EXHIBIT E

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	2014-CP-32-01397
Joshua Lamar Forrest, S.C.D.C. No. 274525,	)	
	)	**FINAL ORDER OF DISMISSAL**
v.	)	
State of South Carolina	)	
Defendant.	)	

FILED
2016 JUN 1 P 2:13
CAROLYN
CLERK OF COURT
LEXINGTON SC

This matter comes before the Court by way of an application for post-conviction relief filed by Joshua Lamar Forrest (Applicant) on April 11, 2014 ("the Application"). Respondent made its Return and Motion to Dismiss on December 31, 2014, requesting the application be summarily dismissed as untimely filed and successive in nature. Respondent concurrently filed a Conditional Order of Dismissal upon the same grounds. By Order dated March 7, 2016, the Honorable William P. Keesley continued the matter in order to consider the Conditional Order of Dismissal. A hearing into Respondent's motion was convened before this Court on April 21, 2016. Applicant was present at the hearing and was represented by David K. Allen, Esq. Johnny Ellis James Jr., Esq., of the South Carolina Attorney General's Office, represented Respondent.

After thorough consideration of the record before this Court and arguments offered at the hearing of April 21, 2016, this Court finds the current application for post-conviction relief must be denied and dismissed with prejudice.

I. PROCEDURAL HISTORY

Applicant is confined at the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted in Lexington County for two (2) counts of Armed Robbery and one count of Disorderly Conduct. Applicant

proceeded *pro se* at his guilty plea on November 17, 2005, at which time he pled guilty to Attempted Armed Robbery (1998-GS-32-2369). The Honorable Edward Miller sentenced him to ten (10) years imprisonment, suspended upon time served to three (3) years' probation. Applicant was to be supervised in Aiken County while on probation.

Applicant signed a Standard Conditions of Probation form on November 17, 2005, indicating that the conditions had been explained to him and that he agreed to them. A probation arrest warrant was issued on December 22, 2005, listing several alleged violations. Among the listed violations were failure to "refrain from entering any establishment whose primary business is the sale and drinking of alcoholic beverages" and "a preponderance of evidence to believe that [Applicant] did commit the offenses of Murder and Possession of a Weapon during a Violent Crime." The warrant was served by Applicant's probation agent on January 9, 2006. A sentencing sheet dated February 13, 2006, reflects that the Honorable Doyet A. Early, III, ordered that the probation violation case "be heard before General Sessions Court during the Murder and Possession of Weapon during Violent Crime trial." Following a jury trial on the charges of Murder and Possession of a Weapon during a Violent Crime which resulted in a hung jury, Applicant appeared before Judge Early on December 7, 2006, for a probation revocation hearing. Applicant's trial counsel, Sherri Stoney, Esquire, represented him. Judge Early revoked Applicant's suspended sentence in full. On June 24, 2009, Applicant was found guilty of Murder and Possession of a Weapon during a Violent Crime following a jury trial and sentenced to life imprisonment pursuant to S.C. Code Ann. § 17-25-45.

2007-CP-32-2906; 2009-CP-02-1238

On August 17, 2007, Applicant filed an application for post-conviction relief in Lexington County (2007-CP-32-2906). Pursuant to an order filed May 22, 2009, venue was

changed to Aiken County. In his application, Applicant alleged that he was being held unlawfully for the following reasons (errors as preserved):

1. "Violation of Due Process of Law"
    a. "Never violation Probation Conditional Order"
2. "(14) Amendment to the United States Constitution"

Applicant filed an amended Application July 20, 2009 (2009-CP-02-1238), asserting the following grounds for relief (errors as preserved):

1. "The court lacked subject matter jurisdiction to conduct the probation hearing."
2. "Ineffective assistance of counsel at probation revocation hearing."
3. "That neither the Applicant nor his attorney was served with a warrant for a probation violation as is required under S.C. Code Section 24-21-450 and the Due Process Clauses of the Constitutions of the United States and the State of South Carolina. Further, nor was the Applicant or his attorney served with a citation and attached affidavit in lieu of the required warrant."
4. "Failed to advise Applicant of right to appeal or file appeal."

An evidentiary hearing was held on July 14, 2010, before the Honorable W. Jeffrey Young in Aiken County. Applicant was represented by Kenneth Hanson, Esquire. At the hearing, Applicant testified on his own behalf. Applicant's counsel at the probation hearing, Sherry Stoney, Esquire, and probation agents Marie Boulton and Anthony White also testified. On October 8, 2010, the court filed an Order of Dismissal, denying and dismissing Applicant's application with prejudice.

On February 11, 2011, Applicant filed a Notice of Appeal. On or about August 12, 2011, Applicant filed a Petition for Writ of Certiorari to the South Carolina Supreme Court. On or about December 19, 2011, Respondent filed its Return. By Order dated July 24, 2012, the case was transferred to the South Carolina Court of Appeals, which granted Certiorari by Order dated September 4, 2013. In an unpublished opinion filed January 28, 2015, the Court of Appeals

affirmed the ruling of the PCR court. Forrest v. State, 2015-UP-052 (S.C. Ct. App. filed January 28, 2015). The Remittitur issued February 18, 2015.

CURRENT APPLICATION

In his second and current application, Applicant contends he is being held unlawfully for the following reasons (errors as preserved):

1. "Denied the right to assistance of counsel altogether."
    a. "Applicant pled guilty without any assistance of counsel."

Respondent incorporated the Lexington County Clerk of Court records, Applicant's prior PCR records, and the South Carolina Department of Corrections' records.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the Application must be summarily dismissed because it is successive to the previous application 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.

