

The South Carolina Court of Appeals

Marcus A. Joseph, #147764, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-002219

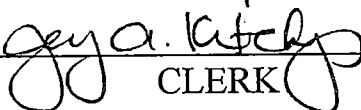
The Honorable George M. McFaddin, Jr.
Clarendon County
Trial Court Case No. 2015CP1400549

ORDER

This case is transferred to the Supreme Court of South Carolina pursuant to Rule 204(a) of the South Carolina Appellate Court Rules.

FOR THE COURT

BY


CLERK

Columbia, South Carolina

FILED

October 26, 2017

cc:

Megan Harrigan Jameson, Esquire
Marcus A. Joseph

~~The Honorable Daniel E. Shearouse~~

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS)
THIRD JUDICIAL CIRCUIT)

Marcus A. Joseph, #147764)

2015-CP-14-549)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

FINAL ORDER OF DISMISSAL
OF ORIGINAL FILED IN THIS OFFICE

DATE

8/3/17
H.P.

CLERK OF COURT
CLARENDON COUNTY, SC

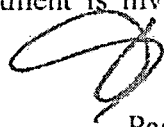
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OCT 25 2017
SC Court of Appeals

BEULAH
CLERK OF COURT
CLARENDON COUNTY, SC
2017 AUG -3 PM 3:16

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, and 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 August 22, 2016 and filed September 12, 2016, 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.

On September 26, 2016, Applicant filed a document titled "Objection to Conditional Order of Dismissal." In the objection, Applicant alleges that the plea court lacked jurisdiction because his charges were initiated by a magistrate warrant. He also alleges that a *Brady* violation occurred when the State told the plea judge that Applicant gave two statements when the warrant states that Applicant gave one statement. Applicant also alleges that the plea court proceeded to the sentencing phase without Applicant waiving his right to the last argument to the jury. Applicant alleges that his indictment is invalid because the court did not meet when it was

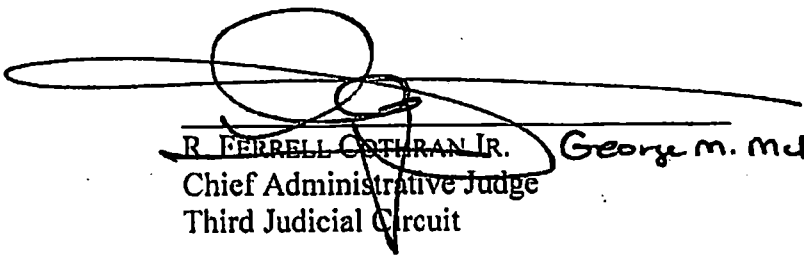


statutorily supposed to meet. This Court finds that all of Applicant's objections are meritless. Applicant has failed to show that he should be entitled to a hearing on an eighth PCR application and that he could not have timely discovered his alleged newly-discovered evidence. Accordingly, this Court 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 19th day of July, 2017.


~~R. FERRELL COTTRILL, JR.~~
Chief Administrative Judge
Third Judicial Circuit

George M. McFadden, Jr.

Sumter, South Carolina.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 – Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCPC, the Director of the South Carolina Department of Corrections has designated S. Halter (Server) as his duly authorized agent for the purpose of making service on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF Richland)

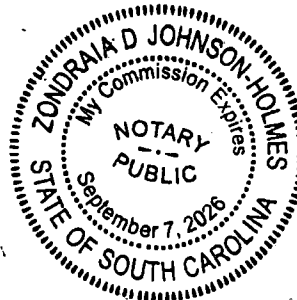
AFFIDAVIT OF PERSONAL SERVICE

On this 11th day of September, 2017, I served the Conditional Order of Dismissal on *Inmate* Joseph, Marcus, *SCDC Inmate Number* 147764, by delivering personally and leaving a copy of same at *Kirkland Correctional Institution*, Columbia, SC. I am not a party to this action.

s/ Sherry Halter
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 11th day of October, 2017.

Zondraia D Johnson-Holmes
Notary Public for South Carolina
My commission expires: Sep 7, 2026.



ACCEPTANCE OF SERVICE

Service of a copy of the within Legal Pleadings is accepted at the South Carolina Department of Corrections (*Kirkland Correctional Institution*), Richland County, SC this 11th day of October, 2017.

s/ Marcus Joseph
Inmate Joseph, Marcus
SCDC Inmate Number 147764

PLEASE FIND FOR FILING

(1) NOTICE OF APPEAL

(2) CERTIFICATE OF SERVICE

(3) ORDER AND BY THIS LETTER

I HEREBY GIVE NOTICE THAT I HAVE
CAUSE THE SAME TO BE SERVED UPON THE
RESPONDENTS

MARCUS A JOSEPH

APPLICANT

RECEIVED

OCT 25 2017

SC Court of Appeals

8

STATE OF SOUTH CAROLINA) IN THE COURT OF
COUNTY OF CLARENDON) COMMON PLEAS
MARCUS A JOSEPH 147764) THIRD JUDICIAL CIRCUIT
Applicant) 12015-CP-14-549

