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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM CHARLESTON COUNTY

The Honorable Deadra L. Jefferson

Case No. 2015-CP-10-00420

Demetric Hardaway, 330891,

APPELLANT,

vs.

State of South Carolina,

RESPONDENT.

NOTICE OF APPEAL

I Certify that I am appealing the Final Order of the Honorable Deadra L. Jefferson dated August 1 2017 and received on August 9 2017.

This 22 Day of August 2017.

Demetric Hardaway, 330891
TCI SA-226
1578 Clarence Coker Hwy.
Turbeville SC 29162

STATE OF SOUTH CAROLINA

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Demetric Hardaway, 330891,

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vs.

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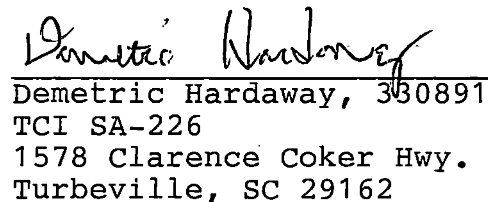
PROOF OF SERVICE

I Certify that I have served a copy of my Notice of Appeal on the Respondent's Counsel of Record: South Carolina Attorney General's Office , Alan Wilson, Attorney General, Post Office Box 11549, Columbia, SC 29221-1549 by depositing the same in the United States Mail, Postage Prepaid on this:

This 22 Day of August 2017.



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ADDRESSED TO:
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South Carolina Attorney General's Office
Alan Wilson, Attorney General
Post Office Box 11549
Columbia, SC 29211-1549

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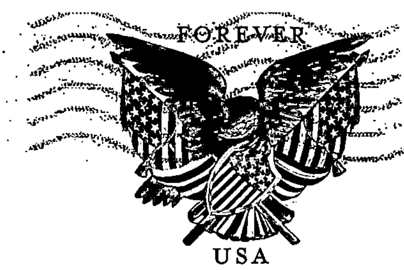

LEGAL MAIL

South Carolina Supreme Court
The Honorable Daniel E. Shearouse
Post Office Box 11330
Columbia, SC 29211

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29211-133030

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT

Demetric Hardaway, # 330891,) CASE NO.: 2015-CP-10-00420

Applicant,

v.

State of South Carolina,

Respondent.

FINAL ORDER OF DISMISSAL

FILED
2017 AUG -4 PM 3: 18
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed January 21, 2015. Respondent made its Return on April 10, 2017 requesting the application be summarily dismissed as untimely, successive, and 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 and filed on April 11, 2017, provisionally denying and dismissing this action while giving the Applicant twenty (20) days from the date of service of said Order 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 May 3, 2017, serving the above-mentioned Conditional Order of Dismissal on Applicant.

In a document captioned "Applicant's Objections to Conditional Order of Dismissal," Applicant makes the following objections:

1. "It was Counsel who failed to adequately apprise and the trial court likewise did not inform the Applicant of his right to appeal or file for a reconsideration of sentence after being sentenced to [twenty] (20) years, after an [eighteen] 18 year deal was on the table and was taken off when Applicant's paid counsel was replaced with appointed counsel."
2. The trial court "failed to give Applicant correct information as to the "strike" situation i.e. only if the Applicant were to be convicted or "strike," he would receive a life sentence.

3. "The discussion has been lost as it relates to "other" defenses in this case i.e. "mutual combat." The State has attempted to get the discussion steered toward "self-defense for obvious reasons."

Applicant also argues that his current application is not successive under White v. State, 208 S.E.2d.35, 263 S.C. 110 (1974) because he was denied a direct appeal. Applicant claims that he "prepared his application pro-se" and appointed counsel "did not substantially alter or change his issues." Applicant also claims that at the "time of his plea and possibly during his PCR hearing, [the] Charleston County Prosecutor and the Public Defender's Office was under investigation for . . . collusion and working relationship that was too close." Applicant alleges that his PCR Counsel also worked for the Charleston County Public Defender's Office, which was the same office that represented him during his plea.

To further his argument concerning successive filings, Applicant cites Matthew v. Evatt, 105 F.3d 907 (S.C. Ct. App. 1997).[1] Matthew v. Evatt allows for the filing of successive applications in three circumstances: "(1.) When there are procedural irregularities. (2.) When Counsel does not differ from that at trial. (3.) When an Applicant prepares his application without the benefit of counsel." Applicant believes that any of the above reasons stated should allow for the filing of a successive PCR action in his case.

