

State of South Carolina } Court of Common Pleas
County of Horry } 2015-CP-26-7171

Patrick P. Bryant
Applicant

Applicant's objection
to Conditional order
of Dismissal

State of South Carolina
Defendant

RECEIVED

FILED
Horry County
2017 JUN 12 PM 4:23
CLERK OF COURT
HORRY COUNTY

AUG 08 2017

This matter comes before the Court
way of an application for post conviction
relief filed on September 28, 2015 and amended
on December 7, 2015. The Respondents/Defendants
made it's return on May 6, 2016 and
received by applicant on May 17, 2016.

S.C. SUPREME COURT

Procedural History

applicant is confined in SCDC pursuant to
orders of commitment of the Horry County Clerk
of court on unrelated charges. Applicant is
challenging his prior conviction of Armed robbery
and his failure of being denied appellate
court review of his prior PCR application. The
applicant would show this Honorable Court
that he was denied due process of law and
equal protection of the law.

Letter To The S.C. Supreme Court
Clerk Filing The Notice of Appeal

Date - 8-2-17

Honorable Shearouse
Clerk of S.C. Supreme Court

Re: Patrick P. Bryant #215212 v. State of South Carolina
2015-CP-26-07171

Dear Honorable Shearouse,

Enclosed for filing is a notice of
appeal in this case. Also enclosed are the
following:

- (1) proof of service of the notice of appeal
on the Respondent's
- (2) a copy of the order which is to be challenged
on appeal.
- (3) 243(c) Explanation

Patrick Bryant

RECEIVED

AUG 02 2017

P.C.I. MAILROOM

Notice of Appeal from A
Post-Conviction Relief Filing

The State of South Carolina
Supreme Court

Appeal From Horry County Court
of Common Pleas

[Benjamin H. Culbertson
Chief Administrative Judge]

C/A. 2015-CP-26-07171

Patrick P. Bryant[#] 215212 appellant

v.

State of South Carolina Respondent

Patrick P. Bryant[#] 215212 appeal his
Final Order of Dismissal by the Honorable
Benjamin H. Culbertson and filed by the
Horry County Clerk of Courts office on July 5,
2017. Appellant received this order on or
about July 13, 2017

Patrick Bryant

Proof of Service of Notice of Appeal

State of South Carolina
Supreme Court

C/A. 2015-CP-26-07171

Appeal From Horry Court of
Common Pleas

Patrick P. Bryant #215212 appellant

v.
State of South Carolina Respondent

Proof of Service

I, Patrick P. Bryant #215212 certify and verify that I have served the Notice of Appeal and Explanation on the Respondent's and S.C. Supreme Court by depositing a copy of the same in the U.S. mail at Perry Cor. postage prepaid, addressed as follows:

Attorney General (S.C.)
P.O. Box 11549
Columbia, S.C. 29221

I, Patrick P. Bryant #215212 certify and verify under the penalty of perjury that the foregoing is true and correct.

Patrick Bryant

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF Horry)	
)	2015-CP-26-7171
Patrick P. Bryant,)	
S.C.D.C. No. 215212)	
)	CONDITIONAL ORDER OF DISMISSAL
v.)	
)	
State of South Carolina)	
)	
Defendant.)	

2016 MAY 31 PM 1:45
 CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Patrick P. Bryant (Applicant) on September 28, 2015 and amended by filing December 7, 2015 (collectively "the Application"). Respondent made its Return, requesting the application be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Horry County Clerk of Court on unrelated convictions. Applicant was charged by the Myrtle Beach Police Department on November 6, 1993 with Armed Robbery. Applicant was thereafter indicted by the Horry County Grand Jury on January 6, 1994 for that crime as charged (1994-GS-26-93). Michael Edward Suggs, Esq. represented Applicant on the charges. On July 14, 1994, Applicant entered a plea of guilty to the charge as indicted. The Honorable David H. Maring, Sr. sentenced Applicant to a term of twenty years confinement. Applicant filed no notice of appeal.

