RECEIVED

SEP 26 2017

S.C. SUPREME COURT

The Honorable, Daniel Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia 29211

RE: Walter McQueen v State of South Carolina: 2013-CP-15-0214

Dear Mr Shearouse

Enclosed for filing is a notice of Appeal in the above Case. Also enclosed are the following:
(1) Proof of Service of the notice of Appeal on the respondent.
(2) A Copy of the order [Final Order of Dismissal] which is [are] to be challenge on appeal
(3) Appellant is indigent and has Counsel Dawkins v State 639 SE2d 55 (2006) for filing fee
(4) This appeal is being filed with the Supreme Court because Rule 243(c)(b), ~~247~~(c), SCACR (see Rule 203(d) for when an appeal Can be filed with the Supreme Court).

9-25-17
Date

/s/ Walter McQueen
G.C.I.
4556 Broadview Rd
Columbia 29210

cc: Ruston Neely
David Matthews
Daniel Shearouse

1 U.S.C §1
28 U.S.C §1746

The State of South Carolina
In the Supreme Court
Appeal from Colleton County
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge
Case no.: 2013-CP-15-0214

Walter McCrae ---------- Appellant

v

State of South Carolina ---------- Respondent

Notice of Appeal

Walter McCrae appeals the final Order of Dismissal of the Honorable, Perry M. Buckner dated September 6, 2017. Appellant received written notice of entry of this final Order of Dismissal on September 15, 2017.

9-25-17 /s/ Walter McCrae

Date Walter McCrae
1 U.S.C §1 G.C.I.
28 U.S.C §1746 4556 Broadview Rd
Columbia 29210

Daniel Shearouse
P.O Box 11330
Columbia 29211

David Matthew, Esq
319 N. Lucas St
Walterboro 29488

Preston Neely, Esq
P.O Box 11549
Columbia 29211

Patricia C. Grant
Clerk of Court
Colleton County
Post Office Box 620
Walterboro S.C. 29488-0028

CERTIFIED MAIL®

7017 1450 0000 0361 4744

UNITED STATES POSTAGE
PITNEY BOWES
02 1P $ 006.77⁰
0000815883 SEP 08 2017
MAILED FROM ZIP CODE 29488

RECEIVED
SEP 15 2017
GCI - MAILROOM

WALTER MCQUNE
G.C.IB5-40B
4556 BROADRIVER RD
COLUMBIA SC 29210

299882
BSA 40B

29210840985 0077

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF COLLETON	)	CIVIL ACTION NO.: 2013-CP-15-00214
	)	
WALTER J. MCQUNE,	)	
	)	
Applicant,	)	**FINAL ORDER OF DISMISSAL**
	)	
v.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

This matter came before this Court on August 8, 2017, at the Colleton County Courthouse. At the hearing Applicant was present and represented by David Mathews, Esquire. Representing the Respondent, Rustin W, Neely, Esquire, of the South Carolina Attorney General's Office. This Court had before it a copy of the records of the Colleton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's *pro se* filings, Applicant's mental competency evaluations, and the pleadings in this matter. This Court finds the following:

#1 PmB

I. PROCEDURAL HISTORY

Applicant was indicted at the August 2003 term of the Colleton County Grand Jury for murder (2003-GS-15-0491). Everett W. Bennett Jr., Esquire, represented Applicant. On February 5, 2004, Applicant pleaded guilty to the lesser included offense of voluntary manslaughter. The Honorable Jackson V. Gregory sentenced Applicant to twenty-five years' imprisonment. Applicant did not appeal his plea or sentence.

Applicant filed his first PCR application on October 15, 2004, alleging the following grounds for relief:

1. Counsel for Applicant was ineffective for failing to secure a competency evaluation prior to applicant entering a guilty plea.

2. The Applicant's plea of guilty was not freely and voluntarily given due to a lack of competency at the time of the guilty plea.
3. After discovered evidence of lack of competency requires vacation of the conviction and sentence.