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[1] In Matthews, the Court of Appeals refers to examples of circumstances in which the Supreme Court of South Carolina has "entertained successive applications in cases in which the successive claims potentially could have been raised in the first PCR application. However, the Court of Appeals pointed out that these cases involved "very rare procedural circumstances." For example, "the Supreme Court of South Carolina permitted a successive application where the applicant did not have counsel to assist in the preparation of his first PCR application. See Case v. State, 277 S.C. 474, 289 S.E.2d 413, 413-14 (1982) (court permitted a successive application where the applicant's first PCR application was filed without the benefit of counsel and was dismissed without a hearing). In another case, the Supreme Court of South Carolina permitted a successive application where the applicant did not have PCR counsel that differed from his trial counsel. See Carter v. State, 293 S.C. 528, 362 S.E.2d 20, 20-21 (1987) (court permitted a successive application where the applicant raised the issue of ineffective assistance of trial counsel in his successive application and trial counsel represented the applicant during his first PCR application). Finally, the Supreme Court of South Carolina permitted a successive application where the applicant, due to "so many procedural irregularities," did not have direct review of a claim he brought in his first and second PCR applications. Washington v. State, 324 S.C. 232, 478 S.E.2d 833, 834-35 (1996)." Matthews v. Evatt, 105 F.3d 907, 915 (4th Cir. 1997).

Applicant further attacks the Conditional Order of Dismissal for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP. Applicant argues that Respondent's "assertions" that he failed to state a claim are "without merit" because the "issue here is an issue of a denial of a direct appeal." Applicant alleges that counsel "failed to file notice of appeal considering the evidentiary fact that there was an 18 year deal on the table just prior to the plea and where the trial judge clearly gave the Applicant misleading or at the very least confusing information concerning the "two strike" "three strike."" Applicant also argues that "as it relates to the statute of limitations, the time should have been tolled due to his first appeal as a matter of right." Applicant asserts that after each action beginning with the appeal from his first PCR action, the statute of limitations should have been tolled. Applicant contends that under S.C. Code Ann. § 17-27-45(c)[2] his application was timely.

After filing his objections to this Court's Conditional Order of Dismissal, Applicant submitted a Rule 59(e) Motion to Amend the Final Order of Dismissal dated July 12, 2017 to the Court requesting that the Final Order be amended to include "all" issues presented to the Court. Attached to this Final Order and incorporated herein by reference is the proposed Final Order of Dismissal that was submitted to this Court for review and was likewise mailed to Applicant on July 5, 2016. Because this Court has not issued the Final Order of Dismissal, Applicant's motion is construed as an additional response to this Court's Conditional Order of Dismissal. In his motion, Applicant asserts that "all issues raised by Applicant's objections were either not addressed in their entirety or were not adequately addressed in the Final Order of Dismissal."

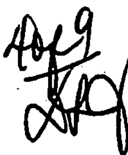
[2] "If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence."

Specifically, Applicant reasserts his claim that the Application was timely because the statute of limitations was tolled during the pendency of his Federal Habeas Corpus action and due to his discovery that the Charleston County Public Defender's Office was under investigation. Applicant argues that this allegation should be considered newly discovered evidence and thus reviewed under S.C. Code § 17-27-45(c) rather than § 17-27-45 (a). In support of his claim, Applicant cites Easterwood v. Champion, 213 F.3d 1321(10th Cir. 2000) (holding that one-year limitations period for filing successive habeas petition began to run when opinion on which claim was based became accessible in prison law library).

Applicant also asserts that the issues raised in his current application could not have been raised in his first application "unless Applicant had a crystal ball to know the future he could not have known about the investigation into the Charleston County Solicitor's Office and Public Defender's Office that any came to light after the first PCR and appeal." Similarly, Applicant argues that his claim regarding the plea offer of eighteen (18) years was not mentioned in the Final Order of Dismissal. Applicant asserts that because he was unable to continue to pay his private counsel, he was thereafter appointed a public defender. The Applicant then pled guilty and received a twenty year sentence instead of the eighteen years he was offered in the plea deal.

