

Honorable Shearouse,

This is a hand written copy of the Notice of Appeal submitted by me in regards to the PCN case NO: 2013-CP-38-0185 received on August 9, 2017.

Everyone (State, PCN court) has been served a copy of the Notice of Appeal. Could you please provide me the case number?

In advance, thank-you and I look forward to your Acknowledgement of receiving my Notice of Appeal.

In kindest regards,

Frederick L. Howell, 316890

F. L. Howell

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SEP 01 2017

S.C. SUPREME COURT

RECEIVED

SEP 01 2017

**OFFICE OF
DISCIPLINARY COUNSEL**

State of South Carolina
County of Orangeburg

Frederick L. Howell, 310890
Plaintiff

v.

State of South Carolina
Defendant

In the Court of Common Pleas
First Judicial Circuit
Case No: 2013-CP-38-0185

Appeal the PCN Court's Final
Order and motion to Restrict
Future Filings

I, Frederick L. Howell, am appealing the PCN Court's Final
Order of dismissal and the motion to Restrict Future Filings
received on August 9, 2017 to the Supreme Court of
South Carolina. I am placing the PCN Court and the State
on notice of such as well as provided the Supreme
Court a copy of this Notice of Appeal from Case
No: 2013-CP-38-0185.

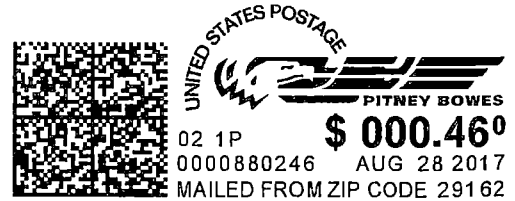
Respectfully Submitted,
Frederick L. Howell
X [Signature]

RECEIVED

SEP 01 2017

S.C. SUPREME COURT

Frederick L. Howell, #316890
Turberville C.I. - TA #126
1576 Clarence Coker Hwy
Turberville, S.C.
29162



SCDC

SEP 18 2017

MAIL ROOM

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AUG 28 2017

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29211-215959

Supreme Court
Clerk of Court
c/o Daniel Sheehouse
P.O. Box 12159
Columbia, S.C.
29221



STATE OF SOUTH CAROLINA)

COUNTY OF ORANGEBURG)

FREDERICK L. HOWELL, #310890)

Plaintiff,)

vs.)

STATE OF SOUTH CAROLINA)

Defendant.)

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

CASE NO: 2013-CP-38-0185

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

FILED FOR RECORD
WINNIE B. CLARK
CLERK OF COURT
ORANGEBURG, SC
AUG - 4 A 11:41

Plaintiff's Attorney:
Frederick L. Howell, #310890 (pro se)
Address: Turbeville Correctional Institution
P.O. Box 252
Turbeville, SC 29162
Phone: _____ Fax _____
E-mail: _____ Other: _____

Defendant's Attorney:
Julie A. Coleman, Bar No. _____
Address:
PO Box 11549
Columbia, SC 29211
Phone: 803.734.3737 Fax 803.734.4113
E-mail: _____ Other: _____

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☒ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: _____

Estimated Time Needed: _____

Court Reporter Needed: ☐ YES / ☒ NO

SECTION II: Motion/Order Type

☐ Written motion attached

☒ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

July 3, 2017

Date submitted

SECTION III: Motion Fee

☐ PAID - AMOUNT: \$ _____

☒ EXEMPT:

(check reason)

☐ Rule to Show Cause in Child or Spousal Support

☐ Domestic Abuse or Abuse and Neglect

☐ Indigent Status ☐ State Agency v. Indigent Party

☐ Sexually Violent Predator Act ☒ Post-Conviction Relief

☐ Motion for Stay in Bankruptcy

☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)

☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: _____

☐ Other: _____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.

☐ Other: _____

JUDGE CODE _____

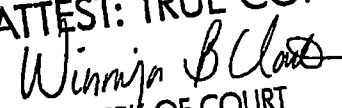
Date: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: \$ _____

☐ CONTESTED - AMOUNT DUE: \$ _____

ATTEST: TRUE COPY

CLERK OF COURT
ORANGEBURG COUNTY, SC

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL CIRCUIT

Frederick L. Howell, #310890

2013-CP-38-185

Applicant,

FINAL ORDER OF DISMISSAL

V.

State of South Carolina,

Respondent.

