STATE OF SOUTH CAROLINA COUNTY OF LAURENS	)	IN THE COURT OF COMMON PLEAS FOR THE EIGHTH JUDICIAL CIRCUIT
Derek J. Brown, #297592 Applicant, v.	)	Case No.: 2019-CP-30-0948 **CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief filed by Applicant Derek J. Brown on October 30, 2019. Respondent the State of South Carolina made its return and moved to summarily dismiss the action as procedurally barred as successive, untimely, barred by the doctrine of *res judicata* and barred for failure to meet the requisite burden for newly discovered evidence pursuant to 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 as untimely and successive and provisionally dismisses the action based on the following:

I. Procedural History

The records before this Court indicate the Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted at the September 2001 term of the Laurens County Grand Jury for Murder (2001-GS-30-0720, Count 1) and Possession of a Weapon During the Commission of a Violent Crime (2001-GS-30-0720, Count 2). Applicant was represented by Geddes D. Anderson, Esquire. Assistant Solicitor Lance Sheek prosecuted the case.

The case was initially called before the Honorable James W. Johnson, Jr. on August 25, 2003. Following a Jackson v. Denno hearing, the case was continued on motion of the co-

defendants due to an amendment of the indictment by the prosecution.[1] The case was recalled before Judge Johnson and a jury on October 20, 2003. On October 23, 2003, Judge Johnson granted a motion for directed verdict for co-defendant Latimore. (Tr. 985-86). On October 29, 2003, the jury found Applicant and co-defendant Shelton guilty as charged. (Tr. 1356-57). Judge Johnson sentenced Applicant to life imprisonment for murder and five years for possession of a weapon during the commission of a violent crime to run concurrently.

A timely Notice of Appeal was filed, and an appeal was perfected on Applicant's behalf. The Initial Brief of Appellant was filed on September 8, 2005. The Initial Brief of Respondent was filed on January 27, 2006. The Final Brief of Appellant was filed on July 18, 2006. In his Final Brief of Appellant, counsel raised the following ground:

> The judge erred by refusing to direct a verdict acquitting Derek Brown of the crimes charged, where the state failed to introduce any evidence that he committed or aided and abetted the commission of the murder of Philip Johnson.

The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Derek J. Brown, Unpublished Op. No. 2006-UP-400 (S.C. Ct. App. filed December 7, 2006). A pro se Petition for Rehearing was denied on January 18, 2007. The Remittitur was issued on February 22, 2007.

2007-CP-30-0082

Applicant subsequently filed his first PCR application on February 7, 2007, and amendments on May 15, 2007 and April 30, 2009. In his application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Trial Counsel
2. Ineffective Assistance of Appellate Counsel
3. Prosecutorial Misconduct
4. Subject Matter Jurisdiction

[1] Applicant had two co-defendants: (1) Corey M. Shelton and (2) Ricky A. Latimore.

5. Jury Tampering
6. Denial of Due Process

Respondent made its Return on or about February 26, 2008.An evidentiary hearing into the matter was convened on May 1, 2009, at the Newberry County Courthouse. Applicant was present at the hearing and represented by William T. Toal, Esquire. On January 28, 2010, the Honorable D. Garrison Hill issued an order denying and dismissing Petitioner's application for post-conviction relief with prejudice on November 24, 2009.

A timely Notice of Appeal was filed following the denial of PCR. On August 19, 2011, the South Carolina Supreme Court granted the petition for a writ of certiorari in part. On May 9, 2012, the Supreme Court dismissed the writ of certiorari as improvidently granted. *Brown v. State*, Op. No. 2012-MO-014 (S.C. Sup. Ct. filed May 9, 2012) (dismissed as improvidently granted). On May 30, 2012, the Remittitur was issued.

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On October 12, 2012, Applicant subsequently *pro se* filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina. That Petition was dismissed by Order dated September 25, 2014. Applicant timely appealed the Court's judgment in C/A No. 14-7611 to the United States Court of Appeals for the Fourth Circuit, and the appeal was dismissed on April 7, 2015.

II. Current Action Before Court

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

1. Ineffective Assistance of Counsel
2. Actual Innocence/Manifest Miscarriage of Justice
3. Denial of due Process/structural errors

Applicant seeks the following relief:

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1. Grant an evidentiary hearing to allow the taking of evidence that if true entitles Applicant to relief as the issue complained of resulted in the conviction of an innocent man.

Applicant filed an amended application on July 7, 2020, raising the following issues:

1. Ineffective Assistance of Counsel for failure to investigate.
2. Newly Discovered Evidence
3. Fraud Upon the Court:

> "Failure of counsel and the Court, to investigate the laws of South Carolina as to whether they were 'affixed' with the impression of the Great Seal of South Carolina Section 16-1-16 of the 1976 Code, as last amended by Act 184 of 1993."

III. Findings and Conclusions

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief pursuant to §17-27-70(B) of the South Carolina Code of Laws on the basis that Applicant is not entitled to post-conviction relief due to procedural bars prohibiting his application and no purpose would be served by any further proceedings pursuant to 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 she is entitled to relief before the court will hold an evidentiary hearing).