Applicant alleges that he is entitled to appellate review pursuant to White v. State [3] because he instructed counsel to file a Notice of Appeal and a Motion for Reconsideration but an appeal was never perfected. Applicant further argues that the Final Order of Dismissal should have mentioned the evidentiary fact that there was no "potential prejudice" in filing a Motion for Reconsideration of his sentences, and that trial counsel was instructed to so file. In support of his claim, Applicant cites State v. Higgenbottom, 344 S.C. 11, 542 S.E.2d 718 (2001) (holding that

[3] 263 S.C. 110, 208 S.E.2d 35 (1974).



the trial court's increase of defendant's sentence upon his motion for reconsideration violated due process).

Likewise, Applicant argues that the Final Order of Dismissal fails to discuss the possibility of Applicant pursuing the defense of self-defense under the "Castle Doctrine" or a defense of Mutual Combat at trial. Applicant contends that "there is reasonable probability that the jury would have found Applicant not guilty or could have found [him] guilty of involuntary manslaughter due to the circumstances of the case."

Statute of Limitations & Newly-Discovered Evidence

This Court holds that under S.C. Code Ann. § 17-25-45(c), Applicant's contention that his application was timely is meritless. Applicant asserts that the statute of limitation should have been tolled under S.C. Code Ann. § 17-25-45(c), after the appeal from his first PCR action. Applicant contends that under S.C. Code Ann. § 17-27-45(c) his application was timely. S.C. Code Ann. § 17-27-45(c) states: "[i]f the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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 ascertained by the exercise of reasonable diligence." This Court notes that the Applicant did not make claims of after-discovered evidence of material facts in his current application. Thus, the applicable statute is actually §17-27-45(a). This section states that "[a]n application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment or 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." Applicant pled guilty to the challenged offense subject of this application on September 25, 2008, and did not appeal. The present application was filed January 21, 2015, more

than five (5) years beyond the expiration of the statute of limitations. Accordingly, this post-conviction relief application is untimely.

With regards to Applicant' argument concerning newly discovered evidence, this Court finds Applicant has failed to show that the allegations concerning the discovery of the investigation involving the Charleston County Solicitor's Office and the Charleston County Public Defender's Office meets *any* of the requirements for a new trial based on newly-discovered evidence. "In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights." State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

> "(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. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions."

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). Accordingly, as none of the above situations is present in this case, Applicant's argument concerning newly discovered evidence fails.

Successive

This Court also holds that the Applicant's claim is indeed successive, despite his assertions to the contrary. Applicant argues that the instant post-conviction relief application is "in essence a direct appeal denial." However, Applicant knew or should have known that no direct appeal had

been filed at the time he filed his first post-conviction relief application in 2009. Applicant could have raised his current claim in the 2009 application or in his Federal Habeas action but failed to do so. In Graham v. State, 378 S.C. 1, 661 S.E.2d 337 (2008), the Supreme Court of South Carolina held that a PCR applicant was barred from making a claim under White v. State in a second PCR application when he could have done so in the first PCR application.

Furthermore, this Court notes that Applicant received an evidentiary hearing for his first post-conviction relief application. The evidentiary hearing into the matter was convened on March 3, 2011, before the Honorable R. Markley Dennis, Jr. Applicant was present at the hearing and represented by Laura E. Paris, Esquire. Applicant's trial counsel, Jason Todd Mikell, Esquire, did not represent him during his first PCR proceeding. On May 4, 2011, the post-conviction relief application was denied and dismissed with prejudice by the Honorable R. Markley Dennis. Applicant filed a timely notice of appeal. A petition for writ of certiorari was filed by Robert M. Dudek, Esquire on Applicant's behalf. Respondent filed its Return on or about February 28, 2012. The Supreme Court of South Carolina transferred jurisdiction over the case to the South Carolina Court of Appeals. On July 16, 2013, the South Carolina Court of Appeals denied Applicant's petition. Hardaway v. State, S.C. Ct. App. Order filed July 16, 2013. The Remittitur was issued on August 1, 2013.

Thus, this Court finds that Applicant's current allegations could have been raised in the prior proceedings based on Applicant's prior application for post-conviction relief. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. The current application is therefore successive.