Applicant filed his first application for Post-Conviction Relief from the plea on December 15, 1994 (1994-CP-26-3647). Applicant therein alleged (verbatim):

1. Poor and ineffective counsel:
 - a. counsel took advantage of my ignorance of the law

b. failed to attempt to negotiate a plea bargain
Respondent made its return on February 28, 1995. Applicant thereafter amended his application by filing May 11, 1995. In that amended application, Applicant levied no less than eleven (11) allegations, as follows (verbatim):

1. Ineffective Assistance of Counsel;
2. Denial of Due Process of Law;
3. Violation of 5th, 6th, and 14th Amendments of the U.S. Constitution;
4. Arrest without probable cause;
5. Double Jeopardy;
6. Shifting the Burden of Proof;
7. Guilty Plea under Duress;
8. Guilty Plea not knowingly and intelligently given;
9. Guilty Plea was by means of tricks;
10. Denial Witness; and
11. Applicant was prejudiced by counsel's failure to conduct investigation, which would have produced evidence of probated value.

An evidentiary hearing into the matter was convened on December 4, 1995 before the Honorable Sidney Thomas Floyd. Applicant was present at the hearing and was represented by Charles Leonard, Esq. Allen Bullard, Esq., of the South Carolina Attorney General's Office, represented Respondent. Judge Floyd denied and dismissed that application for PCR in an order dated March 2, 1996. Applicant filed no notice of appeal.

Applicant was released on parole from the custody of the South Carolina Department of Corrections on or about November 7, 2003. Applicant was thereafter returned to the custody of the Department of Corrections on or about October 10, 2005. He is presently serving a sentence of Life Without Parole pursuant to S.C. Code Ann. § 17-25-45¹ arising out of a conviction for Criminal Sexual Conduct with a Minor, Second Degree (2007-GS22-667), as well as a sentence of ten (10) years arising out of a conviction for Criminal Domestic Violence of a High and Aggravated Nature (2005-GS22-755).

¹ For which the conviction at issue in this Application serves as the predicate offense.

II. CURRENT APPLICATION

In his post-conviction relief application, and more specifically in a nine (9) page handwritten attachment, Applicant alleges he is being held unlawfully for the following reasons (as excerpted and summarized by Respondent save where otherwise indicated with quotations, all errors [sic]):

1. "Trial Court lack[ed] subject-matter jurisdiction to [. . .] convict applicant on a void indictment"
 - a. Applicant waived presentment. "[Applicant] cannot waive presentment to a charge that he allegedly committed."
 - b. The Trial Court acquires subject-matter jurisdiction by way of a valid indictment.
 - c. "[Applicant] was not allowed to plead to a lesser included offense of common law robbery. Therefore the Armed Robbery indictment was void."
 - d. "The absence of an indictment is a jurisdictional defect which deprives the court of the power to act. Such a jurisdictional defect cannot be waived by a defendant, even by a plea of guilty." (emphasis original). Applicant thereafter cites to Smith v. United States, 360 U.S. 1 (1959).
 - e. Further arguments in support of the above assertion are reformulations of the basic premise that an indictment is necessary to vest subject-matter jurisdiction in the Court and that no valid indictment existed with respect to the subject crime to which Applicant pled guilty.
2. Violations of the 5th, 6th, and 14th Amendments to the United States Constitution
3. "On September 1, 2015 an inmate that's adequately trained in the law that works as a Law Library clerk at Perry Corr. Discovered a new due process violation after reading all my legal material, that have not been previously presented that requires vacation of my conviction and sentence."
 - a. Further clarification of precisely what constitutes that due process violation does not appear in the original filing, but appears to be expanded upon in the amendment of December 7, 2015.
 - b. Applicant's Due Process rights have been violated "because the results of his prior conviction still persist, even though the sentence has been fully served." Applicant thereafter refers to the use of the Armed Robbery conviction as the predicate to his sentence of LWOP.

Applicant requests relief as follows (verbatim):

- Vacate Armed Robbery conviction and re-sentence on CSC and w/minor

Respondent incorporates the Horry County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final order of Applicant's previous PCR action, and the records of this current PCR action.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Failure to State a Claim – Failure to Request Appropriate Relief

The Court finds that the Application must be dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other write, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. In his prayer for relief, Applicant requests the Court (verbatim) "Vacate Armed Robbery conviction and re-sentence on CSC and w/minor." This relief is unavailable in a post-conviction relief action. If this Court finds a defect in the original proceedings, the appropriate relief would be a new trial on the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969); *see also* Singleton v. State, 313 S.C. 75, 86, 437

S.E.2d 53, 59-60 (1993) (Unless a defendant has been falsely tried and convicted of a crime and the true perpetrator is discovered at a later date, vacating the sentence is not justified). 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* Grant v. MacDougall, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964). Even if Applicant were seeking a valid form of relief with respect to the subject conviction, his request for the Court to modify the sentence of a wholly distinct conviction not at issue cannot be fulfilled. Because Applicant seeks only relief which is not available to him, the Application must be summarily dismissed.