Michelle R. Suggs, Esquire, represented Applicant. Salley W. Elliott and Adrianne Turner, Esquires, represented Respondent. The Honorable Carmen T. Mullen dismissed Applicant's application with prejudice by a consent order filed August 8, 2007. The order of dismissal indicates Applicant informed his counsel of his intent to withdraw his application with prejudice. Further, Judge Mullen's order states Applicant acknowledged he was satisfied with his counsel and was withdrawing his application freely and voluntarily. Ms. Suggs, Ms. Elliott, and Applicant also signed the consent order of dismissal.

#2 PCR B

On March 19, 2013, Applicant filed his second PCR application with the Colleton County Clerk of Court alleging, among other things, that he was not competent at the time that he waived his first PCR application, and requesting a new hearing. On October 21, 2014, the State submitted its "Return and Motion to Dismiss," as well as a proposed Conditional Order of Dismissal. On December 15, 2014, this Court signed and filed a Conditional Order of Dismissal (COD) with the Colleton County Clerk of Court granting the State's motion to dismiss, and caused to be sent a demand that Applicant provide reasons why the conditional order of dismissal ought not to be permanently granted within 20 days of the date of service of the COD on him. On April 19, 2017, through an Order, the Supreme Court of South Carolina notified this Court that a Conditional Order of Dismissal had been filed in Colleton County, however, a final order of dismissal was never filed. On April 21, 2017, the Court had not received a response from Applicant within the time ordered. The Court then signed and filed a Final Order of Dismissal on April 21, 2017.

The Court later learned, after signing the Final Order of Dismissal that the COD was not received by the Attorney General's office until March 1, 2016, and the Applicant was not personally served the COD until March 24, 2016. On April 4, 2016, Applicant mailed objections to the COD to the Colleton County Clerk of Court, challenging this Court's assertion that Applicant did not file objections within 20 days of service.

On June 2, 2017, this Court held a hearing to determine whether Applicant's opposition to his COD was timely filed and meritorious. This Court appointed David Mathews, Esquire, to represent Applicant. On June 7, 2017, By Applicant's motion, this hearing was continued. On August 8, 2017, this Court held a hearing to determine whether Applicant's objections to his COD were timely filed or meritorious. This Court took the testimony of Applicant and heard legal arguments from both parties. This Court finds Applicant has failed to show why this application should not be summarily dismissed for the following reasons:

II. DISCUSSION

A. Timeliness of Applicant's filing

The State asserted Applicant's PCR filing on April 16, 2016 was untimely per S.C. Code Ann. § 17-27-45. "It is clear under South Carolina law that mailing does not constitute filing. When a statute requires the filing of a paper or document, it is filed when delivered to and received by the proper officer. The mailing of petitioner's application was therefore not sufficient under § 17-27-45(A)." *Gary v. State*, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001) (citations omitted). However, the State did not request a dismissal based on a lack of timely filing because the State received Applicant's objections five days before the twenty day requirement. Applicant's objections to this Court's COD were mailed to the Colleton County Clerk of Court on April 4, 2016, twelve days after the COD was served on him by the State on March 24, 2016. The mailing date of April 4, 2016, is clear from the postmark on

Applicant's letter containing his objections to the COD. This Court's COD provided Applicant with twenty days to file objections in response to the COD. A letter from the Colleton County Clerk of Court to the Applicant, with a copy sent to the State, reflects Applicant's "Objections to Conditional Order of Dismissal" were filed in Colleton County on April 16, 2016.

Therefore, Applicant's objections were filed twenty-three days after the COD was served on Applicant, which is three days after the twenty days allowed by this Court's COD. However, the State received Applicant's COD objections on April 8, 2016. Applicant has shown the Clerk of Court did not file his objections until twelve days after he mailed them. This Court finds Applicant exercised due diligence in filing his objections to this Court's COD. Therefore, this Court will consider those objections.

#4 RnB

B. Applicant's objections to the COD

Applicant objected to this Court's COD on the following grounds:

1. The State failed to address Applicant's argument that he was mentally incompetent under Rule 8(d), SCRCP.
2. The State failed to assert an affirmative defense in response to Applicant's prior filings.
3. Summary dismissal of his Application was inappropriate because the standard for summary dismissal assumes the facts presented by the Applicant are true.

