

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SPARTANBURG ) FOR THE SEVENTH JUDICIAL CIRCUIT

Kenneth Lee Brown, ) Case No.: 2015-CP-42-2548

Applicant, )

v. )

State of South Carolina, )

Respondent. )

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed by Kenneth Lee Brown ("Applicant") on June 10, 2015. Respondent made its Return requesting the Application be summarily dismissed.

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M. HOPE CLARK

**I. PROCEDURAL HISTORY**

Applicant is currently confined in the Federal Bureau of Prisons for unrelated convictions. Applicant was indicted at the January 1983 term of the Spartanburg County Grand Jury for the crimes of armed robbery and assault and battery with intent to kill (1983-GS-42-0006); attempted armed robbery (1983-GS-42-0010); three counts of burglary and larceny (1983-GS-42-0019, -0021, and -0031 Counts 1 and 2); burglary (1983-GS-42-0020); burglary, armed robbery, and criminal sexual conduct, first degree (1983-GS-42-0030, Counts 1, 2, and 3). Michael Rudasill, Esquire represented Applicant. On January 28, 1983, Applicant pleaded guilty before the Honorable Paul M. Moore. Judge Moore sentenced Applicant to five consecutive terms of life imprisonment, in addition to consecutive terms of 20 years for attempted armed robbery and 10 years for armed robbery and assault and battery with intent to kill. Applicant did not appeal.

### **First PCR Application**

Applicant subsequently filed an application for post-conviction relief on October 31, 1985, alleging his continued confinement was unlawful for the following reasons:

1. Ineffective assistance of trial counsel;
2. Involuntary guilty plea; and
3. "Sentencing judge did not comply with Rule 11 of Federal Rules of Criminal Procedure."

Respondent made its Return on May 9, 1986. An evidentiary hearing was convened on May 23, 1986. Petitioner was present and represented by Charles Sanders, Esquire. The Honorable Thomas J. Hughston, Jr., denied and dismissed the application by Order dated July 2, 1986. Petitioner did not appeal the denial of his application.

### **Second PCR Application**

Applicant filed a second PCR application on October 31, 1985, alleging he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of post-conviction relief counsel.

Respondent made its Return and Motion to Dismiss on March 1, 1989. On October 27, 1989, the Honorable E.C. Burnette, III, issued a Conditional Order of Dismissal, and then a Final Order on January 26, 1990 dismissing the matter with prejudice. Applicant did not appeal the denial of his second PCR application.

### **State Habeas Petition: 2001-CP-42-0398**

Applicant filed a state petition for writ of habeas corpus in circuit court on February 9, 2001, alleging he was being held in custody unlawfully for the following reasons:

1. "Trial judge was affirmatively misinformed by the Circuit Solicitor and misled into believing that he was required by law to impose life sentences on [Applicant]";
2. "Trial judge imposed sentence out of prejudice and corrupt motive.";
3. Ineffective assistance of trial counsel; and
4. Entitled to a review concerning a belated appeal under White v. State.

Respondent made its Return and Motion to Dismiss on or about February 21, 2003. An evidentiary hearing into the matter was convened on April 10, 2003. At the hearing, Respondent made a motion to dismiss the application because there is no habeas corpus relief in the circuit court and even if the petition were to be construed as a PCR application, it would have been successive and time barred. In an Order dated June 5, 2003, the Honorable J. Derham Cole issued a Final Order dismissing the matter with prejudice. Applicant did not appeal.

### Current Application

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

1. "New law says anyone who was 17 years of age and Sentence to life imprisonment is unconstitutional. U.S. Supreme Court."
  - a. "Petitioner was 17 years old when Crime was Committed and when he was put in jail. didn't turn 18 until January 07, 1983."

Also before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the records of Applicant's State Habeas application,<sup>1</sup> the PCR application, and the Respondent's return and motion to dismiss.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Miller v. Alabama

The Court finds the allegation related to Miller v. Alabama, \_\_\_ U.S. 1303 S. Ct. 2455 (2012) must be dismissed. On November 12, 2014, the South Carolina Supreme Court held sentences of life without the possibility of parole that were imposed on juveniles violated the Eighth Amendment under Miller and that those individuals are entitled to resentencing pursuant to the United States Constitution. Aiken v. Byars, 410 S.C. 534, 765 S.E.2d 572 (2014). The

<sup>1</sup> Respondent's records of Applicant's first and second PCR actions have been destroyed pursuant to agency retention policy and S.C. Code Ann. §§ 30-1-10 to 180, and S.C. Code of Regs. R.12-321.

