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STATE OF SOUTH CAROLINA )  
 COUNTY OF CHARLESTON )  
 )  
 Demetrius Smalls, )  
 S.C.D.C. No.: 286806, )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE NINTH JUDICIAL CIRCUIT  
 CASE NO.: 2013-CP-10-0719

**S.C. Supreme Court**

**CONDITIONAL ORDER OF DISMISSAL**

**FILED**  
 2014 JUL 10 5 PM 2:4  
 JAMES L. ARMSTRONG  
 CLERK OF COURT

In response to the post-conviction relief application filed February 5, 2013, the Respondent would show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the February 2006 term of the Charleston County Grand Jury for two (2) counts of armed robbery (2006-GS-10-1256, 1253), assault and battery with intent to kill (ABWIK) (2006-GS-101255), and kidnapping (2006-GS-10-1254). Applicant was represented by David W. Wolf, Esquire. On June 26, 2007, Applicant pled guilty as indicted. Pursuant to a negotiated plea agreement, the Honorable R. Markley Dennis, Jr. sentenced Applicant to concurrent terms of twenty-five (25) years imprisonment for armed robbery and kidnapping and twenty (20) years imprisonment for ABWIK. Applicant did not appeal.

Applicant subsequently filed an application for post-conviction relief (PCR) on March 15, 2010 (2010-CP-10-2100). In that application, Applicant raised the following grounds for relief:

1. Ineffective assistance of counsel for failing to file an appeal.

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**S.C. Supreme Court**

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2. Counsel did not conduct an adequate investigation.
3. Involuntary guilty plea.

Respondent made its Return and Partial Motion to Dismiss on July 14, 2010. A hearing into the matter convened on September 15, 2010, at the Charleston County Courthouse. Applicant was present and represented by Mark Archer, Esquire. At the hearing, Respondent moved to dismiss the application as being untimely. By Order filed October 19, 2010, the Honorable Roger M. Young, Sr. granted the Respondent's partial motion to dismiss the application while also granting Applicant a belated review of direct appeal issues pursuant to White v. State, 263 S.C. 110, 108 S.E.2d 35 (1974).

Applicant filed a Petition for a Writ of Certiorari pursuant to White v. State. He was represented by Elizabeth A. Franklin-Best, Esquire, of the South Carolina Commission on Indigent Defense. By Order filed October 31, 2013, the South Carolina Court of Appeals denied Applicant's request for a belated appeal based on insufficiency of evidence demonstrating Applicant did not knowingly and voluntarily waive his right to a direct appeal. The Remittitur was sent on November 21, 2013.

Applicant subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina on October 1, 2013 (2:13-2651-RMG-BHH). The matter is currently pending.

## II.

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

1. Ineffective assistance of trial counsel by failing to perform a thorough investigation.
2. Ineffective assistance of PCR counsel.
3. "Denied fifth and fourteenth Amendment and Fourth Amendment (USCA)."

### III.

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. S.C. Code Ann. §17-27-90 provides that:

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, 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).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application 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).

IV.

Furthermore, 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) 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 June 26, 2007. This Application was filed on February 5, 2013, which was well after the 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) (2003) 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 that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute and for being successive.

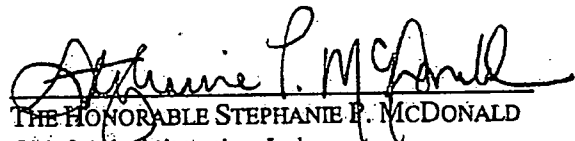
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V.

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. 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. 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  
Attn: J. Croom Hunter, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 3<sup>rd</sup> day of June, 2014.

  
THE HONORABLE STEPHANIE P. McDONALD  
Chief Administrative Judge  
Ninth Judicial Circuit Court

Charleston, South Carolina