B. Failure to State a Claim – Indictment-Jurisdiction Confusion

Furthermore, the Court finds that Applicant's primary allegation is without merit. An indictment is a notice document and any insufficiency in the indictment does not deprive the circuit court of jurisdiction. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625 (2002). "[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue. Circuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry at 101, 610 S.E.2d at 499. Thus, Applicant's argument that a void indictment deprives the Court of subject-matter jurisdiction is without merit. In any event, challenges to the indictment must be raised prior to the swearing of the jury or they are waived. Id. at 102 (citing S.C. Code Ann. § 17-19-90). Thus, a PCR applicant may only raise challenges to the sufficiency of an indictment by alleging ineffective assistance of counsel for failing to properly move to quash the indictment in accordance with § 17-19-90. Because Applicant has failed to do so, this

allegation and every part of the Application based thereupon must be dismissed pursuant to Rule 12(b)(6), SCRCF.

C. Failure to State a Claim – Collateral Consequences

Still further, the Court finds that Applicant's allegation with respect to his subsequent LWOP sentence is similarly without merit. "The imposition of a sentence may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of the collateral consequences." Williams v. State, 378 S.C. 511, 514-15, 662 S.E.2d 615, 617 (Ct. App. 2008); *see also* Brown v. State, 306 S.C. 381, 382-83, 412 S.E.2d 399, 400 (1991). Thus, a defendant need not be advised of all collateral consequences of his or her plea in order for the plea to withstand constitutional scrutiny. Id.

A consequence that the defendant must be informed of is one which impacts the sentence imposed on the defendant, and as such, is a direct consequence. *See* State v. Armstrong, 263 S.C. 594, 598, 211 S.E.2d 889, 891 (1975) (stating the defendant must be apprised of the direct consequences, which are the direct and immediate results, of his guilty plea). "The distinction between 'direct' and 'collateral' consequences of a plea, while sometimes shaded in the relevant decisions, turns on whether the result represents a definite, immediate, and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Dir., Patuxent Inst., 475 F.2d 1364, 1365-66 (4th Cir. 1973).

The fact that a conviction for a violent offense may be used to enhance a subsequent conviction is a collateral consequence of a guilty plea. Smith v. State, 329 S.C. 280, 494 S.E.2d 626 (1997). Applicant's allegation is only that his violent offense was used to enhance the sentence arising out of his subsequent conviction. As such, this allegation and every part of the Application based thereupon must be dismissed pursuant to Rule 12(b)(6), SCRCF.

D. Statute of Limitations

The Court also 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. Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a).

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). 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) 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 Applicant was convicted on July 14, 1994 and never appealed. The current application was not filed until September 28, 2015 – well after the one-year statutory filing period expired. Therefore, the Application must be summarily dismissed as barred by the statute of limitations.

E. Laches

The Court finds the Application must also be barred under the doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). This requirement “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the

integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” *Id.* (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). In due consideration of the above requirement, Laches is an equitable doctrine defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). *See also* Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005). “Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute laches.” Whitehead, *supra*.

Applicant seeks post-conviction relief nearly twenty-two (22) years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant’s claims. McElrath, *supra*; Honeycutt, *supra*; Whitehead, *supra*. Applicant offers no such justification, for there is none. The prejudice brought upon the State by this delay, in the form of witness memories and physical evidence naturally faded and degraded by the passage of time, is self-evident. *See generally*, Bray v. State, *supra* (finding laches applied seven years after proceeding in question); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (pointlessness of record reconstruction undoubtedly futile eleven years after proceeding in question). Therefore, the Application must be summarily dismissed as barred by the doctrine of laches.

F. Successive & IAPCR

The Court also finds the Application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code 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 indicate 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 the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Ineffective assistance of PCR counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief

actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” Id. at 452, 409 S.E.2d at 394. Applicant’s contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Thus, Applicant has failed to show that a successive application is appropriate.

Furthermore, Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. *See again* Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); 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).