FILED FOR RECORD
WINIFRED B. CLARK
2017 AUG -4 A 11:
CLERK OF COURT
ORANGEBURG, SC

This matter comes before the Court by way of an application for post-conviction relief ("PCR") filed November 3, 2015. Respondent made its return on or about August 16, 2016, requesting the application be summarily dismissed based upon the expiration of the statute of limitations, successiveness, laches, res judicata, and failure to state a claim for post-conviction relief.

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 March 13, 2017 and filed March 20, 2017, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached herewith is a certificate of service, showing that Applicant was served this Conditional Order of Dismissal on April 10, 2017.

On April 28, 2017, Applicant filed a document titled "Opposition to Conditional Order of Dismissal." In the objection, Applicant alleges that his application is timely because the ground of ineffective assistance of PCR counsel was not available until February 12, 2013, when his second PCR action was remitted from the Supreme Court. This Court finds that this contention is without merit. Ineffective assistance of PCR counsel is not a cognizable claim for post-

Page 1 of 2

is not a cognizable claim for

ATTEST: TRUE COPY

Winnifred B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

conviction relief. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013) (the question of whether ineffective assistance during a collateral proceeding is not applicable to post-conviction relief actions in South Carolina); Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016) (reasserting the holding in Kelly that a petitioner does not have the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel). This rationale was used in the dismissal of Applicant's previous PCR application and this Court now dismisses the current allegation under the same rationale and res judicata. Accordingly, this Court finds that Applicant has failed to provide sufficient reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's Conditional Order of Dismissal, the PCR 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 days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 227, SCACR., for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 21st day of July, 2017.



EDGAR W. DICKSON
Chief Administrative Judge
First Judicial Circuit
Orangeburg County

Orangeburg, South Carolina.



RECEIVED
JUL 19 2017

ALAN WILSON
ATTORNEY GENERAL

July 3, 2017

The Honorable Edgar W. Dickson
Presiding Judge
P.O. Box 1949
Orangeburg, SC 29116-1949

FILED FOR RECORD
WINNIE B. CLARK
2017 AUG -4 A 11:41
CLERK OF COURT
ORANGEBURG, SC

Re: Frederick L. Howell, #310890 v. State of South Carolina
2013-CP-38-0185

Dear Judge Dickson:

Enclosed please find the original proposed **Final Order of Dismissal** in the above-captioned case. For your convenience, I am enclosing a copy of the signed and served Conditional Order of Dismissal for your review.

If this Order meets your approval, please sign and forward to the Orangeburg Clerk's office in the enclosed addressed envelope and have them serve the orders on all parties. If you have any questions, please feel free to contact me.

Sincerely,

Julie A. Coleman
Assistant Attorney General

JAC/dgr
Enclosures

cc: Frederick L. Howell, #310890

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Frederick L. Howell,
S.C.D.C. No. 310890

v.

State of South Carolina

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIRST JUDICIAL CIRCUIT

) 2013-CP-38-185

) **CONDITIONAL ORDER OF DISMISSAL**

FILED FOR RECORD
WILLIAM B. CLARK
2015 MAR 20 P 1:35
CLERK OF COURT
ORANGEBURG, SC

This matter comes before the court by way of an application for post-conviction relief filed by Frederick L. Howell (Applicant) on January 2, 2015¹ ("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 Orangeburg County Clerk of Court. On April 7, 2005, the Orangeburg County Sheriff's Department sought and obtained an arrest warrant against Applicant for the crime of Burglary, First Degree (H-660558). Applicant was thereafter indicted by the Orangeburg County Grand Jury during the June 13, 2005 term for the same (2005-GS-38-710). Richard H. Gustafson, Esquire represented Applicant on the charges. On August 8, 2005, Applicant entered a plea of guilty to the crime as indicted. The Honorable James C. Williams Jr. sentenced Applicant to a term of twenty-two (22) years confinement.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, Esquire. By opinion decided March 6, 2007, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Howell, Op. No. 2007-UP-102 (Ct. App. Filed March 6, 2007). Applicant petitioned the Supreme Court of South Carolina for a writ of Habeas Corpus, but

¹ Due to clerical error, the assigned case number and stamped file date are not reflective of each other.

ultimately withdrew that petition and his appeal was dismissed by Order dated July 19, 2007. The Remittitur issued on July 24, 2007.

2007-CP-38-690

Applicant filed his first Application for Post-Conviction Relief on May 31, 2007 (2007-CP-38-690), alleging:

1. Ineffective assistance of counsel
 - a. "Failure to challenge the burglary first indictment."
 - b. "Defense counsel failed to procure alibi witnesses."
 - c. "Failed to adequately investigate and introduce evidence."
2. Subject-matter jurisdiction
 - a. "Failure to challenge the burglary first indictment."

