, 2008). Applicant's objection to the report and recommendation was made on July 15, 2008.

On July 22, 2008, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Gibbs v. Rushton*, Case No. 8:07-3493-CMC-BHH (D.S.C. filed July 22, 2008).

This matter was appealed to the United States Court of Appeals for the Fourth Circuit. The Court issued its judgement denying the petition on November 21, 2008 and its mandate on December 15, 2008.

Fourth PCR Action: (2009-CP-42-0172)

Applicant subsequently filed his fourth PCR application on January 13, 2009, in which he alleged newly discovered evidence. Respondent made its return and motion to dismiss on July 16, 2009, requesting the court summarily dismiss the action for successiveness and untimeliness. The Honorable J. Mark Hayes, II, signed the conditional order of dismissal on July 24, 2009, summarily dismissing the matter for successiveness and untimeliness. Judge Hayes issued the final order of dismissal, which was filed October 28, 2009. Applicant filed a petition for rehearing, which was denied on June 30, 2010.

A notice of appeal was made on February 11, 2010. The South Carolina Court of Appeals transferred the matter to the South Carolina Supreme Court on April 23, 2010. On June 10, 2010, by written order the Supreme Court of South Carolina dismissed the appeal for failure to provide the Court with a copy of the conditional order of dismissal or with the explanation required by

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Rule 243(c), SCACR. The remittitur was issued on July 29, 2010.

II. Current Action before this Court

In his current and fifth PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Counsel was ineffective for failing to file an appeal from my PCR."
 - a. "I am prejudice[d] by Counsel's unprofessional error."
 - b. "I did not knowingly and intelligently waive[] my right to a[n] appeal from PCR."
2. "*Austin v. State* review of my PCR."

Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections records, the trial transcript, the current application for relief, and prior direct appeal, PCR, PCR appeal, and habeas records.

III. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted by the parties, and applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Successiveness

The application shall be summarily dismissed because it is successive to Applicant's previous PCR 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 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). 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 PCR applications are forbidden 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). 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.* 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).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.

*Res Judicata*²

The application is similarly 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 in a prior action bars subsequent

² Because Applicant only pursued PCR actions based upon his 1993 convictions, this ground summary dismissal is only appropriate based upon those convictions.



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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 all his allegations in his prior actions. Indeed, Applicant's allegations are identical to those raised to and ruled upon by the Court in his third PCR action. Specifically, he is now seeking *Austin* relief, which was addressed and granted in his third PCR action and in the appeal therefrom. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

Laches

The Court finds the application, as it relates to the 1994 convictions, must be dismissed based on the doctrine of *laches*. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. See *McElrath v. State*, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." *Id.* Thus, the doctrine of *laches* bars any an action where the applicant has failed to exercise his rights for an unreasonable period. *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (quoting *Hallums v. Hallums*, 296 S.C. 195, 371 S.E. 525 (1988)); see also *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) ("Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner."). Recognizing the importance of finality in litigation, Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

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A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

The South Carolina General Assembly has likewise recognized this problem and instituted a one year statute of limitations. *See* S.C. Code Ann. § 17-27-45(a). Applicant filed this current application approximately fourteen years after the remittitur from his direct appeal was issued. Applicant's delay has greatly prejudiced the State (as well as the Applicant). Records of the guilty plea may no longer be available. *See, e.g.* Rule 607(i), SCACR (court reporter only required to retain records for five years). The State should not be called upon to defend the constitutionality of convictions after such a long delay. *See Aice v. State*, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice."). Accordingly, this Court shall summarily dismiss the PCR application based on Applicant's lack of diligence in pursuing his claim for relief.

Ineffective Assistance of PCR Counsel³

Applicant's claim he is entitled to relief on grounds that his prior PCR counsel was ineffective is without merit. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state PCR actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392,

³ Because Applicant only pursued PCR actions based upon his 1993 convictions, this ground for summary dismissal is only appropriate based upon those convictions.

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395 (1991).

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* recognizes a general exception to this rule where prior PCR counsel fails to appeal the denial of the application. *Id.* *Austin* “is limited to its particular factual situation” and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394; *see also Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his second PCR action and enjoyed an *Austin* appeal flowing from his third PCR action. Applicant further enjoyed to exhaustion the federal habeas corpus procedures, including an attempt to appeal to the United States Fourth Circuit Court of Appeals and the Supreme Court of the United States. It is clear Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.” Applicant’s allegations of ineffective assistance of PCR counsel for failure to file an appeal from the PCR action are inapplicable in this case, because the convictions upon which he filed his PCR actions was already granted a belated appeal, which was considered and ultimately denied and dismissed by the appellate courts. Thus, *Austin* is no longer applicable because *Austin* relief has already been granted. Accordingly, relief is denied on this ground because the exception to the bar against ineffective assistance of PCR Counsel claims is inapplicable here.

Statute of Limitations

The Court finds that 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. Specifically, 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 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 on appeal, whichever is later.
S.C. Code Ann. § 17-27-45(A).

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 statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, South Carolina Code Annotated Section 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.”

Concerning the 1993 convictions, Applicant was found guilty at trial on June 15, 1994 and the remittitur from the direct appeal was issued on December 6, 1995. Concerning the 1994 convictions, Applicant was found guilty at trial in August 16, 1994 and the remittitur from the direct appeal was issued on April 26, 1996. The application was due on December 7, 1996, and April 27, 1997, respectively. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

IV. Conclusion

Pursuant to South Carolina Code Annotated Section 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 Spartanburg County Clerk of Court.

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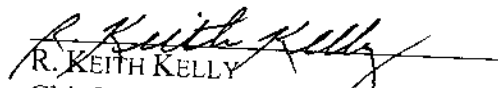
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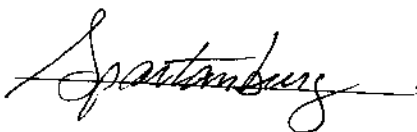
and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Chelsey F. Marto, Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 28th day of July, 2022.


R. KEITH KELLY
Chief Administrative Judge
Seventh Judicial Circuit

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