

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE SEVENTH JUDICIAL CIRCUIT
 COUNTY OF SPARTANBURG)
 Kenneth Maurice Jones,) Case No.: 2015-CP-42-4968
 S.C.D.C. No. 183003,)
)
 Applicant,)
) **CONDITIONAL ORDER OF DISMISSAL**
 v.)
)
 State of South Carolina)
)
 Respondent.)


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This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Kenneth Maurice Jones ("Applicant") on December 2, 2015. Respondent made its Return, requesting the Application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the February 1992 term of the Spartanburg County Grand Jury for assault and battery with intent to kill ("ABWIK") (1992-GS-42-1096) and murder (1992-GS-42-1097). Charles E. Sanders, Esquire represented Applicant. Applicant proceeded to trial before the Honorable E. C. Burnett, III, and a jury. The jury found Applicant guilty as indicted on July 14, 1993. On July 15, 1993, Judge Burnett sentenced Applicant to imprisonment for life for murder and 20 years for ABWIK.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Daniel T. Stacey, Esquire. By memorandum opinion decided April 12, 1995, the South Carolina Supreme Court affirmed Applicant's convictions. State v. Jones, Op. No. 95-MO-175 (S.C. 1995). The Remittitur issued on April 28, 1995.


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First PCR Application: 1995-CP-42-1667

Applicant filed his first application for post-conviction relief on September 23, 1995 (1995-CP-42-1667). He alleged the following grounds for relief in his application:

1. Ineffective assistance of counsel;
2. Violation of State and Federal Constitutional rights;
3. Due process violation of South Carolina Statute.

Respondent made its return on December 19, 1995, and an evidentiary hearing into the matter was convened on March 5, 1998, before the Honorable C. Victor Pyle, Jr. Applicant was present at the hearing and represented by Allen Bullard, Esquire. Teresa A. Knox, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf. Charles E. Sanders, Esquire, testified for the state. By written Order dated May 20, 1998, and filed May 22, 1998, Judge Pyle denied and dismissed the application.

Applicant filed a timely notice of appeal. Melody J. Brown, Esquire, filed a Petition for Writ of Certiorari pursuant to Johnson v. State¹ on Applicant's behalf. The South Carolina Supreme Court denied Applicant's petition by unpublished opinion. Jones v. State, Order dated January 21, 2000. The Remittitur was returned to the circuit court on February 9, 2000.

First Federal Habeas Action: 3:00-2028-PMD-JRM

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on June 19, 2000 (C.A. No. 3:00-2028-PMD-JRM). In his Petition, Applicant set forth the following grounds for relief:

1. "Petitioner Received Ineffective Assistance of Appella[te] Counsel and Post Conviction Relief Counsel from the Denial of his PCR"
 - a. "Appellant Counsel failed to brief meritorious issues on appeal from the denial of his PCR application. PCR counsel failed to submit an Order from the PCR hearing as per the Circuit Court Judge's Order. . . Applicant had show[n] ineffective counsel and had his PCR counsel

¹ Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988)

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submitted a proposed order deciding the case in his clients favor the court would have been legal[l]y obligated to sign same. Evidence support[s] relief.”

2. “Applicant/Petitioner Received Ineffective Assistance of Trial Counsel.”
 - a. “Trial Counsel failed to object to prior bad act which was improperly before the Court. Office McNair testified at trial that petitioner “had been arrested several weeks before [the incident] for trespassing.” . . . The record supports petitioners allegations and the Court err[ed] in not granting relief.”
3. “Petitioner was denied Due Process in that the Court Err[ed] in not Granting Relief on Appeal.”
 - a. “The petitioner was denied due process when the court err[ed] and allowed the state to allow testimony from a victim witness without allowing the petitioner to impeach the witness with a prior crime of assault and battery of a high and aggravated nature.”
4. “Petitioner was Denied Due Process in [that] the State Court Err[ed] in not Granting Relief on Appeal.”
 - a. “The petitioner was denied due process when the court error [went] uncorrected and it admitted petitioners statement into evidence physically after it had been read to the jury, such providing and undue influence. This abuse of discretion by the Court went uncorrected on appeal and denied the petitioner a fair trial and due process.”

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Respondent filed its Return and Motion for Summary Judgment on August 15, 2000. On January 29, 2001, the Honorable Joseph R. McCrorey, United States Magistrate Judge, issued a Report and Recommendation ordering that Respondent’s motion for summary judgment be granted. The Honorable Patrick Michael Duffy, United States District Judge, accepted the Report and Recommendation for summary judgment and denied Applicant’s petition on January 29, 2001. Applicant did not appeal.

Second PCR Application: 2001-CP-42-1491

Applicant filed his second application for post-conviction relief on May 25, 2001 (2001-CP-42-1491). He alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel;
2. Ineffective assistance of appellate counsel;



3. Ineffective assistance of PCR counsel;
4. Constitutional violations; and
5. Subject matter jurisdiction.

Respondent made its return on or about March 28, 2003. A hearing into the matter was convened on November 10, 2003, before the Honorable J. Derham Cole. Applicant was present at the hearing and represented by Cameron Boggs, Esquire. Douglas E. Leadbitter, of the South Carolina Attorney General's Office, represented Respondent. By written Order dated January 5, 2004, and filed January 6, 2004, Judge Cole denied and dismissed the application on grounds that it was untimely and successive.

Applicant filed a timely notice of appeal. Robert M. Pachak, Esquire, filed a Petition for Writ of Certiorari pursuant to Johnson v. State on Applicant's behalf. The South Carolina Supreme Court denied Applicant's petition by unpublished opinion. Jones v. State, Order dated March 2, 2005. The Remittitur was issued to the circuit court on March 18, 2005.