Respondent made its return on April 16, 2008. An evidentiary hearing into the matter was convened on June 8, 2009 before the Honorable Diane S. Goodstein. Applicant was present at the hearing and was represented by Clarissa W. Joyner, Esquire. Mary S. Williams, Esquire, of the South Carolina Attorney General's Office, represented Respondent. Judge Goodstein denied and dismissed that application for PCR in an order dated December 17, 2009. Applicant did not appeal.

2010-CP-38-147

Applicant filed his second Application for Post-Conviction Relief on January 28, 2010 (2010-CP-38-147), alleging:

1. Ineffective assistance of PCR counsel
2. Newly discovered evidence (fingerprint analysis)
3. Fraud upon the court (falsified and fabricated evidence)

Respondent made its Return and Motion to Dismiss, arguing the application was successive, barred by the statute of limitations, and that the second and third grounds failed to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. The

matter was thereafter dismissed by the Honorable Edgar W. Dickson by Order dated August 13, 2011.

Applicant filed a timely notice of appeal. On January 25, 2013, the Supreme Court dismissed Applicant's appeal for failure to satisfy the requirements of Rule 243(c), SCACR. The Remittitur was returned on February 12, 2013.

4:12-2808-JFA-TER

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on September 28, 2012 (C.A. No. 4:12-2808-JFA-TER). In his Petition, Applicant set forth the following grounds for relief:

1. "Defense counsel and solicitor falsified and fabricated all of the evidence used to obtain a guilty plea (counsel ineffective) . . . and guilty plea knowingly, voluntarily and intelligently made."
2. "Denial of Effective Assistance of Counsel (PCR); Failure to file a 59(e) motion and appeal (Ineffective)."
3. "PCR Judge erred on Rule 2nd PCR Application is successive, time barred and do not support a cognizable claim."
4. "Actual innocence [sic], miscarriage of justice."

Respondent filed its Return and Motion for Summary Judgment on April 15, 2013. The Honorable Thomas E. Rogers, United States Magistrate Judge, issued on October 28, 2013 a Report and Recommendation that Respondent's motion for summary judgment be granted. Howell v. McFadden, 4:12-2808-JFA-TER, 2013 WL 6909176 (D.S.C. 2013). On January 2, 2014, the Honorable Joseph F. Anderson, United States District Judge, requested a supplemental Report & Recommendation from Magistrate Judge Rogers to address the then-recent holding in Martinez v. Ryan, 132 S.Ct. 1309 (2012). Howell v. McFadden, 4:12-2808-JFA-TER, 2014 WL 28678 (D.S.C. 2014). The Magistrate issued that "Supplemental Report & Recommendation" on January 27, 2014, again recommending that Respondent's motion for summary judgment be granted. Howell v. McFadden, 4:12-28-8-JFA-TER, 2014 WL 791504 (D.S.C. 2014). Judge

Anderson denied Applicant's Petition on February 24, 2014 and accepted the Report and Recommendation for summary judgment. Howell v. McFadden, 4:12-2808-JFA-TER, 2014 WL 791506 (D.S.C. 2014). Applicant did not appeal.

Applicant subsequently filed a motion for relief pursuant to Fed.R.Civ.P. Rule 60(b)(1)(6) on July 28, 2014. Judge Anderson denied that motion by Order dated December 15, 2014. Howell v. Attorney General of South Carolina, 4:12-2808-JFA-TER, 2014 WL 7146973 (D.S.C. 2014).

2013-CP-38-183

Applicant filed his third Application for Post-Conviction Relief on February 3, 2013 (2013-CP-38-183), alleging:

1. "PCR counsel failed to file and serve notice of appeal"
2. "Appeal was not knowingly and intelligently waived"
3. "Ineffective assistance of PCR counsel"

Applicant was represented by Jonathan Waller, Esquire.² Respondent made its Return and Motion to Dismiss, arguing the application was successive, barred by the statute of limitations, barred by the doctrine of laches, and that the claim under Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) was meritless.³ The matter was thereafter dismissed by the Honorable Edgar W. Dickson by Order dated February 3, 2014.

Applicant filed a timely notice of appeal. On May 28, 2014, the Supreme Court dismissed Applicant's appeal for failure to satisfy the requirements of Rule 243(c), SCACR. The Remittitur was returned on June 13, 2014.

² Counsel was appointed by the Orangeburg Clerk of Court in violation of South Carolina Administrative Order Number 2008-10-06-01.

