

In The State of South Carolina

In The Supreme Court

Appeal from Barnwell County

Court of common pleas

Doyet A. Early III, circuit court Judge

case NO. 2014-cp-06-269

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## NOTICE OF APPEAL

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Robert Mitchell 140920 Appeals The conditional order of Dismissal of The Honorable Judge Doyet A. Early III, Dated 20th March, 2015. The Appellant Mitchell received written notice of entry on this Conditional order of dismissal April 2, 2015.

Dated: April 21, 2005

Robert Mitchell

Robert Mitchell 140920

BRCI / Mont. 191

4460 Broad River Rd

Columbia, S.C. 29210

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APR 22 2015

**SO SUPREME COURT**

In The State of South Carolina

In The Supreme Court

Appeal From Barnwell County

Court of common pleas

Doyet A. Early III Circuit Court Judge

Case No. 2014-CP-06-269

Justin J. Hunter, . . . . . Respondent

Robert Mitchell 140920 . . . . . Appellant

PROOF OF SERVICE

I Robert Mitchell 140920 do certify that I have served a true copy of notice of appeal in this case NO. 2014-CP-06-269 on the Supreme Court of South Carolina and the respondent by placing the said documents in the U.S. mail postage prepaid via hand delivery Broad River personal on April 21, 2015 address to the following:

1) Office of the Attorney General  
Justin J. Hunter, Esquire  
Per Division 2nd Circuit  
P.O. Box 11549  
Columbia, S.C. 29211

2) Supreme Court Building  
1231 Berris St.  
Columbia, S.C. 29211

Robert Mitchell  
Robert Mitchell 140920  
BRCI/Mont. 191  
4460 Broad River Rd.  
Columbia, S.C. 29210

SWORN and subscribed before me  
this 21st day of April 2015.

Susan H. Frye  
Notary for South Carolina

my commission Expires \_\_\_\_\_  
My Commission Expires  
March 5, 2018

STATE OF SOUTH CAROLINA )  
 COUNTY OF BARNWELL )  
 )  
 Robert L. Mitchell, #140920 )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2014-CP-06-269

**FINAL ORDER OF DISMISSAL**

FILED FOR RECORD  
 2015 MAR 26 PM 1:20  
 PROthon J. H. KELLY, JR.  
 CLERK OF COURT  
 BARNWELL COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed July 23, 2014. The Respondent made its return on December 17, 2014, requesting the application be summarily dismissed based upon statute of limitations, successiveness, failure to state a claim, and the doctrine of *res judicata*.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed December 18, 2014 and filed January 5, 2015, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated February 10, 2015, serving the above mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Answer to Conditional Order of Dismissal" and filed on January 22, 2015, the Applicant reargues his claim that he was discriminated against by the solicitor, defense counsel, trial judge and pcr counsel.

**RECEIVED**  
 APR 20 2015  
 SO. SUPREME COURT


*[Handwritten signature]*

This Court has reviewed the Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant pled guilty on January 30, 1997 and the South Carolina Supreme Court affirmed his convictions and sentences on April 8, 1997. As this action was filed on July 23, 2014, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-2745(a) (Supp.2003). This is the Applicant's fourth application for post-conviction relief. This Court notes successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first PCR application on August 5, 1999. See Odom v. State, 337 S.C. 256, 261 523 S.E.2d 753, 755 (1999). (“[A]n Applicant is entitled to a full adjudication on the merits of the original petition, or ‘one bite at the apple.’”).

**IT IS THEREFORE ORDERED** that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 20 day of March, 2015.

  
DOYET A. EARLY, III  
Chief Administrative Judge  
Second Judicial Circuit Court

Bamberg, South Carolina.