Third PCR Application: 2006-CP-42-1859

Applicant filed his third application for post-conviction relief on June 6, 2006 (2006-CP-42-1859). He alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel;
2. Prosecutorial misconduct;
3. Due process violations;
4. Judicial estoppel;
5. Newly discovered evidence; and
6. Subject matter jurisdiction

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Respondent made its return and motion to dismiss on or about September 14, 2006. A hearing into the matter was convened on May 23, 2007, before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and was represented by Robert H. Cooper, Esquire. S. Prentiss Counts, of the South Carolina Attorney General's Office, represented Respondent. By



written Order dated June 29, 2007, and filed July 2, 2007, Judge Hayes denied and dismissed the application on grounds that it was untimely and successive. Judge Hayes also found that the Applicant failed to raise a *prima facie* case of newly discovered evidence.

Applicant filed a timely notice of appeal. The South Carolina Supreme Court dismissed Applicant's petition on September 10, 2007 for failing to show an arguable basis that the determination by the lower court was improper. The Remittitur was issued to the circuit court on September 26, 2007.

Fourth PCR Application: 2008-CP-42-6617

Applicant filed his fourth application for post-conviction relief on December 11, 2008 (2008-CP-42-6617). He alleged the following grounds for relief in his application:

1. Newly discovered evidence;
2. Ineffective assistance of trial counsel.

Respondent made its return and motion to dismiss on August 20, 2009. On August 24, 2009, the Honorable J. Mark Hayes, II, issued a Conditional Order of Dismissal, and then a Final Order on November 23, 2009 dismissing the matter with prejudice.

Second Federal Habeas Action: 11-249

On September 15, 2011, Applicant filed a motion pursuant to 28 U.S.C. § 2244 in the U.S. Fourth Circuit Court of Appeals, seeking authorization for district court consideration of a successive application. The Court denied that motion by Order filed October 7, 2011.

Fifth Application: 2012-CP-42-4450

Applicant filed his fifth application for post-conviction relief on October 23, 2012 (2012-CP-42-4450).² He alleged the following grounds for relief:

1. Newly discovered evidence;

² Applicant filed a subsequent application on September 30, 2013 (2013-CP-42-4099), which was thereafter merged into 2012-CP-42-4450 by Order filed March 12, 2014.

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2. No investigation before trial;
3. Ineffective assistance of counsel;
4. Prosecutorial misconduct in failing to disclose Brady materials; and
5. Due process violations.

Respondent made its return and motion to dismiss on May 5, 2014, arguing the application failed to make a prima facie case for newly discovered evidence, was successive, untimely, barred by res judicata. On December 4, 2014, the Honorable J. Derham Cole issued a Conditional Order of Dismissal. The Honorable J. Mark Hayes, II, issued a Final Order of Dismissal on February 1, 2016, dismissing the matter with prejudice.

Current PCR Application

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

1. Ineffective assistance of trial counsel;
2. "No chain of custody, ballistic, or forensic report"
3. Newly discovered evidence

Also before this Court are the Spartanburg County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, and the pleadings.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds it must also summarily dismiss the current Application because it is successive to the *six* previous applications 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 (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.

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." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been raised previously. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).


This Court finds that the current allegations were or could have been raised in Applicant's prior *five* applications for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to present any reasons why he could not have raised the current allegations in any of his previous applications for post-conviction relief. Accordingly, this Court finds this application must be summarily dismissed as successive.

Statute of Limitations

The Court finds the application must 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. Section §17-27-45(A) provides:

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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).


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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 offense he challenges in this application on July 15, 1993. The Remittitur was returned April 28, 1995. Applicant was therefore required to file his application on or before July 1, 1997. This application was filed on December 2, 2015, which was well-beyond the expiration of the statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consol. Sch. Dist. of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) 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 this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

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Res Judicata

This Court further finds the doctrine of *res judicata* also bars Applicant's claims of ineffective assistance of counsel. *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 of ineffective assistance of counsel in his previous post-conviction relief applications. 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 the doctrine of *res judicata*.

Newly-Discovered Evidence

This Court finds Applicant has failed to make a *prima facie* showing of newly-discovered evidence entitling him to relief. Accordingly, this application must be summarily dismissed. An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)). Applicant has failed to establish that the alleged evidence meets any of the requirements for after-discovered evidence. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a *prima facie* showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Therefore, this Court finds that this allegation, and this application, 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

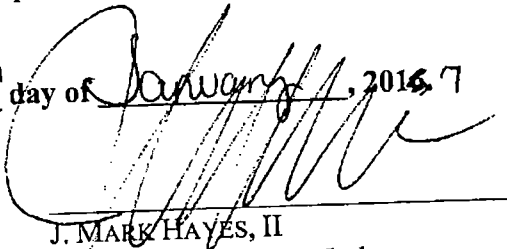
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service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Johnny E. James, Jr., Esquire
Post-Conviction Relief Division
P.O. Box 11549
Columbia, SC 29211

Applicant is cautioned that his response to this order must be actually received by the Spartanburg County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 4th day of January, 2016, 7



J. MARK HAYES, II
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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H. HOPE BLACKLEY

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M. Hope Blackley
Clerk of Court

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7TH JUDICIAL CIRCUIT

Keith Maurice Jones
Applicant # 183003

CASE # 20150942-4968

CERTIFICATE OF SERVICE

VS
State
Respondent

I certify that, on this date, I served a copy of the Conditional Dismissal
In this action dated 1-4 2017 on 1-5-17

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Ashley Hawthorn
Gloria Oliver
Keith Jones

1-5-17
(Date)

Camie Seay
(Signature)