South Carolina Supreme Court specifically ordered “any individual affected by our holding may file a motion for resentencing within one year from the filing of this opinion in the court of general sessions where he or she was originally sentenced.” Id. at 545, 765 S.E.2d at 578 (emphasis added). As such, any challenges under Miller are not properly heard in a PCR action and this allegation must be summarily dismissed.

#### Successiveness

To the extent the Applicant raised any additional issues in his current application apart from those raised pursuant to Miller v. Alabama, the Court finds that the current application for PCR must also be summarily dismissed because it is successive to the previous application for PCR.

S.C. Code Ann. § 17-27-90 (2003) 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 Applicant bears the burden of showing that he could not have raised any current allegations in a previous application. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

This Court finds that any allegations apart from those made pursuant to Miller v. Alabama could have been raised in the proceedings based on the Applicant’s prior applications for PCR. Accordingly, the current application is successive and barred under § 17-27-90. The Applicant has failed to establish sufficient reason why he could not have raised those allegations

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in his previous applications. Therefore, this Court finds Applicant has failed to meet the burden imposed upon him, Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980), and dismisses this Application with prejudice.

### Statute of Limitations

To the extent the Applicant raises any issues in his current application apart from those made pursuant to Miller v. Alabama, this Court further finds that the application should also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act “(the PCR 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 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 pleaded guilty to the offenses he challenges in this Application on January 28, 1983. This Application was filed on June 10, 2015, 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, § 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 judgment as a matter of law.”

Therefore, this Court summarily dismisses any remaining allegations in the application for PCR for failure to file within the time mandated by the PCR Act.

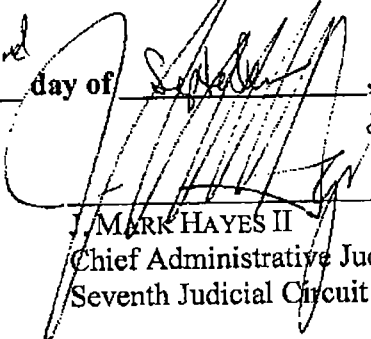
**CONCLUSION**

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 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 23<sup>rd</sup> day of September, 2016.

  
J. MARK HAYES II  
Chief Administrative Judge  
Seventh Judicial Circuit

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Spartanburg, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

September 19, 2016


The Honorable J. Mark Hayes, II  
Chief Administrative Judge-CP, 7th Circuit  
180 Magnolia Street  
Spartanburg SC 29306

Re: **Kenneth Lee Brown v. State of South Carolina**  
**2015-CP-42-2548**

Dear Judge Hayes:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and forward to the Clerk's office in the enclosed addressed envelope and have her serve the order on all parties. If you have any questions, please feel free to contact me.

Sincerely,

  
for Johnny E. James, Jr.  
Staff Attorney

JEJ/ah  
Enclosure(s)

cc: Kenneth Lee Brown, #56822-004

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M. HOPKINS

# Spartanburg County

Spartanburg County Court House  
180 Magnolia Street  
P. O. Box 3483  
Spartanburg, SC 29304-3483

Phone (864) 596-2591  
Fax (864) 596-2239



**M. Hope Blackley**  
Clerk of Court

*9-23-16*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

7<sup>TH</sup> JUDICIAL CIRCUIT

*Kenneth Lee Brown*

CASE # *20150042-2548*

Applicant

CERTIFICATE OF SERVICE

*vs*  
*Steele*

Respondent

I certify that, on this date, I served a copy of the *Quintin P. D. of Divisoral*  
In this action dated *9-23-2016* on *9-23-16*

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:

*Quintin P. D. of Divisoral*

*Alvia Olive*

*Kenneth Brown*

*9-23-16*  
\_\_\_\_\_  
(Date)

*Alvia Olive*  
\_\_\_\_\_  
(Signature)