Therefore, the Application must be summarily dismissed as successive to Applicant’s previous PCR applications.

G. Res Judicata

Finally, the Court finds that the Application must also be summarily dismissed because it is barred by the doctrine of *res judicata*. *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.; *see also* Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

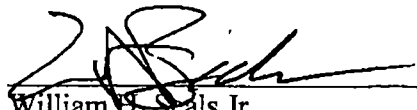
The Applicant had a full opportunity to litigate all his allegations in his prior action. Indeed, though Applicant may have forgotten with the passage of over two decades, his allegations relating to the 5th, 6th, and 14th Amendments were presented in his May 11, 1995 amendment to his first PCR Application and were thus adjudicated by the PCR Court. The finality of the previous Court ruling must be respected. As such, the Application must be summarily dismissed as barred by *res judicata*.

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

Office of the Attorney General
Jessica Kinard, Esquire
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 17 day of May, 2016.


William H. Seals Jr.
Chief Administrative Judge for
Administrative Purposes
Fifteenth Judicial Circuit

Miami, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Patrick P. Bryant,
S.C.D.C. No. 215212,

Applicant,

v.

State of South Carolina

Respondent.

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT

) Case No.: 2015-CP-26-07171

FINAL ORDER OF DISMISSAL

FILED
HORRY COUNTY
2017 JUL -5 PM 2:19
REHEE N. ELVIN
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed September 28, 2015, and amended by filing December 7, 2015. Respondent made its return on or about May 6, 2016, requesting the application be summarily dismissed as not cognizable under the Uniform Post-Conviction Relief Act, as untimely, as barred by laches, as successive, and as barred by the doctrine of *res judicata*.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed May 17, 2016, and filed May 31, 2016, provisionally denying and dismissing this action, while giving the Applicant 20 days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated July 25, 2016, serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant mailed a document titled "Applicant's Objection to Conditional Order of Dismissal" on August 12, 2016, in which Applicant argues against the Conditional Order of Dismissal. First, upon review of the public index of the Horry County Clerk of Court, it appears

that Applicant failed to properly file his objections as directed by this Court in its Conditional Order of Dismissal. That order plainly required that "Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel[.]" Applicant's objections are therefore not properly before the Court for consideration.¹

Even if they were properly submitted to this Court, Applicant's objections do not provide any reason for the Conditional Order of Dismissal to not become final. The primary thrust of Applicant's objection is that prior PCR counsel failed "to ensure that all grounds for relief [were] included in the first PCR application[.]" As stated in the Conditional Order of Dismissal, Applicant's contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Applicant correctly notes that he did not appeal from the order denying his prior PCR application, but alleges no deficiency on the part of prior PCR counsel such that he was improperly denied his right to an appeal. In any event, Applicant had *decades* to bring any claims regarding his 1994 conviction and subsequent proceedings, including those conceivably pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), and failed to do so.

The Court finds that Applicant's assertion that his allegations constitute newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been

¹ The objections were made known to the Court by Respondent.

ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). A defendant requesting a new trial based on after-discovered evidence after a guilty plea must show:

(1) The newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the 'interest of justice' requires the applicant's guilty plea to be vacated.

Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014).

Applicant has failed to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, or could have been, discovered before his trial. 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. Accordingly, the Court shall dismiss this matter with prejudice.


Applicant also clarifies that he "only asked/requested the Court to vacate his prior conviction," and that the desire for re-sentencing on his later conviction is merely his long-term motive and goal. The Court finds this clarification obviates its reasoning for dismissal set forth in section III.A. of the Conditional Order of Dismissal and therefore that portion of the order is **WITHDRAWN**.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, excepting those found in section III.A., the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within 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 5th day of June, 2017.



BENJAMIN H. CULBERTSON
Chief Administrative Judge
Fifteenth Judicial Circuit

Conway, South Carolina.

State of South Carolina } S.C. Supreme Court
County of Henry } # 2015-CF-26-07171

Patrick P. Bryant)
S.C.D.C. No. 215212)
Applicant,) Applicant's 243(E)
) Explanation
v.)
State of South Carolina)
Respondent)

This matter comes before this Honorable Court by way of an application for post-conviction relief filed September 28, 2015 and amended on December 7, 2015. Respondent made its return on or about May 6, 2016 requesting the PCR application be summarily dismissed as not cognizable under the Uniform Post-Conviction Relief Act, as untimely, as barred by laches, successive and barred by statute of limitation. The applicant contended that the effects of his prior conviction that he is challenging still persist.