Successive applications are disfavored and the burden is on the 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, 309 S.C. 157, 420 S.E.2d 834 (1992).

Applicant contends that the Court's disfavor for successive applications should not bar his present claims because, as his prior PCR action was ultimately adjudicated in Aiken County, where his probation revocation took place, the Court in his prior action lacked jurisdiction under the PCR statute to rule upon claims arising out of the underlying conviction, which took place in Lexington County.

This Court is unpersuaded by Applicant's argument. Under S.C. Code Ann. § 17-27-40, "[a] proceeding is commenced by filing an application verified by the applicant with the clerk of the court in which the conviction took place." Applicant's first PCR was originally filed in Lexington County, where the underlying conviction took place, and his claims for relief could have been submitted in that original application. That his prior action exclusively attacked the probation revocation proceeding in Aiken County and was changed in venue accordingly does not defeat the fact that Applicant could have raised his present claims in his original filing, did not do so, and further declined to do so in any subsequent amendment or supplemental filing.

This Court finds that the current allegations 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, 420 S.E.2d 834 (1992).

Statute of Limitations

The Court further finds that the Application must also be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-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 pled guilty to the offense he challenges on November 17, 2005. He was therefore required to file his application on or before November 17, 2006. This Application was filed on April 11, 2014, which was over seven years after the statutory filing period had expired.

Applicant alleges that his decision to proceed *pro se* and plead guilty was not knowing and voluntary, he never received an appeal, he was denied his right of appellate review and, the statute of limitations does not apply to his Application under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) and Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002)[1]. Indeed, "Austin appeals do not have to be filed within the one year statute of limitations because they are belated appeals intended to correct unjust procedural defects." Wilson at 218, 559 S.E.2d at 582.

However, the case at hand is distinct from Wilson. In Wilson, the Court suspended the statute of limitations because "Austin's policy would be frustrated if the one year statute of limitations for PCR claims applied where the applicant was denied his direct appeal due to ineffective assistance of counsel, and then was denied his right to a PCR application because of

[1] Applicant, in his Return to State's Motion to Dismiss also claims that Applicant never received a PCR hearing. However, as explored above, Applicant did file a PCR application in Lexington County based on the same underlying indictment as is now at issue and did thereafter receive a full evidentiary hearing after a change of venue.

the one year statute of limitations." Id. at 218, 559 S.E.2d at 583. Whereas Wilson had received neither a direct appeal nor a PCR application due to ineffective assistance of counsel, Applicant's lack of direct appeal was not due to ineffective counsel, but due to his own inaction. Applicant has enjoyed a full evidentiary hearing on the merits of his first application for post-conviction relief and an appeal therefrom. Austin's policy, protecting the right to a direct appeal from the decision of a PCR court, as contemplated by Wilson, has not been frustrated at all.

The State brings the Court's attention to Dearybury v. State, 367 S.C. 34, 625 S.E.2d 212 (2006). There the Court considered the relationship between the one-year statute of limitations from the time of discovery of material facts[2], the request for a belated appeal, and the requirement that an individual's decision to proceed *pro se* must be knowing and voluntary under Faretta v. California, 422 U.S. 806 (1975). In Dearybury, the applicant filed his application within a month of discovering that his divorce attorney had not at all represented him on his criminal conviction and that he had been acting *pro se*. "If Petitioner did not knowingly and voluntarily waive his right to counsel, he is presumably entitled to a belated direct appeal." Dearybury at 40, 625 S.E.2d at 215. However, the Court further noted that the "fact that petitioner [was] proceeding *pro se* does not in itself constitute good cause for failure to conform to the prevailing rules of procedure." Id. at n.4 (*citing* Walker v. State, 676 S.W.2d 460 (Ark. 1984)).

Applicant has failed so entirely to conform to the rules of procedure under the PCR statute that the Court need not consider the merits of his Faretta claim. The statute of limitations ran, at the earliest, in November 2006. When Applicant amended in 2009 his first application for post-conviction relief, he demanded a belated appeal from his probation revocation proceeding but did not seek a belated appeal from his underlying guilty plea. Applicant did not file the

[2] S.C. Code Ann. § 17-27-45(c)

present application until April 11, 2014, and still failed then to demand a belated appeal, but instead requested "[t]hat [his] conviction be vacated and dismissed with prejudice." In neither his Return to State's Motion to Dismiss, nor in arguments at the hearing, does Applicant indicate that he now wishes to pursue relief different from that which he requested in his original application. Where an applicant seeks only relief to which he or she is not entitled, "it is not incumbent upon [the] court to pass upon what relief, if any, he [or she] might, perchance, be entitled to." Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968); *see also* Grand v. MacDougall, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964); White v. State, 263 S.C. 110, 119, 208 S.E.2d 35, 39 (1974) (No authority for the court to grant a full right of appeal, let alone new trial, upon ground that applicant did not knowingly and voluntarily waive right to appeal from conviction and sentence). Applicant cannot avail himself of an exception to the statute of limitations that only exists to provide a form of relief he does not request and in which he expresses no interest. The suspension of the statute of limitations under Austin and its progeny is not readily interchangeable with demands for broader relief.

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." The statute of limitations has run and run again. As Applicant failed to file within the time mandated by the Post-Conviction Procedure Act, further failed to request relief for which the statute of limitations may be suspended, and Respondent so moved, the Application must be summarily dismissed.

CONCLUSION

IT IS THEREFORE ORDERED that, for the reasons set forth herein, the Application is hereby denied and dismissed with prejudice. This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 9th day of May, 2016.

Perry H. Gravely
Presiding Judge

Pickens, South Carolina