Summary Dismissal based on Statute of Limitations

This Court finds that this Application for Post-Conviction Relief should 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). In the present case, Applicant was convicted of the offenses he challenges in this application on October 29, 2003. The South Carolina Supreme Court affirmed Applicant's conviction and sentence and the Remittitur was sent on February 22, 2007. Based on Section 17-27-45(a), Applicant needed to file an application for post-conviction relief within one year of the remittitur being filed. The Applicant was therefore required to file his application on or before February 22, 2008. This Application was filed on October 30, 2019, ***more than a decade*** 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, the Court finds that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by the Post Conviction Procedure Act.

Summary Dismissal based on Successiveness

The Court finds that the current application should 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 has not alleged any sufficient reason these allegations could not have been presented in his earlier application; therefore, Applicant has failed to meet his burden.

Accordingly, the Court finds summary dismissal of the application is appropriate because it is improperly successive.

Summary Dismissal based on *Res Judicata*

The Court further finds that the doctrine of *res judicata* bars the Applicant's claims. *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). *Res judicata* also bars any issues that could have been raised in the former action. Id.

The Applicant had a full opportunity to litigate all allegations in his prior PCR application. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, the Court finds that the issues raised in this application for post-conviction relief should be summarily dismissed as barred by *res judicata*.

Newly Discovered Evidence

The Court finds Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentences and be released, is without merit. The Uniform Post-Conviction Procedure Act states a person may institute a PCR 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 the applicant contends there is evidence of a material fact not previously presented, the PCR 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).

Applicant alleges there is no visible impression of the Great Seal on 1993 Act No. 184 under which he was convicted. In support of this allegation, Applicant cites Article III, Section 18 of the South Carolina Constitution, "No Bill or Joint Resolution shall have the force of law until it . . . has had the Great Seal of the State affixed to it. . . ."

Our Supreme Court has held absolute literal compliance is not essential to valid legislation, but substantial compliance is sufficient. Smith v. Jennings, 67 S.C. 324, 45 S.E. 821, 824 (1903). Furthermore, under the enrolled bill rule, an act is deemed to be properly passed when it has been ratified by the presiding officers of the General Assembly, approved by the Governor, and enrolled in the Office of Secretary of State. Medical Soc. of South Carolina v. Medical Univ. of South Carolina, 334 S.C. 270, 278, 513 S.E.2d 352, 356 (1999); Beaufort County v. Jasper County, 220 S.C. 469, 487, 68 S.E.2d 421, 430 (1951); State v. Town Council of Chester, 39 S.C. 307, 17 S.E. 752, 755 (1893) ("when the bill . . . is deposited in the department of state, according to law, its authentication as a bill that has passed congress is complete and unimpeachable).

Other jurisdictions have upheld acts challenged as invalid because there was not strict compliance with a constitutional provision. See Taylor v. Wilson, 22 N.W. 119 (Neb. 1885) (finding an act was not unconstitutional when the president of the senate did not sign it as required by the state's constitution); Commr's of Leavenworth Co. v. Higginbotham, 17 Kan. 62 (Kan. 1876) ("[T]he mere failure of the president of the senate to do his duty cannot have the effect to invalidate the law.").

Additionally, our Supreme Court has upheld the appointment of an officer whose commission lacked the Great Seal as required by law. State v. Toomer, 7 Rich. 216, 229, 41 S.C.L. 216, 229 (1854). In Toomer, the Court explained if the State excused the delinquency of the officer

and cured the defects, then the title has related back to the time of the election. Id. Moreover, section 2-7-45 of the South Carolina Code states:

> The Code of Laws of South Carolina, 1976, which contains the permanent laws of general application through the 1975 session of the General Assembly and which was presented to the members of the General Assembly during the 1977 session is hereby adopted as the Code of Laws of South Carolina, 1976, and is declared to be the only general statutory law of the State as of January 1, 1976.

Our Supreme Court has held codification of an act will cure a constitutional defect, and is part of the general statutory law of the State. S.C. Tax Comm'n v. York Elec. Co-op., Inc., 275 S.C. 326, 333, 270 S.E.2d 626, 629-30 (1980). The Acts Applicant currently challenges had substantial compliance with the requirements and were codified into the 1976 Code. Therefore, these laws are enforceable, and Applicant's allegation lacks merit.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the Court finds this matter should be summarily dismissed with prejudice.

IV. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), the 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 (20) 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, factual or legal, with the Laurens County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – Zachary W. Jones
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Laurens 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 7 **day of** Nov. **, 2023.**

DONALD B. HOCKER
Chief Administrative Judge
Eighth Judicial Circuit

Laurens, South Carolina

ALAN WILSON
ATTORNEY GENERAL

October 6, 2023

The Honorable Donald B. Hocker
Eighth Judicial Circuit Chief Administrative Judge
Post Office Box 972
Laurens, SC 29360

Re: **Derek J. Brown, #297592 v. State of South Carolina**
2019-CP-30-00948

Dear Judge Hocker,

Enclosed please find the proposed **Conditional Order of Dismissal** in the above-captioned case. Respondent's Return and Motion to Dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign it, and forward it to the Laurens County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions regarding this matter, please let me know.

Sincerely,

Zachary W. Jones
Assistant Attorney General

K. MICHELLE SIMMONS
2023 NOV -9 A 10: 35
LAURENS COUNTY
CLERK OF COURT

ZWJ/zew
Enclosure

cc: Derek J. Brown, #297592