³ "Applicant has failed to establish a sufficient reason why he could not have raised his current allegation regarding a lack of appeal of the denial of his first application for post-conviction relief in his second application; therefore, he has failed to meet the burden imposed upon him." Furthermore, Applicant appealed from the ruling of the PCR court in his second application for post-conviction relief, though it did not satisfy the requirements of the South Carolina Appellate Court Rules.

2014-001864

Applicant filed a Petition for writ of Habeas Corpus in the South Carolina Supreme Court on August 22, 2014. The Supreme Court dismissed that petition on September 25, 2014 pursuant to Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) and, noting “the repetitive and frivolous nature of petitioner’s prior filings”, directed the Clerk of Court to restrict Applicant’s future filings pursuant to In re Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

14-432

Applicant filed a motion to authorize a successive application in the United States Fourth Circuit Court of Appeals on September 22, 2014. The Court of Appeals denied that motion by Order filed October 6, 2014.

4:14-3869-RMG-TER

Applicant filed a second *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on December 16, 2014 (C.A. No. 4:14-3869-RMG-TER). The Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued on December 16, 2014 a Report and Recommendation that the petition be dismissed as successive without requiring Respondent to file a return. The Honorable Richard Mark Gergel, United States District Judge, denied Applicant’s Petition on January 16, 2015 and adopted the Report and Recommendation in full. Applicant did not appeal.

15-309

Applicant filed a second motion to authorize a successive application in the United States Fourth Circuit Court of Appeals on September 28, 2015. The Court of Appeals denied that motion by Order filed October 21, 2015.

4:15-2561-JFA-TER

Applicant filed on June 26, 2015 the first of two *pro se* civil actions against Respondent in federal court pursuant to 42 U.S.C. § 1983,⁴ alleging a violation of his constitutional rights. The Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued on August 18, 2015 a Report and Recommendation that the complaint be dismissed in full, without issuance and service of process. The Honorable Joseph F. Anderson Jr., United States District Judge, dismissed Applicant's complaint on November 13, 2015 and adopted the Report and Recommendation in full. Howell v. Wilson, 3:15-2561-JFA-TER, 2015 WL 7272185 (D.S.C. 2015).

Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals affirmed the ruling of the District Court on June 28, 2016. Howell v. Wilson, No. 16-6111, 2016 WL 3524789 (4th Cir. 2016). The mandate issued on July 20, 2016.

4:15-2701-JFA-TER

Applicant filed on July 9, 2015 his second *pro se* civil action against Respondent in federal court pursuant to 42 U.S.C. § 1983, alleging a violation of his constitutional rights. The Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued on October 29, 2015 a Report and Recommendation that the complaint be dismissed in full, with prejudice, without issuance and service of process, and with designation as a "strike" for the purposes of the "three strikes" rule of 28 U.S.C. § 1915(g). Howell v. Wilson, 4:15-2701-JFA-TER, 2015 WL 9311664 (D.S.C. 2015). The Honorable Joseph F. Anderson, Jr., United States District Judge, dismissed Applicant's complaint on December 21, 2015, held Applicant's complaint to be

⁴ Though Applicant claimed to bring the action under various Federal Rules of Civil Procedure, the District Court found that the substance of his allegations was that of a § 1983 claim and construed it as such over Applicant's objections. This matter, as well as the next, is relevant as Applicant was seeking, in part, "declaratory/injunctive relief to file a successive and untimely post-conviction action" and was "in effect, seeking release from prison." Howell v. Wilson, 4:15-2561-JFA-TER, 10 (D.S.C. Order dated August 18, 2015) (No Westlaw cite available).

frivolous for the purposes of 28 U.S.C. § 1915(g), and adopted the Report and Recommendation in full. Howell v. Wilson, 4:15-2701-JFA-TER, 2015 WL 9412534 (D.S.C. 2015).

Filing of July 25, 2016

Applicant filed on July 25, 2016 a "Petition for Declaratory Judgment" in the South Carolina Supreme Court again challenging the procedural bars by which his previous actions had been dismissed. The Clerk of Court replied the same day that no action would be taken on the filing as Applicant had failed to comply with the Maxton order issued against him on September 24, 2014.

II.

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

1. "PCR Counsel Failed to File and Serve Notice of Appeal"
2. "Appeal was not Knowingly and Intelligently waived"
3. "Ineffective Assistance of PCR Counsel"

Applicant supports his above allegations with a five (5) page handwritten "Memorandum in Support of PCR Application." In a subsequent application clocked January 2, 2015, merged and interpreted as an amendment by Order of this Court, Applicant further alleges:

1. "Statute 17-27-20(6) *cognizable claim*"
 - a. The eleven (11) page memorandum thereafter attached spends the majority of its language arguing against the numerous procedural bars evident to Applicant, but ultimately appears to allege ineffective assistance of PCR counsel.