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF BARNWELL )  
 )  
 Robert L. Mitchell, )  
 S.C.D.C. No. 140920, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 OF THE SECOND JUDICIAL CIRCUIT  
 2014-CP-06-269

**CONDITIONAL ORDER OF DISMISSAL**

FILED FOR RECORD  
 2015 JAN -5 PM 1:45  
 RHONDA D. McELVEEN  
 CLERK OF COURT  
 BARNWELL COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Robert Lee Mitchell (Applicant) on July 23, 2014. Respondent made its Return, requesting the application be summarily dismissed

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Barnwell County Clerk of Court. Applicant was indicted at the May 1995 term of the Barnwell County Grand Jury for Murder (1995-GS-06-110), grand larceny (1995-GS-06-111), and robbery (1995-GS-06-113). He was represented by Karen Fryar and Walter Bedingfield, Esquire. On January 30, 1997, the Applicant pled guilty to murder, petty larceny and grand larceny before the Honorable Costa Pleicones. He was sentenced to life imprisonment for murder, ten (10) years for grand larceny to be served consecutively, and thirty (30) days for petty larceny to be served concurrently. Applicant filed an untimely Notice of Appeal which the Supreme Court of South Carolina dismissed on March 21, 1997, and sent the Remittitur on April 8, 1997.

**1997-CP-06-106**

Applicant filed an application for Post-Conviction Relief ("PCR") on May 12, 1997, alleging he was being held unlawfully for the following reasons:

1. Involuntary Plea
2. Ineffective Assistance of Counsel

Respondent filed a return on July 24, 1997 and an evidentiary hearing was convened on August 5, 1999, before the Honorable Howard King. Applicant was present at the hearing represented by Thomas Weeks, Esquire. The court denied and dismissed Applicant's application by written order dated October 26, 1999.

A timely Notice of Appeal was filed on Applicant's behalf and a Johnson Petition for Writ of Certiorari was submitted by the South Carolina Office of Appellate Defense. On July 20, 2001, the South Carolina Supreme Court denied the petition and the Remittitur was sent August 9, 2001.

**4:02-813-22BH**

Applicant then filed a Petition for Writ of Habeas Corpus to the United States District Court for the District of South Carolina on March 19, 2002. The Respondent filed a Motion for Summary Judgment on May 2, 2002, which the Applicant responded to with a "Motion for Voluntary Dismissal" on June 18, 2002. The United States District Court of South Carolina granted the Applicant's motion to dismiss the petition on August 5, 2002.

**2003-CP-06-125**

On June 11, 2003, Applicant filed a second PCR Application, alleging he was being held unlawfully for the following reasons:

1. Ineffective Assistance of Counsel (failed to file timely appeal)
2. Ineffective assistance of trial counsel and PGR counsel for failing to raise the issue that Applicant was represented by only one attorney in a death penalty case.

DAEH#2

An evidentiary hearing was convened into the matter on August 24, 2004, before the Honorable Reginald Lloyd. Applicant was present and represented by Pete Kumala, Esquire. Judge Lloyd denied and dismissed the application by written order dated November 2, 2004.

On June 17, 2005, Wanda H. Carter of the South Carolina Office of Appellate Defense filed a Johnson Petition for Writ of Certiorari, and Petition to be Relieved as Counsel, in which she raised the following issue on behalf of petitioner:

The PCR court erred in denying petitioner's allegation that he did not voluntarily waive his right to a direct appeal in the case.

The South Carolina Supreme Court denied the appeal by written order dated October 4, 2006. The Remittitur was sent October 20, 2006.

#### **4:06-3218-CMC-TER**

On November 15, 2006, Applicant filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 with the United States District Court, raising the following allegations:

Ground One: Ineffective assistance of counsel due to my trial lawyer failing to file my direct appeal as I asked him to do.

Ground Two: The court lacked subject matter jurisdiction to accept my guilty plea due to a violation of a §16-3-26(B)(1).

Respondent filed a motion for summary judgment on January 8, 2007, along with a return and supporting memorandum. United States Magistrate Judge Thomas E. Rogers, III, issued an order filed January 11, 2007 pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), advising Applicant of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately. Applicant filed a response on February 28, 2007.