Applicant's objections to this Court's COD failed to assert any specific factual or legal ground why his application should not be dismissed. Applicant's first PCR application already alleged he was mentally incompetent. The State is not required to assert affirmative defenses to each of Applicant's filings. The State argues Applicant's PCR application is procedurally barred by the statute of limitations and the court's prohibition against successive applications.

Applicant argues he was mentally incompetent for the withdrawal of his first PCR application, which was, therefore, improvidently dismissed. If the application was improperly dismissed then Applicant argues his current PCR is neither untimely nor successive as he has not had his 'bite at the

apple.'

Under the PCR rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple." *Odom v. State*, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). This Court shall address Applicant's argument that his first PCR was improvidently dismissed because Applicant was mentally incompetent. On March 11, 2006, Dr. Elena Nichita found Applicant was mentally incompetent due to depression, but likely to become competent in the future. These findings were made after mental competency evaluations on November 23, 2005 and March 2, 2006. In those findings, Dr. Nichita found Applicant was depressed and should be treated for depression. Dr. Nichita reported Applicant claimed he could not read or write. Dr. Nichita reported there was some evidence of malingering from Applicant's testing. Importantly, Dr. Nichita found Applicant's incompetence was remedial and he would become competent in the foreseeable future.

#5

Accordingly, PCR counsel had Applicant evaluated at a later date by Doctor L. Randolph Waid, a licensed clinical psychologist. On April 12, 2007, Dr. Waid found there was "no compelling evidence that Mr. McQune was highly disrupted by psychiatric disturbance or lacked intellectual capacity that would have rendered him incompetent to understand the plea arrangement or proceedings." Dr. Waid's report further noted, "Walter McQune was evaluated at Kirkland Facility of the South Carolina Department of Corrections soon after his plea on February 5, 2004. Initial evaluation conducted on 2/20/04 failed to reveal any complaint of mental health difficulties or evidence of psychiatric disturbance." Applicant withdrew his first PCR action on August 8, 2007, nearly five months after Waid's evaluation.

This Court finds the evidence shows Applicant was competent when he pleaded guilty and when he withdrew his first PCR. Accordingly, this Court finds Applicant has not proven he was not incompetent when he withdrew his first PCR allegation. Therefore, Applicant must show why his

application should not be dismissed as successive and untimely.

C. Successive Application

The Court finds that the PCR application filed March 19, 2013 is successive to the Applicant's first PCR application from October 15, 2004. Courts disfavor successive applications and place the burden on applicants to show that grounds for post-conviction relief could not have been raised in the original application. *See e.g.*, *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981). 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.

#6 PMB

Since the Applicant has not shown why the new grounds for post-conviction relief could not have been raised in the 2004 application, this 2013 application is summarily dismissed.

This Court has found Applicant was competent when he withdrew his first PCR application.[1] Therefore, Applicant must show why his successive application should not be dismissed. [S]uccessive 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,

[1] Applicant alleges he was incompetent when he withdrew his first PCR action.
"[I]n the context of mentally incompetent PCR applicants, case law warrants a holding that, in circumstances in which an applicant demonstrates the failure to timely file for PCR was due to mental incompetency, the statute should be tolled... If the PCR court finds mental incompetence prevented his filing a PCR application, the court should determine the duration of the incompetence, and whether the application was filed within one year of Ferguson regaining competency." *Ferguson v. State*, 382 S.C. 615, 619, 677 S.E.2d 600, 602 (2009). Applicant's second PCR action was filed on March 19, 2013. This was over 5 years after Applicant's first PCR action was dismissed by withdrawal on August 8, 2007.

409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then 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 has failed to prove any of his allegations could not have been raised in his previous application. Applicant's alleges his PCR and plea counsel were deficient. Applicant has failed to show why his allegations against plea counsel could not have been raised in his first PCR. Applicant has also failed to show why his allegations against PCR counsel should be allowed. "[T]he contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90. *Robertson v. State*, 418 S.C. 505, 514, 795 S.E.2d 29, 33 (2016). Therefore, this Court finds Applicant failed to establish any sufficient reason why his current grounds for relief were not properly raised in his previous applications and waived by his withdrawal.