The applicant have responded to all of the Respondent's pleadings to include the conditional Order of Dismissal from May 31, 2016. It would be a miscarriage of justice not to remand this case back to the lower court for a PCR hearing and/or summary judgment hearing.

Bryant was convicted on July 14, 1994 of Armed Robbery in the Horry County General Sessions Court. Michael Edward Suggs, esq. represented Applicant on the charge. The Honorable David H. Moring, Sr. sentenced Applicant to a term of twenty years confinement. Applicant filed ~~not~~ notice of appeal. ~~The right to seek appellate review of the denial of PCR is expressly~~ authorized by state law, S.C. Code Ann. § 17-27-100 (1985).

Because applicant is entitled to the assistance of appellate counsel on PCR, this Court must craft a remedy to correct the unfairness which has occurred, while the constitutional right to counsel does not extend to discretionary appeals or collateral attack, we have ruled that Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, shall continue to apply in PCR matters. Johnson v. State, 294 S.C. 310, 364 S.E. 2d 201 (1988); compare Pennsylvania v. Finely, 481 U.S. 551, 107 S.Ct. 1990.

This Court should remand this case for an evidentiary hearing on the fact whether petitioner/applicant requested and was denied an opportunity to seek appellate review.

See Austin v. State 305 S.C. 453,
409 S.E. 2d 395

In the current PCR application, the applicant alleged that results of his prior conviction still persist, even though sentence has been fully served, applicant is entitled to an evidentiary hearing to determine whether he has been prejudiced.

In United States v. Abegam, 346 U.S. 502, 512-513, 74 S.Ct. 247 the United States Supreme Court held:

Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected. As the power to remedy an invalid sentence exist, applicant is entitled to an opportunity to attempt to show that his conviction was invalid. See McDuffie v. State, 277 S.E. 2d 595

This PCR application should not be dismissed for failure to state a claim. The applicant have alleged in his PCR application that his conviction and sentence was in violation of his 5th, 6th and 14th Amendment violation See pg#3 number 2 of the conditional order of dismissal.

Applicant contended that his conviction and sentence was in violation of the United States Constitution and the S. C. Constitution and laws of this state.

The applicant is asserting a 5th, 6th and 14th amendment violation which sets forth the prima facie violation of my constitutional rights.

Grounds are constitutional dimension. The fundamental defects alleged are standards that require establishment of a complete miscarriage of justice and an omission inconsistent with the rudimentary demand of fair procedure.

The following acts and omission by counsel constituted ineffective assistance of counsel.

It would be a denial of due process not to give the herein applicant an evidentiary hearing on his Federal constitutional claims.

The applicant's 1994 armed robbery conviction is being used to adversely affect his current sentence to wit, enhance his present sentence as in the case at bar, reduce prison privileges, and reduce his possibility of parole. Applicant is entitled to an opportunity to attempt to show that his conviction for armed robbery was invalid for the following reasons:

- ① The State never served the applicant written notice of its intent to seek LWOP in this case.
- ② Applicant's prior conviction was obtained before enactment of the statute.
- ③ Applicant was not advised of the possibility of LWOP at the time of his prior conviction.
- ④ The discretion given the Solicitor's office by §17-25-45 regarding service of LWOP is arbitrary and capricious.
- ⑤ Due Process violation of the Equal Protection clause.

In Addition To

on September 10, 2013 an inmate that's adequately trained in the law that works as a law library clerk at Perry Corr. Institution discovered a due process violation after reading all of my legal material which have not been previously presented that requires vacation of my conviction and sentence.

Shortly after making this Discovery, applicant now file this PCR application pursuant to the "Discovery rule" in accordance S.C. Code Ann. § 17-27-45(C); *Maday v. State*, 401 S.E.3d 631, 737 S.E.2d 623 (S.C. 2013); see also *Coates v. State*, 575 S.E.2d 557 (S.C. 2003). Therefore, this PCR application is timely filed and a evidentiary hearing should be held with the appointment of counsel to assist the applicant in this matter because genuine issue of material fact exist.

Applicant avers he has demonstrated sufficient reason why his claims were not included in his first PCR application. Based upon this factual dispute, a hearing is necessary to resolve these critical issues.

