

STATE OF SOUTH CAROLINA)
COUNTY OF LAURENS)

IN THE COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Russell Leon David, Sr., #240689,)
Applicant,)

2014-CP-30-0342

v.)

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

This matter comes before this Court by way of an application for post-conviction relief filed May 1, 2014. The Respondent made its Return and Motion to Dismiss on September 5, 2014.

PROCEDURAL HISTORY

In its Return, Respondent requests that the action be summarily dismissed. The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Laurens County Clerk of Court. ^{stopped} The Applicant was indicted by the February 1997 term of the Laurens County Grand Jury for Conspiracy, Lynching, Strong Armed Robbery, Kidnapping, Grand Larceny of a motor vehicle, and Murder (1997-GS-30-0183). He was represented by Chip Howe, Esquire. On March 26, 1997, the Applicant pled guilty to all charges. The Honorable Costa M. Pleicones sentenced the Applicant to confinement for life for Murder, five (5) years, consecutive to Murder, for Conspiracy, ten (10) years, consecutive to Murder, for Lynching, 2nd degree, ten (10) years, consecutive to Murder, for Strong Arm Robbery, thirty (30) years, consecutive to Murder, for Kidnapping, and ten (10) years, consecutive to Murder, for Grand

Larceny of a motor vehicle. The Applicant did not appeal his conviction or sentence.

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On December 20, 2012, the Applicant filed a Writ of Habeas Corpus in the United States District Court for the District of South Carolina. The Honorable Bristow Marchant issued a Report and Recommendation on February 12, 2013, recommending that the action be dismissed for Applicant's failure to exhaust all of his state remedies, including PCR. On March 4, 2013, the Honorable R. Bryan Harwell issued an Order adopting the Report and Recommendation and dismissing Applicant's Federal Habeas Corpus action.

2013-CP-30-0243

The Applicant filed his first PCR application on March 22, 2013, in which he alleged:

1. "Applicant was denied right to"
 - a. "Applicant guilty and innocence phase"
 - b. "Applicant was not rendered assistance"
 - c. "Applicant(sic) counsel was ineffective"

The Respondent filed its Return and Motion to Dismiss on May 6, 2013, asking the Court to dismiss Applicant's application for failing to file within the Statute of Limitations. On May 9, 2013, the Honorable Eugene C. Griffith, Jr., signed a Conditional Order of Dismissal. After a thorough review of Applicant's response to the Conditional Order of Dismissal, Judge Griffith issued a Final Order of Dismissal on June 27, 2013.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected. The South Carolina Supreme Court dismissed Applicant's appeal on November 12, 2013. The Remittitur was sent on December 4, 2013.

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

1. "Ineffective Assistance of Counsel for first counsel failed to"
2. "Ineffective Assistance of Counsel for not advising Applicant of"
3. "Ineffective Assistance of Counsel for not objecting to conviction"

In his Amended Application filed on August 13, 2014, Applicant alleged:

1. "Was Attorneys representation(sic) deficient under the Sixth Amendment"
- 2. "Was the Chain of Custody Broken"
3. "Did Counsels fall below or fell below an objective standard of reasonableness"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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:

1962 Code § 17-608; 1969 (56) 150

All grounds for relief available to an application 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).

successive

35-S.C.L. Rev. 114 Autumn 1983 -

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).

This Court additionally 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 judgement 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 March 26, 1997. The Applicant was therefore required to file his application by March 27, 1998. This Application was filed on May 1, 2014, which was well after the statutory filing period had expired.

A motion for summary judgement 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 judgement as a matter of law."

This 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 regarding ineffective assistance of counsel in both the state and federal courts. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his convictions. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, this Court summarily dismisses these claims as barred by *res judicata*.

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

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this ____ day of _____, 20__.

DONALD B. HOCKER¹
Chief Administrative Judge
Eighth Judicial Circuit

_____, South Carolina

¹ When this Application was filed and the State filed its Return and Motion to Dismiss, Judge Frank Addy, Jr. was the presiding judge. However, Judge Addy issued a letter about a potential conflict of interest in this case and a Conditional Order of Dismissal was never signed nor filed. As the Chief Administrative Judge of Common Pleas in the Eighth Circuit, I, Donald B. Hocker, now preside over this case.