

APR 20

STATE OF SOUTH CAROLINA )  
COUNTY OF RICHLAND )  
Elijah Marshall, #186970, )  
Plaintiff, )  
vs. )  
State of South Carolina, )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2014-CP-40-05355

RICHLAND COUNTY  
FILED  
2015 APR 20 AM 11:32  
JONETTE E. HARRIS  
C.C.P. & C.S.

RECEIVED ORDER  
MAY 05 2016  
SC Court of Appeals

This matter comes before the Court upon Defendant State of South Carolina's Motion to Dismiss, which was heard Thursday, April 9, 2015. Present at the hearing was the *pro-se* Plaintiff and Assistant Attorney General Courtney E. Lowell appearing on behalf of the Defendant.

On August 3, 2014, Plaintiff filed this Summons and "Notice and Motion for Declaratory Judgment and Injunctive Relief." Through this action, it appears Plaintiff seeks information and/or legal advice with regard to a Petition for Writ of Habeas Corpus. In the relief demanded, Plaintiff provides for seven (7) items; including that "Petitioner is entitled to be informed, to know what is a state habeas corpus in the lower court. 'cir ct.' is used for"; "Petitioner is entitled to be informed as to what issue(s) can be raised in a state habeas corpus in the lower court, 'cir. ct.'"; and "Petitioner is entitled to be informed to know when can a state habeas corpus be used after going to the original jurisdiction."

As discussed below, after full consideration of the pleadings filed in this action, the oral arguments of the parties, applicable law and for the reasons set forth below, the Court grants Defendant's Motion to Dismiss.

Plaintiff was indicted at the September 2006 term of the Richland County Grand Jury for First Degree Burglary (96-GS-40-13590) and Petit Larceny (96-GS-40-13591). On November 7, 1996, the State gave formal written notice that it would seek a life without parole sentence for the burglary charge. On February 12-14, 1997, Plaintiff received a jury trial where he was convicted on both charges. The Court sentenced Plaintiff to life imprisonment, pursuant to S.C. Code Ann. § 17-25-45, as Plaintiff had prior convictions of Armed Robbery and Assault and Battery with Intent to Kill. Plaintiff made a motion to reconsider the sentence, which was denied

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following a May 8, 1997 hearing. Plaintiff filed and served a timely notice of appeal. The South Carolina Supreme Court affirmed Plaintiff's convictions and sentence in an unpublished opinion. *State v. Marshall*, 99-MO-23 (S.C., filed March 10, 1999).

***First Post-Conviction Relief Action (2000-CP-40-00738)***

Plaintiff filed an application for post-conviction relief on February 23, 2000 in which he alleged ineffective assistance of counsel. He subsequently filed an amended application on July 26, 2001, which was denied and dismissed in its entirety by written Order filed December 26, 2001. Plaintiff appealed the denial of his post-conviction relief application. The Supreme Court of South Carolina entered an Order denying the petition for writ of certiorari in an unpublished order filed on July 24, 2003. The Remittitur was issued on August 12, 2003.

***First Federal Habeas Corpus Action (4:05-cv-00345-GRA)***

The Plaintiff then filed a petition for writ of habeas corpus on February 25, 2005. On December 19, 2005, the Federal District Court granted the Defendant's motion for summary judgment finding that Plaintiff's claims were without merit. Plaintiff then filed a notice of appeal on January 17, 2006. The Fourth Circuit Court of Appeals dismissed the appeal on June 22, 2006.

***Second Post-Conviction Relief Action (2009-CP-40-06712)***

Plaintiff then filed a *second* application for post-conviction relief on September 16, 2009, where he alleged he was being held unlawfully for ineffective assistance of PCR counsel. A Final Order of Dismissal was signed on July 30, 2012 finding that the application was filed untimely, was successive to Plaintiff's previous application, and failed to state a claim upon which relief could be granted. Plaintiff subsequently filed a Motion to Alter or Amend the Judgment pursuant to Rule 59(e), SCRPC, which was denied and dismissed October 15, 2012.

Plaintiff then filed a notice of appeal of the denial of his second post-conviction action. The South Carolina Supreme Court issued an Order on December 18, 2012 dismissing Plaintiff's appeal due to Plaintiff's failure to show that there was an arguable basis for asserting that the determination by the lower court was improper. The remittitur was issued on January 3, 2013.

***Second Federal Habeas Corpus Action***

Plaintiff then filed a motion with the Fourth Circuit Court of Appeals for an order authorizing the Federal District Court to consider a successive application for relief. The Fourth Circuit Court of Appeals denied this motion by order filed January 4, 2012.

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### *First State Habeas Action*

Plaintiff then filed a petition for writ of habeas corpus with the South Carolina Supreme Court in its original jurisdiction, on February 1, 2013. The Supreme Court of South Carolina issued an order dismissing Plaintiff's Petition for Writ of Habeas Corpus on February 21, 2013, stating that no extraordinary reason existed to entertain the matter.