However, the court suggest dismissing the instant application as successive. Applicant would submit the basis of instant application is premised on counsel's erroneous advice to enter a plea of guilty. Applicant would submit he has never had his one full bite of the apple due to ineffective assistance of PCR counsel in that regards. While ineffective assistance of PCR counsel is not a ground to file a second PCR application when PCR counsel in the first initial review collateral proceeding failed

to comply with the post-conviction relief mandates 71.1 S.C. Rules of Civil procedure

This court correctly pointed out that his issues could have been raised in the prior application, however, state statutory PCR counsel failed to ensure all available grounds for relief were included in the original application, thus ensuring that [all] available grounds for relief be raised in the initial application. Thus resulting in an inadequate corrective process and any default should be imputed to the state.

Applicant asserts the instant application should not be dismissed as successive, but rather an evidentiary hearing should be convened to determine whether or not applicant has a statutory created liberty interest in South Carolina PCR actions, Rule 71.1(d), S.C.R.P. Appointment of counsel. It is the state who bears the burden of a procedural default on any claims that should have been raised in the original application and presented to the PCR court for consideration. S.C.R.P. states:

(A) Appointment of counsel for hearing. If after the state has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent. Counsel shall be given reasonable time to confer with the applicant. Counsel shall ensure that all

grounds for relief are included in the application and shall amend the application if necessary.

The word shall is considered mandatory, see S.C. Police Officers Retirement Sys. v. Spartanburg, 301 S.C. 188, 391 S.E. 2d 39 (1990) (shall is considered mandatory under the principles of statutory interpretation); S.C. Dept of Hwy & Public Trans. v. Dickinson, 258 S.C. 189, 191, 391 S.E. 2d 135 ordinarily the use of the word shall in a statute means that the action referred to is mandatory.

The duty is on the applicant to show a duty of care was owed to him, Rayfield v. SCD, 397 S.C. 95, 105-100, 376 S.E. 2d 910, 916 (Ct. App 1988) cert. denied 398 S.C. 201, 379 S.E. 2d 133 (1987) An affirmative legal duty may be created by a statute, contract relationship, status, property interest, or some other special circumstance, Arthur v. Aiken County, 525 S.E. 2d 542, 547.

An affirmative legal duty here is created by the S.C. Const. Art 1, § 3; S.C. Code Ann. § 17-27-60 (2003) and Rule 71.1(d) SCRPC.

The S.C. provisions here create a liberty interest in the 6th Amend. right to effective assistance of counsel, via the 14th Amendment.

Applicant had a legitimate claim of entitlement to counsel as created and determined by reference to S.C. state law. These laws make it clear that the appointment of counsel in the first-initial-review collateral proceeding (PCR) is not discretionary.

It was appointed PCR counsel's professional obligation to ensure that all available grounds for relief were raised in at the first-initial-review collateral proceeding (PCR), anything short of that is scrutinized under § 17-27-90, and thus should be imputed to the state. Applicant had the burden of proof at the initial PCR hearing, Rule 71.1(e) SCRPC. This encompasses and securing the right under Rule 71.1(d) that appointed PCR counsel shall ensure all available grounds will be raised in the first PCR application. Counsel is appointed just for this reason and thus has a duty to represent the client without the constitutional duty of effective assistance. In this regard, the PCR procedure itself is ineffective and runs afoul of the United States Supreme Court's 14th Amendment directive that the states employ an adequate PCR remedy to

present federal const. claims, See Case v. Nebraska,
381 U.S. 336 (1965)

The U.S. Supreme Court incorporates into the
14th Amendment, any guarantee which is
fundamental in the context of the (judicial)
process maintained by the American States,
Duncan v. Louisiana, 391 U.S. 145.

To not apply the 6th Amendment, where it is
a fundamental guarantee constitutionally
and statutorily created and maintained by the
state of S.C. for first-time post-conviction
applicants, especially in the context of
PCR being the "first appeal, following a guilty
plea, applies to the state of South Carolina, a
watered-down, subjective version of those
individuals' guarantees of the Bill of Rights.

The failure of applicant's first PCR applicant
to ensure that all grounds for relief are
included in the first PCR application is plainly
ineffective assistance of counsel, Washington v. State
324 S.C. 232, 478 S.E. 2d 833, 835 (S.C. 1996) (ineffective
assistance of PCR counsel).