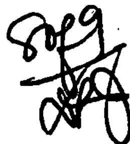
Res Judicata

This Court further finds that the doctrine of *res judicata* bars Applicant's claims in the current application. *Res judicata* prohibits "subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. Conway, 334 S.C. 30, 512 S.E.2d 106 (1999) (citation omitted). *Res judicata* also bars any issues that were raised or *could have been raised* in the former action. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)).

Applicant filed his first PCR action in 2009 in which he alleged that his Counsel was ineffective. He appealed that action and subsequently filed a federal habeas action. Applicant's current claims also allege ineffective assistance of counsel and arise from the same conviction. Therefore, Applicant has had a full opportunity to litigate all allegations regarding ineffective assistance of counsel. Applicant could have raised the instant claims in his prior proceedings. His failure to do so prevents him from raising them now. Accordingly, this Court summarily dismisses the application as barred by *res judicata*.

Potential Defenses

Finally, with regard to Applicant's claims concerning the potential to pursue a defense at trial, this Court finds that by virtue of entering a guilty plea the Applicant waived the right to jury trial and the right to present any evidence or defenses. "A 'guilty plea' is an admission or a confession of guilt, and is as conclusive as a verdict of a jury; it admits all material fact averments of the accusation, leaving no issue for the jury, except in those instances where the extent of the punishment is to be imposed or found by the jury." Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014). "The general rule is that a plea of guilty, voluntarily and understandingly made, constitutes a waiver of nonjurisdictional defects and defenses, including claims of violation of constitutional



rights prior to the plea." Rivers v. Strickland, 264 S.C. 121, 124, 213 S.E.2d 97, 98 (1975). "By entering a guilty plea, an accused waives the right to trial and the incidents thereof and the constitutional guarantees with respect to criminal prosecutions." Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014). Accordingly, by entering a guilty plea, the Applicant knowingly and voluntarily waived his right to the defenses he now raises.

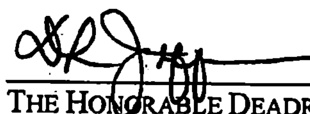
Conclusion

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 this Court's Conditional Order of Dismissal, the PCR application is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 1st day of August, 2017.



THE HONORABLE DEADRA L. JEFFERSON
Chief Administrative Judge
Ninth Judicial Circuit

August 1, 2017
Charleston, SC

CC
AG
AT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Demetric Hardaway,	)	Case No.: 2015-CP-10-00420
S.C.D.C. No. 330891,	)	
	)	
Applicant,	)	
	)	**CONDITIONAL ORDER OF DISMISSAL**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

FILED
2017 APR 12 PM 3:20
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed January 21, 2015. Respondent made its Return requesting that the matter be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the October 2007 term of the Charleston County Grand Jury for Murder (2007-GS-10-11998). Jason Todd Mikell, Esquire, represented Applicant, and Jennifer Kneece Shealy, of the Ninth Circuit Solicitor's Office, prosecuted the case. On September 25, 2008, Applicant pled guilty to the lesser offense of Voluntary Manslaughter. Consistent with a negotiated sentence, the Honorable Roger M. Young, Sr. sentenced Applicant to imprisonment for a term of 20 years. Applicant did not appeal his plea or sentence.

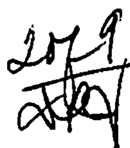
PCR Application: 2009-CP-10-02735

Applicant filed his first application for post-conviction relief on April 30, 2009 (2009-CP-10-02735). He alleged the following grounds for relief in his application:

1. "Ineffective Assistance of Counsel"
   a. "Counsel neglected our fiduciary relationship by [abandoning] me on the day of sentencing which in doing so, he jeopardized my liberty with his imperfect duty. Counsel failed to apply the correct law and also failed to research the law and facts surrounding the imposition of the sentence."
2. "Conflict of Interest"
   a. "Mr. Jason T. Mikell was appointed to represent me, somewhere between April 11, 2007 and April 17, 2007. I relieved him on May 25, 2007 due to the fact that, I had [acquired] a private attorney. The private attorney named, J. Michael Bosnak [oversaw] my case from May 25, 2007 until April 17, 2008. On April 17, 2008 Mr. Boxnak stated that it was impossible for him to be productive during trial due to a broken rotators cup. I strongly believe that his true reason(s) for not going forth with my case was unspecified but I still consented to his desire to be relieved. Due to the lack of resources, I later requested for public assistance and Mr. Jason T. Mikell was reassigned to my case. Mr. Mikell was more in opposition to my desire to pursue the law of self-defense, rather than siding with me and/or seeking the best possible remedy option. Mr. Mikell's previous relief is sufficient enough reason to suggest that it [opened] doors for conflict, incompatibility, lower degrees of honesty, and absence of faithful integrity. Mr. Mikell should not have been reassigned to my case because that action clearly denies my Sixth Amendment right. The right to assistance of counsel has been held to imply the right to effective assistance of counsel. Therefore, I was prejudiced."
3. "Manslaughter instructions should have not be given"
   a. "Failure to charge on the specific elements of self-defense that applied to defendants theory constitutes reversible error. Victims prior acts of violence toward another is relevant to defendants theory of self-defense. [incomplete citation removed] If evidence of self-defense is clearly and definitely introduced at trial, it becomes [the] duty of [the] trial judge to charge law applicable to such defense, whether requested or not."

Respondent made its return on August 17, 2009, and an evidentiary hearing into the matter was convened on March 3, 2011, before the Honorable R. Markley Dennis, Jr. Applicant was present at the hearing and represented by Laura E. Paris, Esquire. Matthew J. Friedman, of the South Carolina Attorney General's Office, represented Respondent. At the hearing, Applicant proceeded on the following grounds:

1. Applicant received ineffective assistance of counsel, and his guilty plea was not voluntary, because Mikell abandoned Applicant on the cusp of trial without having fully investigated self-defense.



2. Applicant's guilty plea was not knowing in that he was not advised of the elements and mandatory minimum sentences of claims to which he pled.

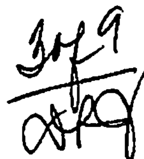
Applicant testified on his own behalf. Applicant's plea counsel, Jason Todd Mikell, Esquire, and D. Ashley Pennington, Esquire, of the Ninth Circuit Public Defender, also testified. By written order dated May 2, 2011, and filed May 4, 2011, Judge Dennis denied and dismissed the application.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by Robert M. Dudek, Esquire, on Applicant's behalf. Respondent filed its Return on or about February 28, 2012. The Supreme Court of South Carolina transferred jurisdiction over the case to the South Carolina Court of Appeals. On July 16, 2013, The South Carolina Court of Appeals denied Applicant's petition. Hardaway v. State, S.C. Ct. App. Order filed July 16, 2013. The Remittitur was issued on August 1, 2013.

Federal Habeas Petition: 8:13-02621-RMG-JDA

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on September 20, 2013 (C.A. No. 8:13-02621-RMG-JDA). In his Petition, Applicant set forth the following grounds for relief:

1. "Denial of Effective Assistance of Counsel because my attorney(s),"
   a. "failed to explain the nature and crucial elements of the offense, the maximum and mandatory minimum penalty and nature of the constitutional rights being waived prior to accepting the plea of guilt;"
   b. "failed to interview witnesses;"
   c. "erroneously advised me that I could not show that I was without fault in bringing on the difficulty because I followed the decedent;"
   d. "failed to fully investigate my self-defense claim(s)."
2. "Involuntary and unknowing guilty plea because circuit court failed to advise me of the nature and crucial elements of the offense, the maximum and mandatory minimum penalty prior to accepting the plea of guilt."



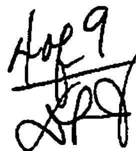
Respondent filed its Return and Motion for Summary Judgment on December 30, 2013. The Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued on July 25, 2014, a Report and Recommendation that Respondent's motion for summary judgment be granted. Hardaway v. Warden of Lee Corr. Inst., 8:13-02621-RMG-JDA, 2014 WL 4273322 (D.S.C. 2014) (incorporated in District Court order). The Honorable Richard Mark Gergel, United States District Judge, denied Applicant's Petition on August 29, 2014, and accepted the Report and Recommendation for summary judgment. Id. Applicant did not appeal the order of the court.