STATE OF SOUTH CAROLINA) NOTICE OF APPEAL
ET AL)

NOW HERE COMES THE APPLICANT WHO HEREBY
APPEAL THE ORDER OF JUDGE GEORGE M. McFADDEN
DATED 19th July 2017 DENYING HIS
APPLICATION FOR POST CONVICTION RELIEF THE ORDER
RECEIVED BY ME ON OCT 11 2017

Respectfully Submitted
MARCUS A JOSEPH

RECEIVED

OCT 25 2017

SC Court of Appeals

CERTIFICATE OF SERVICE

THIS IS TO HEREBY CERTIFY THAT I MARCUS
A JOSEPH THE APPLICANT HAS CAUSED AN APPEAL
TO BE FILED IN THIS CASE BY PLACING SAME
IN THE UNITED STATES MAIL HERE AT KIRKLAND
CORRECTIONAL INST ON THIS 23rd DAY OF OCT
2017

PERSON SERVED

OFFICE OF ATTORNEY GENERAL
P.O. Box 11549
Columbia SC 29211

RECEIVED

OCT 25 2017

SC Court of Appeals

CLERK OF COURT
APPEALS COURT
P.O. Box 11629
Columbia SC 29211

Marcus A Joseph

Sworn to and subscribed before me
this 23 Day of October 2017

Melissa Jay
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires Dec. 1, 2025

MARCUS A JOSEPH 147764
KIRKLAND CORRECTIONAL INST
4344 BROAD River Rd
Columbia SC 29210
Unit F2 B241

LEGAL
MAIL
ONLY

SCDC

NOV 18 2017

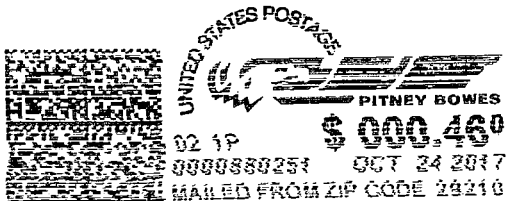
MAIL ROOM

RECEIVED

OCT 24 2017

KIRKLAND CENTER
MAIL ROOM

to
SOUTH CAROLINA
Court of Appeals
P O Box
11629
Columbia South Carolina 29214



RECEIVED

OCT 25 2017

SC Court of Appeals

South Carolina 29214

29214 99999



STATE OF SOUTH CAROLINA
COUNTY OF CLARENDON

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

Marcus A. Joseph, 147764,

) 2015-CP-14-549
)

) Applicant,
)

) v.
)

) **CONDITIONAL ORDER**
) **OF DISMISSAL**
)

) State of South Carolina,
)

) Respondent.
)
)

BEULAH C. ROBERTS
CLERK OF COURT
2016 SEP 12 PM 12:12

This matter comes before this Court by way of an application for post-conviction relief filed November 3, 2015. In its Return, Respondent requests that the action be summarily dismissed.

PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Clarendon County. The Applicant was indicted at the March 1988 term of General Sessions for the Clarendon County Grand Jury for Murder; Armed Robbery; Possession of a Weapon during the Commission of a Violent Crime; and Accessory before the fact (88-GS-14-143). He was represented on the charges by Ray E. Chandler, Esquire and Harold W. Detwiler, Esquire. On June 7, 1988, Applicant pled guilty to Murder and Grand Larceny. Applicant was sentenced by the Honorable James M. Morris to imprisonment for life for the murder charge, without eligibility for parole for a period of twenty (20) years, and ten (10) years for Grand Larceny, all sentences to run concurrently. The Applicant did not appeal his conviction and sentence.

The Applicant subsequently filed an application for post-conviction relief (PCR) on June 20, 1990 (C.A. No. 90-CP-14-0222). The State filed its Return and Motion to Dismiss on

August 21, 1990. By Order dated July 27, 1993, the Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application. No appeal was filed.

The Applicant filed a second application for PCR on April 15, 1994 (C.A. No. 94-CP-14-0290). The Respondent made its Return and Motion to Dismiss on August 22, 1994. By Order dated September 24, 1994, the Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application. No appeal was filed.

The Applicant filed a third application for PCR on June 27, 1995 (C.A. No. 95-CP-14-0287). The Respondent made its Return and Motion to Dismiss on October 25, 1995. By Order dated December 14, 1995, the Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application.