All PCR applicants are entitled to a
"full and fair" opportunity to present claims
in one PCR application. Successive applications

and appeal are generally disfavored because they allow an applicant to receive "more than one bite of the apple". However, applicant submits he was denied his "first bite at the apple" due to ineffective assistance in the first initial review (PCR) proceeding.

Reason why the claims were not raised in the first P.C.R.

Applicant submits that the state's PCR process is inadequate.

In inadequate corrective processes arise where the state procedure [P.C.R. Actions, Rule 11.1(d), SCRCP] does not afford indigent prisoners "competent" appointed PCR counsel; (2) the post conviction remedy does not ensure that appointed PCR counsel will ensure that all grounds available are included in the first application; and (3) The rules of PCR procedure are insufficiently hospitable to the adequate development and litigation of federal constitutional claims. See *Cole v. Nebraska*, 381 U.S. 330-47 (1965)

In case the U.S. Supreme Court granted certiorari precisely in order to decide whether the constitution requires state's to provide a PCR remedy that offers an adequate

corrective process for hearing of federal constitutional guarantees, and if so, what constitutes an adequate process.

South Carolina Rules of Post-Conviction Relief Procedures, Rule 21.1(d) may be construed as inadequate where it deprives a petitioner of a meaningful access to state post-conviction. The United States Supreme Court has held that prisoners have a constitutional right to a meaningful access to state post-conviction remedies and access to these remedies should not hinge upon the "failures" of state appointed PCR counsel to fail to insure that all grounds for relief be included in the original and first PCR application (emphasis supplied).

In *Lee v. Kemna*, 534 U.S. 362, 394 (2002), the Court held that there are exceptional cases in which exorbitant application of a generally sound [state procedural] Rule renders the state ground inadequate to stop consideration of a federal question. In this case, statutorily state appointed PCR counsel fails to comply with the procedural rules and renders the unwary petitioner from presenting viable federal constitutional claims.

The applicant in the entitled case have stated a claim under the PCR statute that his sentence and conviction was in violation of the Constitution of the U.S., S.C. Const. and laws of this state. The applicant request through the PCR procedure to vacate his prior conviction of armed robbery because of a violation of due process of law. The armed robbery conviction is the predicate to his sentence of LWOP, therefore after the armed robbery conviction is vacated, resentencing should take place because it cannot be used as an enhancement tool. This relief is available in the post-conviction relief action. The applicant have not asked the court to modify his sentence. He have only asked/requested the court to vacate his prior conviction. When and until this happen, then the distinct conviction not challenged here will result in re-sentencing.

The applicant stated a claim with a challenge to his indictment. Subject matter jurisdiction may be raised at any time. The applicant have not raised a jurisdiction confusion as the Respondent state, so therefore applicant object to any argument that the Respondent try and use on the subject. The applicant object to a failure to state a claim collateral consequences. Applicant have every right to challenge a ^{prior} conviction if the

effects of it still persist even if the sentence have been completed. Rule 12(b)(6) SCRCP does not apply.

Statute of Limitations does not apply to this case as well as successive application. See "Discovery Rule" argument.

Watches does not apply because the applicant counsel will supply the court with the necessary documents and records to ensure that his pleadings will not affect the availability of evidence to review applicant's claims.

Res Judicata does not apply to case. See Rule 71.1(d).

The applicant have provided specific reasons, factual and legal why his PCR application should not be dismissed in it's entirety.

The applicant received this Conditional Order of Dismissal on May 17, 2016 and was granted (30) days from the date of service of this Order upon him to show why this Order should not become final.

The applicant request a evidentiary hearing and appointment of counsel to resolve these claims

Patrick Bryant

state of South Carolina } S.C. Supreme Court
county of Horry } 2015-CP-26-02171

Patrick P. Bryant #515212 }
Applicant } certificate of Service
v. }
State of South Carolina }
Respondent }

I, Patrick P. Bryant #515212 certify that I have served the Respondents with a copy of my 243(C) Explanation by placing a copy in the Perry Corr. mailroom hands for mailing, postage prepaid, addressed as follows:

Johnny E. Jones Jr.,
Attn. General Office
P.O. Box 11549
Columbia, S.C. 29211

I, Patrick P. Bryant #515212 certify and verify, under the penalty of perjury that the foregoing is true and correct.

Patrick Bryant