Current PCR Application

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

1. "Ineffective Assistance of Counsel"
    a. "In violation of the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and State Law requiring fundamental fairness, I was prejudiced by the ineffective assistance of counsel's representation provided throughout the guilty plea process. In that neither defense counsel Jason T. Mikell nor Ashley Pennington informed me of my right to pursue a direct appeal."
2. "Denial of direct appeal"
    a. "As stated above counsels failed to inform me of the right to direct appeal. Direct appeal was not waived, I did not make a knowing and intelligent decision not to pursue the appeal. Therefore, I was prejudiced by counsels' failure to inform me of my right to appeal."
3. "Violation of Due Process"
    a. "Counsels ineffective assistance rendered the guilty plea process unfair, in violation of the fourteenth amendment."

Also before this Court are the Charleston County Clerk of Court records, Applicant's previous PCR and federal habeas records, and the pleadings. This Court finds as follows:



II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

Successive

This Court finds this application should 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).

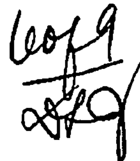
Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. This Court finds Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, this application for post-conviction relief is summarily dismissed as successive.

Failure to State a Claim Pursuant to 12(b)(6)

This Court further finds the application should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP. Specifically, Applicant has failed to make a *prima facie* showing that he is entitled to relief on the grounds that counsel failed to inform him of his right to appeal from his guilty plea and that he should be permitted an appeal pursuant to White v. State.[1] This Court further finds Applicant is not entitled to an evidentiary hearing concerning this allegation.

Before a Court will hold an evidentiary hearing, the 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) ("It is, therefore, incumbent upon the applicant to make at least a *prima facie* showing entitling him to relief."). Counsel has a constitutionally-imposed duty to consult with defendant about appeal following a guilty plea when there is reason to think either (1) that rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470 (2000). Although not determinative, a highly relevant factor in this inquiry will be whether the conviction follows a

[1] 263 S.C. 110, 208 S.E.2d 35 (1974).



trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues and because such a plea may indicate that the defendant seeks an end to judicial proceedings. Id. at 480. To show prejudice in these circumstances, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient failure to consult with him about an appeal, he would have timely appealed. Id. at 484. The "bare assertion that a defendant was not advised of appellate rights is insufficient to grant relief." Jones v. State, 382 S.C. 589, 598, 677 S.E.2d 20, 23-24 (2009) (quoting Weathers v. State, 319 S.C. 59, 61, 459 S.E.2d 838, 839 (1995)).

Applicant does not claim that he asked counsel to file an appeal, nor does he claim a rational defendant would have wished to appeal. See Roe v. Flores-Ortega, 528 U.S. 470 (2000). Applicant only claims that plea counsel failed to affirmatively advise him of the right to appeal. Further, Applicant pleaded guilty pursuant to a negotiated plea and has not alleged that a rational defendant would have wanted an appeal. Accordingly, Applicant has failed to set forth a *prima facie* claim that would entitle him to relief. Therefore, this Court finds Applicant is not entitled to an evidentiary hearing in the matter and this application for post-conviction relief is summarily dismissed with prejudice.

Statute of Limitations

This Court finds the application must also be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Section §17-27-45(a) provides:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a).

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 offense he challenges in this application on September 25, 2008, and he did not appeal. This application was filed on January 21, 2015, which was more than five years beyond the expiration of the statute of limitations.

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, section 17-27-70(c) of the South Carolina Code of Laws 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 application is summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

Res Judicata

This Court further finds that the doctrine of *res judicata* bars Applicant's claims in the current application. *Res judicata* prohibits "subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. Conway, 334 S.C. 30, 512 S.E.2d 106 (1999) (citation omitted). *Res judicata* also bars any issues that were raised or *could have been raised* in the former action. Id. (citing Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n S.C., 294 S.C. 9, 362 S.E.2d 176 (1987)).

Applicant filed his first PCR action in 2009 in which he alleged Counsel was ineffective. He appealed that action and subsequently filed a federal habeas action. Applicant's current claims also allege ineffective assistance of counsel and arise from the same conviction.

Therefore, Applicant has had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in both the state and federal courts. Applicant could have raised the instant claims in his prior proceedings. His failure to do so prevents him from raising them now. Accordingly, this Court summarily dismisses the application as barred by *res judicata*.

CONCLUSION

Pursuant to §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 Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Alicia A. Olive, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 11th day of April, 2017.

THE HONORABLE DEADRA L. JEFFERSON
Chief Judge for Administrative Purposes
Ninth Judicial Circuit

Charleston, South Carolina