### *Second State Habeas Action (2013-CP-40-03812)*

On April 14, 2014, the Court issued an Order denying and dismissing with prejudice the Plaintiff's Petition for Writ of Habeas Corpus, filed on July 1, 2013.

### ANALYSIS

Plaintiff's action is dismissed because this is not a declaratory judgment action, but a Petition for Writ of Habeas Corpus or a request for legal advice and information.

A habeas corpus petition must support the requested relief. *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998); *Hunter v. State*, 316 S.C. 104, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, the Plaintiff must make out a *prima facie* case showing he is entitled to relief and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. *Gibson, supra*. To warrant a hearing, the petition must include the two specific allegations.

First, the petition must allege the Plaintiff has exhausted all available post-conviction relief (PCR) remedies. *Id.*; *Hunter*, 447 S.E.2d 203; *Pennington v. State*, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review. *Gibson, supra*.

Second, the petition must allege sufficient facts to show why other remedies, such as PCR, are unavailable or inadequate. *Id.* PCR is not rendered "unavailable or inadequate" merely because the petition might be dismissed as successive. In fact, any matter that is cognizable under the Uniform Post Conviction Procedure Act, S.C. Code Ann. §§ 17-27-10 to -120 (2013), may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts of this State. *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998); *Gibson, supra*; *Keeler*, 330 S.C. 568, 500 S.E.2d 123.

The Uniform Post Conviction Procedure Act is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. *Gibson, supra*. A Plaintiff may

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even allege constitutional violations in PCR proceedings, unless the issue could have been raised by direct appeal. *Id.*; *Keeler, supra*. Thus, “[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application.” *Keeler, supra*.

The South Carolina Declaratory Judgment Act gives courts the “power to declare rights, status and other legal relations.” S.C. Code Ann. § 15-53-20 (1976). To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. *Power v. McNair*, 255 S.C. 150, 154 S.E.2d 551, 553 (1970). “A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as opposed to a dispute or difference of a *contingent, hypothetical, or abstract character*.” *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (emphasis added) (quoting *Power v. McNair*, 255 S.C. at 154, 177 S.E.2d at 553); *Graham v. State Farm Mutual Automobile Ins. Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995); *Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002).

The Declaratory Act is to be liberally construed and administered to achieve its intended purpose “to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations.” S.C. Code Ann. § 15-53-130 (1976). “However, the Declaratory Judgments Act does not require the court to give purely advisory opinions as to the issues sought to be raised.” *Auto-Owners Ins. Co. v. Rhodes*, 405 S.C. 584, 595, 748 S.E.2d 781, 787-788 (2013) (quoting *City of Columbia v. Sanders*, 231 S.C. 61, 97 S.E.2d 210 (1957)). “[A]n issue that is contingent, hypothetical, or abstract is not ripe for judicial review.” *Colleton County Taxpayers Ass’n v. Sch. Dist. of Colleton County*, 371 S.C. 224, 242, 638 S.E.2d 685, 694 (2006).

Plaintiff has exhausted all of his remedies through direct appeal and his numerous collateral attacks. A state habeas petition must be filed in the original jurisdiction of the South Carolina Supreme Court. Moreover, under these circumstances, an adjudication of the present question(s) would settle no legal rights of the Plaintiff. It would be only advisory and, therefore, beyond the intended purpose and scope of a declaratory judgment.

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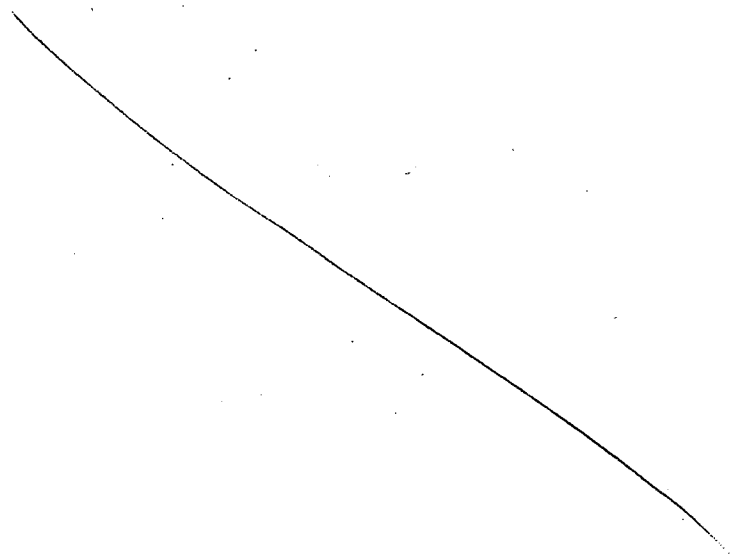
**ORDER**

Therefore, based upon the reasons set forth above, it is hereby, **ORDERED** that the Defendant's Motion to Dismiss is **GRANTED**.

**AND IT IS SO ORDERED.**

*Alison Renee Lee*  
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ALISON RENEE LEE  
Presiding Judge

April ~~14~~ 2015  
Columbia, South Carolina



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