#7 BmB

→ Accordingly, this Court summarily dismisses Applicant's application because Applicant failed to provide sufficient reason that new grounds exist or other grounds could not have been raised in his first PCR.

D. Statute of Limitations

Furthermore, this Court further finds that the PCR application filed March 19, 2013 failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code §§ 17-27-10 to -160. The South Carolina Supreme Court held that the statute of limitations applies to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). While the Applicant's 2004 application was timely, the 2013 application is more than 8 years beyond the statutory deadline of one year after his conviction, February 5, 2005. Because of this failure to file in time, the 2013 application is summarily dismissed.

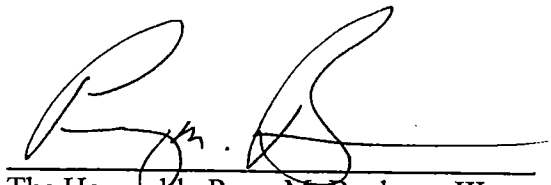
The terms of the Court's Conditional Order of Dismissal stated that the Order would become final twenty days after the defendant was served with the Order unless specific objections to the Order were filed. The Applicant's next communication to the Court declared the Applicant's intention to file a Motion for Summary Judgement. This Notice was filed on January 30, 2015. The Court does not believe that specific meritorious objections to the Conditional Order of Dismissal were made in order for this Court to grant relief. This court summarily dismisses this application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act, therefore, the Applicant's PCR application, filed March 19, 2013, and is hereby dismissed with prejudice.

Having considered the oral arguments presented by both parties, the copy of the records of the Colleton County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's *pro se* filings, Applicant's mental competency evaluations, and the pleadings in this matter. The Court finds that the PCR application filed March 19, 2013 is successive and has failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Ac. See S.C. Code §§ 17-27-10 to -160. The PCR application filed March 19, 2013 is successive to the Applicant's first PCR application from October 15, 2004. While Applicant's 2004 application was timely, the 2013 application is more than 8 years beyond the statutory deadline of one year after his conviction, February 5, 2005. Because of this failure to file in time, the March 19, 2013 application is summarily dismissed.

IT IS THEREFORE ORDERED, the Applicant's PCR application, filed March 19, 2013, hereby be dismissed with prejudice.

AND IT IS SO ORDERED.

[SIGNATURE ON FOLLOWING PAGE.]



The Honorable Perry M. Buckner, III
Presiding Judge for the Fourteenth Judicial Circuit

September 8, 2017
Walterboro, South Carolina

The State of South Carolina
In the Supreme Court
Appeal from Colleton County
Court of Common Pleas
Perry M. Buckner, Circuit Court Judge
Case no: 2013-CP-15-0714

Walter McCrae ---------- Appellant

v

State of South Carolina ---------- Respondent

PROOF OF ~~SERVICE~~

I Certify that I have serve the Notice of Appeal on Alston Wesly, Esq by depositing a copy of in the U.S. mail Postage Prepaid on 9-25-17, addressed at his attorney General of record, Alston Wesly, Esq, P.O. Box 11549, Columbia S.C 29211 and Alleged Counsel, David Mathews, Esq., 319 N. Lucas st., Walterboro 29488 at his address on 9-25-17

9-25-17
Date

/s/ Walter McCrae
Walter McCrae

11 U.S.C §1
28 USC §1746

Daniel Shearouse
P.O Box 11330
Columbia 29211

G.C.I.
BS 40B
4556 Broadriver Rd
Columbia 29210

Mr. Walter McGhee 299880
G.C.I.
B5 40B
4556 Broadriver Rd
Columbia SC 29210

SCDC

SEP 25 2017

MAIL ROOM

UNITED STATES POSTAGE
PITNEY BOWES
02 1P
0000880713
$ 000.39⁰
SEP 25 2017
MAILED FROM ZIP CODE 29210

FOREVER
USA

Mr. Daniel Shearouse
Clerk, South Carolina Supreme Court
P.O. Box 11330
Columbia 29211

29211-133030