Judge Rogers issued a Report and Recommendation on June 14, 2007, recommending that Applicant's petition be dismissed and Respondent's motion for summary judgment be

*DAE#3*

granted. United States District Judge Cameron McGowan Currie issued an Opinion and Order on August 20, 2007, granting Respondent's motion for summary judgment.

**2008-CP-06-0389**

On December 5, 2008, Applicant filed a document captioned "Petition for Writ of Habeas Corpus; or, in the Alternative, Motion for Relief from Judgment or Order," alleging the following grounds for relief:

1. "Because his conviction is based upon a mere preponderance of the evidence and a standard less than beyond a reasonable doubt, that the judgment of conviction is constitutionally infirm and that it therefore should not be preserved by this Honorable Court."
2. "That because Petitioner was not afforded Due Process of appellate review of his judgment of conviction, that he is entitled to direct appellate review because he never knowingly or voluntarily waived his right thereto."
3. "That Petitioner was denied actually and constructively of effective assistance of counsel, he is entitled to have his conviction reversed and remanded for a new trial because there was only one attorney representing him at trial in which a sentence of death was sought, and the law demands that Petitioner have two (2) attorneys appointed for representation where he is an indigent, as in this case at bar."
4. "Petitioner contends that he has suffered a gross miscarriage of justice, and that on such an account he is entitled to judicial redress in order to settle this matter once and for all."

Respondent moved for summary dismissal. A Conditional Order of Dismissal was filed September 15, 2009. Applicant then submitted a pro se document captioned "Applicant's Reply to The Courts Conditional Order of Dismissal " dated October 6, 2009. By Order dated February 26, 2010, and filed March 5, 2010, the Honorable Doyet A. Early, III, dismissed and denied the Petition.

On March 24, 2010, Applicant filed a Notice of Appeal. On June 9, 2010, the Court of Appeals issued an Order dismissing Applicant's appeal for failure to show that there is an

*DAE/4*

arguable basis for asserting that the lower court's determination was improper. The Remittitur was sent June 28, 2010.

**2010-CP-06-0189**

On August 13, 2010, Applicant filed another application for post-conviction relief, alleging he was being held unlawfully and is entitled to a belated appeal under White v. State for the following reasons:

1. Insufficient Assistance of Counsel
  - a. Failure to advise of right to appeal; specifically "Petitioner... never knowingly or intelligently waived his right to a direct appeal of his guilty plea, and the record and the undisputed material evidence, testimonial or otherwise, has clearly established that petitioner's trial counsel, Walter Bedingfield, was instructed by Petitioner to appeal guilty plea."

Respondent filed its Return and Motion to Dismiss on June 30, 2011. A Conditional Order of Dismissal was signed by the Honorable Doyet A. Early, III, on July 7, 2011, and served on Applicant. Applicant submitted a response in opposition to the Conditional Order on August 15, 2011. On November 17, 2011, a Final Order of Dismissal was filed by the Court, denying Applicant's application because he raised the same issue in his 2008 State Habeas action and because he could have raised the issue in all of his prior PCR actions.

Applicant subsequently filed a Motion to Alter or Amend Judgment dated December 19, 2011, and received by Respondent December 22, 2011. By Order dated January 6, 2012, the court dismissed the Motion for failing to file within ten days of receipt of the Final Order of Dismissal which Applicant stated he received on November 28, 2011.

On March 28, 2012, Applicant filed a Motion for Relief from Judgment pursuant to Rule 60(b), SCRCF. Respondent filed a Return and Motion to Dismiss. By Order dated April 9, 2012, the court denied and dismissed Applicant's motion.

DAE#5

Applicant subsequently filed a Notice of Appeal, seeking an appeal of the court's Final Order dismissing Applicant's PCR Application and the Final Order dismissing Applicant's Rule 60(b) Motion. On July 25, 2012, the Supreme Court of South Carolina issued an Order of Dismissal, dismissing Applicant's appeal. The Remittitur was sent August 10, 2012.