Applicant requests relief as follows:

- "A [sic] Evidentiary hearing based upon statute 17-27-20 as explained in the memorandum supporting the instant application.

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

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure to State a Claim

The Court finds 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 writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20.

Ineffective assistance of PCR counsel is not a claim cognizable under the act. To the extent that Applicant alleges ineffective assistance of PCR counsel on grounds other than his Austin claims, Applicant is not collaterally attacking his guilty plea or sentence, but rather seeks to collaterally attack a previous collateral attack. Applicant's contention that such a ground is impliedly created by S.C. Code Ann. § 17-27-90 is meritless, as that section does not pertain to *what* may be raised, but *how* valid grounds must be raised.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court shall dismiss the Application for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

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.”

Applicant contends that he has one year from the remittitur from his most recent PCR action, which issued June 13, 2014.⁵ Applicant’s argument is contrary to the established law of this Court: “The time limitation in § 17-27-45(A) provides that, where a defendant appeals his conviction (as Petitioner did), the one-year period begins the date the remittitur is sent by the

⁵ Applicant erroneously offers May 28, 2014, which is the date of the ruling dismissing his appeal.

appellate court—not the date of conviction.” McCoy v. State, 401 S.C. 363, 368-69, 737 S.E.2d 623, 626 (2013). The Court’s intention is very clearly that the statute of limitations runs from the remittitur from the appeal of *the underlying conviction*. To conclude otherwise would permit an Applicant to reset his statute of limitations so long as he diligently filed successive applications and then appealed the inevitable dismissal, thereby defeating the purpose of the statute of limitations. As such, Applicant’s contention is without merit.

The Applicant pled guilty on August 8, 2005 and the remittitur from direct appeals issued on July 24, 2007. The Application was therefore due Friday, July 25, 2008. The current application was filed January 2, 2015 – well after the one-year statutory filing period expired. Therefore, the Application shall be summarily dismissed as barred by the statute of limitations.

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.” Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). “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.” Id.

Applicant seeks post-conviction relief nearly a decade after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant ~~from~~ ^{from *AB*} seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant’s claims. McElrath at 283, 277 S.E.2d at 890; Honeycutt at 41; Whitehead at 220, 574 S.E.2d at 202. 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, e.g., Bray at 140, 620 S.E.2d at 745 (finding laches applied seven years after proceeding in question); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (record reconstruction undoubtedly futile eleven years after proceeding in question). Therefore, the Application shall be summarily dismissed as barred by the doctrine of laches.

Successive

The Court further 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.

Nonetheless, Applicant strenuously argues that language in S.C. Code Ann. § 17-27-90 provides an exception warranting successive application for ineffective assistance of PCR counsel, namely: "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." (emphasis added). Applicant then frames his particular allegation of ineffective assistance of post-conviction relief counsel as comparable to the facts of Case v. State, 277 S.C. 474, 289 S.E.2d 413 (1982). While Applicant's linguistic argument is a particularly clever approach, Aice remains dispositive of his claims—the number of conceivable arguments that can be raised in a PCR is "limited only by the imagination and creativity of skilled attorneys," and as such the allegation that his first PCR counsel did not raise this or that argument is not a sufficient reason for successive action. Aice at 451, 409 S.E.2d at 394. In any event, this not merely Applicant's second application, as was the application in Case—it is his *fourth*, and his allegations of ineffective assistance of PCR have already been considered by the Court twice.

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.

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

Res Judicata

The Court finds the Application is similarly 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 actions. Applicant's ineffective assistance of PCR counsel, despite not being a cognizable claim, was raised in 2010-CP-38-147, 2013-CP-38-183, *and* in his federal habeas corpus actions. Indeed, the Application is *identical* to that in 2013-CP-38-183. Applicant's Austin claims were adjudicated in 2013-CP-38-183 with the assistance of counsel. The finality of the previous Court rulings must be respected.

Therefore, the Application shall be summarily dismissed as barred by the doctrine of *res judicata*.

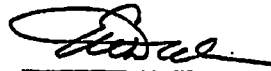
CONCLUSION

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 Orangeburg 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 Orangeburg 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.

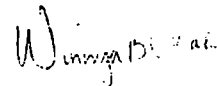
AND IT IS SO ORDERED this 13th day of March, 2017.



EDGAR W. DICKSON
Chief Administrative Judge
First Judicial Circuit

Orangeburg, South Carolina

ATTEST: TRUE COPY



CLERK OF COURT
ORANGEBURG COUNTY, SC