

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF LEXINGTON  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2012CP3200117

**RECEIVED**

Paul A Smith #119472	State of South Carolina
	OCT 22 2014
PLAINTIFF(S)	<b>S.C. Supreme Court</b>
	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
  - Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk:

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**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

	2145	7/23/2012
Circuit Court Judge	Judge Code	Date

**For Clerk of Court Office Use Only**

This judgment was entered on 23rd day of July 2012, and a copy mailed first class or placed in the appropriate attorney's box on 23rd day of July 2012, to attorneys of record or to parties (when appearing pro se) as follows:

Paul A Smith #119472 Broad River Corr Inst CO-149 4460  
Broad River Rd Columbia, SC 29210

Kaelon Elizabeth May PO Box 11549 Columbia, SC  
292111549

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beth A. Carrigg/wh

Beth A. Carrigg - Clerk of Court

Court Reporter

(2)

FILED

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF LEXINGTON )  
 )  
 ) 2012-CP-32-0117  
 Paul A. Smith, # 119472 )  
 Applicant, )  
 vs. ) **CONDITIONAL ORDER OF DISMISSAL**  
 State of South Carolina, )  
 )  
 Respondent. )

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**ORIGINAL**

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 2012 JUL 12 11:22 AM  
**CLOCK IN ERROR**

FILED

This matter comes before this Court by way of an application for post-conviction relief filed (PCR) January 12, 2012. Respondent made its Amended Return and Motion to Dismiss on July 12, 2012.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to order of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2002 term of the Lexington County Grand Jury for Murder (2002-GS-32-1212). He was represented by Kenneth M. Mathews, Esquire. The Applicant proceeded to trial on October 21-24, 2002, at the conclusion of which he was found guilty of voluntary manslaughter. The Applicant was sentenced by the Honorable James R. Barber, III, to life without parole pursuant to S.C. Code Ann. § 17-25-45.

The Applicant filed a timely notice of appeal and an Anders Brief raising the following issue: Whether the trial judge erred by instructing the jury on voluntary manslaughter when Applicant's testimony showed he was acting in self-defense and there was no evidence that Applicant killed the decedent in the heat of passion upon a sufficient legal provocation. The

South Carolina Court of Appeals dismissed the appeal after a full review pursuant to Anders v. California. State v. Smith, Op. No. 2004-UP-401 (S.C. Ct. App. filed June 22, 2004). The Applicant filed a Petition for Rehearing, which was denied by the South Court of Appeals by Order dated August 28, 2004. The remittitur was issued on September 24, 2004.

The Applicant filed an application for post conviction relief on September 14, 2004 (2004-CP-32-3343), asserting ineffective assistance of counsel in the following instances: failure to properly advise Applicant about nature and elements of the charges, including lesser-included offenses; not properly advising Applicant about the applicability of Life Without Parole; not properly objecting to the LWOP notice; not properly objecting to the charges given by the trial judge on voluntary manslaughter and self-defense. Respondent made its Return on April 29, 2005. An evidentiary hearing into the matter was convened on April 10, 2007, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Rita Metts, Esquire. The Respondent was represented by Daniel E. Grigg of the South Carolina Attorney General's Office. The Honorable William P. Keesley issued an Order denying and dismissing the Application on May 18, 2007.

The Applicant filed a timely notice of appeal and a Petition for Writ of Certiorari on February 4, 2008. Applicant raised the following issue on appeal: Whether the post-conviction relief court erred in finding counsel was not ineffective where counsel failed to object to the trial judge's self-defense charge, which omitted the statement that a defendant had no duty to retreat in his own home, where the evidence showed that petitioner was attacked by the decedent on his own premises? On November 6, 2008, the South Carolina Supreme Court issued an Order denying the Petition for a Writ of Certiorari. The remittitur was issued on November 24, 2008.

In his current application for post conviction relief the Applicant alleges that he is being



held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
  - a. Applicant's trial counsel ineffective in not presenting a defense of Self-Defense at trial
  - b. Failure to request the law of immunity from a duty of retreat.
  - c. Trial Counsel ineffective in not contemporaneously objecting to the circuit charging voluntary manslaughter when such charge was not requested by defense.
2. Ineffective Assistance of PCR counsel
  - a. Failure to present issue of mutual combat jury charge in the amended application for PCR and to the PCR court

### III.

Before this Court are the records of the Lexington County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's prior direct appeal, PCR application, and PCR appeal.

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 offense(s) he challenges in this Application on October 24, 2002. The remittitur from Applicant's direct appeal was issued on September 24, 2004. This Application was filed on January 12, 2012, well beyond the expiration of the one-year 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 finds that this application for post conviction relief must be summarily dismissed for failure to file within the time mandated by the Post Conviction Procedure Act.

#### IV.

This Court finds that the current Application for PCR must be summarily dismissed because it is successive to Applicant’s prior 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 (2010) 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).

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. The Applicant has failed to establish sufficient reason why his current allegations were not properly raised or could not have been raised in his previous application for post-conviction relief. Therefore, this Court finds that the application should be summarily dismissed because it is successive.

V.

This Court finds 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 actions bars supplement 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 actions. Id.

The Applicant had a full opportunity to litigate all allegations of ineffective assistance of counsel in the state court. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his conviction. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCP, this Court finds this claim is barred by *res judicata*.



VI.

This Court finds that the Applicant's contention that she received ineffective assistance of counsel on her prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under '17-27-90.'" Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief 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 post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation . . . ." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. This exception is not applicable to the Applicant's current Applicant because the Applicant appealed the denial of his first PCR application; therefore, this Court finds that this allegation must be denied and dismissed.

VII.

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 with the Lexington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Kaelon E. May, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 20 day of July, 2012



R. Knox McMahon  
Chief Administrative Judge  
Eleventh Judicial Circuit

Resiptr, South Carolina

FILED  
2012 JUL 20 07 24 AM  
LEXINGTON COUNTY CLERK OF COURT