### **CURRENT APPLICATION**

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

1. "I am challenging the discrimination on basis of my HIV status that the judge, the solicitor and my trial counsel used against me."

Before this Court are the Barnwell County Clerk of Court records regarding Applicant's convictions, Applicant's prior PCR records and records on appeal, the guilty plea transcript, the transcript from Applicant's hearing from PCR 1997-CP-06-106, and the South Carolina Department of Corrections' records, Applicant's PCR application, and Respondent's Return and Motion to Dismiss.

## **II. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Successiveness**

The Court finds that the current Application for post-conviction relief must be summarily dismissed because it is successive to the previous applications for post-conviction relief. 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.

*DAE#6*

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 could have been raised in prior 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 raised the issue of HIV discrimination in his first PCR Hearing on Thursday, August 5, 1999.<sup>1</sup> That action was dismissed by the PCR court in an order that specifically addressed the HIV discrimination claim.<sup>2</sup> 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).

#### Statute of Limitations

The Court further finds that this Application for post-conviction relief must also be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-

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<sup>1</sup>During the PCR Hearing on his first PCR action, the following exchange took place between Judge King and Applicant:

Q: All Right. Would you tell the Court why you feel that Mr. Bedingfield was ineffective for you?

A: Because if he wanted me not to go to trial and, him and the Solicitor, **because I was HIV positive that should have been irrelevant and I feel like I was discriminated.**

PCR Transcript Case No. 97-CP-06-106, p. 6 ln. 24-25, p. 7 ln. 1-5.

<sup>2</sup> See Order of Dismissal 97-CP-06-106, p. 4 ("Applicant claims he received ineffective assistance because his HIV positive status was revealed during plea negotiations and his guilty plea; therefore, prejudicing him. **The allegation is without merit.**")

Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). 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). Applicant was convicted of the offenses he challenges in this application on January 30, 1997. The remittitur was sent after Applicant's unsuccessful appeal on March 21, 1997. This application was filed on June 23, 2014, well after the one-year 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) (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, because Applicant failed to file within the time mandated by the Post-Conviction Procedure Act, Applicant's post-conviction relief application must be summarily dismissed.

#### **Failure to State a Claim**

This Court finds the PCR application must be summarily dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act (the Act). S.C. Code Ann. §§ 17-27-10 et seq. (2003). Pursuant to the Act, an Applicant may commence a post-conviction relief action on the following grounds:

DAE#8

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

S.C. Code Ann. § 17-27-20(a) (2003).

In his application for post-conviction relief, Applicant has failed to set forth any allegations upon which relief may be granted under S.C. Code Ann. §17-27-10, et. seq. (2003). Therefore, the current application must be summarily dismissed for failing to state a cognizable ground for relief.

#### **Res Judicata**

This Court further finds that Applicant's claims are 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 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. Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in his initial PCR hearing where

DAE#9

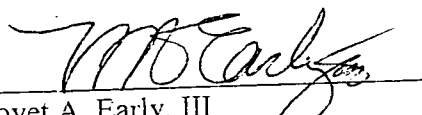
the issue of discrimination was raised and dismissed with prejudice. The public interest in the finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRCPP, this Court finds that these claims are barred by res judicata and must be dismissed.

### CONCLUSION

Pursuant to S.C. Code Ann. §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 (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 Barnwell County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Justin J. Hunter, Esquire  
PCR Division – 2nd Circuit  
P.O. Box 11549  
Columbia, SC 29211

AND IT IS SO ORDERED this 18<sup>th</sup> day of December, 2014.

  
Doyet A. Early, III  
Chief Judge for Administrative Purposes  
Second Judicial Circuit

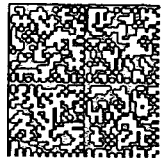
Bamberg South Carolina

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APR 22 2015

SC SUPREME COURT

Robert Mitchell 140920  
B.R.C.I. / Mont. 191  
4460 Broad River Rd.  
Columbia, S.C. 29210



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**LEGAL MAIL**