The Applicant also filed Petition for a Writ of State Habeas Corpus on June 29, 1995. The Honorable John C. Hayes, III, denied the Applicant's petition by written Order on June 27, 1996, but transferred the matter to the Court of General Sessions in Richland County regarding the matter of waiver of presentment to the grand jury. By written Order dated February 23, 1998, the Honorable Henry McKeller ordered that the matter be transferred to the Clarendon County Court of Common Pleas to be placed on the PCR docket, and given the number 1998-CP-14-87. An evidentiary hearing was convened on October 6, 1998, at the Sumter County Courthouse. By written Order dated February 12, 1999, the Honorable Thomas W. Cooper, Jr., ruled that the trial court lacked subject matter jurisdiction to convict Applicant of Grand Larceny, but upheld Applicant's Murder conviction. Two Petitions for Writ of Certiorari were filed and granted by the South Carolina Supreme Court. The Petitions were consolidated by the Court. Robert Dudek, Esquire, represented Applicant on his PCR appeal. After submission of briefs by both sides, the Supreme Court affirmed the decision of the PCR Court. Joseph v. State,



351 S.C. 551, 571 S.E.2d 280 (October 14, 2002). The Supreme Court held that Grand Larceny is not a lesser included offense of Armed Robbery, but upheld Applicant's guilty plea to Murder. Id.

Applicant filed a second Petition, captioned as a Petition for Writ of State Habeas Corpus, on October 4, 1999 (C.A. No. 99-CP-14-0401). The Respondent made its Return and Motion to Dismiss on July 7, 2000. The Honorable Howard P. King denied and dismissed Applicant's petition by written Order on July 20, 2000.

The Applicant subsequently filed a fourth application for PCR on May 7, 2004 (C.A. No. 04-CP-14-0226). The Respondent made its Return and Motion to Dismiss on or about November 22, 2004. A hearing was convened at the Sumter County Courthouse on March 23, 2005. By Order dated April 12, 2005, the Honorable Thomas W. Cooper, Jr. denied and dismissed Applicant's application. By Order dated September 15, 2006, the South Carolina Court of Appeals denied Applicant's Petition for Writ of Certiorari. The remittitur was sent on October 13, 2006.

The Applicant filed a fifth post-conviction relief application on August 29, 2007 and amended October 23, 2007 (C.A. No. 07-CP-14-0438). The State filed its Return and Motion to Dismiss on April 3, 2008, and the Honorable R. Ferrell Cothran, Jr. denied and dismissed the Applicant's application by Final Order dated June 29, 2009.

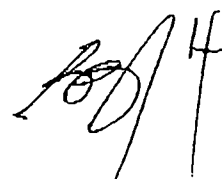
The Applicant filed a Writ of Habeas Corpus on October 5, 2010 (C.A. No. 2010-CP-14-0571). In this application, Applicant alleged the following grounds for relief:

1. "The documents that are being used to confine the petitioner are invalid, non-authentic and contradicts and conflicts with the correct law to be applied."
2. "The Court lacked Subject Matter Jurisdiction because the statutory requirement of the warrant was not complied with in that:

- a. 'The inventory or evidence allegedly possessed was not returned with the warrant, and
 - b. 'the warrant and alleged Full Written Statement was not filed in accordance with SC Rules of Criminal Procedure Rule (1), therefore no valid indictment could not be return, see Grand Jury Key 25.'
3. "The petitioner was denied and deprived of Liberty without Due Process ... and such exceeds the statutory amount authorized by law. The punishment to be imposed by a Magistrate is thirty (30) days ... The Clerk of Court for Circuit and Judge did not issue a warrant for petitioner's arrest."
 4. "The Solicitor did not prepare an indictment as required by law in the case and returned it to the Clerk of Court for petitioner to sign with Waiver of Presentment. The Petitioner's plea was entered in regards to life without the possibility of parole, without the consent of the Solicitor, and as such violates SC State Statute 17-23-130, SC Const. Art. I Section II.
 5. "The Petitioner's confinement on the basis of arrest warrant is fraudulent in that the statute allegedly violated has already been satisfied by the service of twenty-two (22) years for Section 16-3-10 is a 'D' Felony and provides the maximum punishment of ten (10) years, and such was issued by a magistrate."
 6. "The Court was further without jurisdiction of Petitioner because petitioner is a non-resident defendant and was not served with any warrant, indictment, or commitment for a violation of South Carolina State Statute 16-3-20(A)."
 7. "The Court also lacked Subject Matter jurisdiction because the time for preparing [an] indictment and filing was not complied,"

The State filed its Return and Motion to Dismiss on July 21, 2011 and the Honorable R. Ferrell Cothran, Jr. denied and dismissed the application on July 6, 2012.

Applicant filed his sixth application for post-conviction relief (2011-CP-14-00102) on February 15, 2011. The Respondent filed its return and motion to dismiss on September 15,

A handwritten signature in black ink, appearing to be 'R. Ferrell', written over a vertical line.

2011. The Honorable R. Ferrell Cothran denied and dismissed the application by Final Order filed October 25, 2012.

Applicant filed his seventh application for post-conviction relief (2013-CP-14-209). Respondent filed its Answer to complaint on June 26, 2013. Applicant filed his objection to motion to dismiss on September 18, 2013. The Honorable W. Jeffrey Young dismissed the action by order filed June 9, 2014. Applicant filed a notice of appeal by letter dated July 22, 2014. The South Carolina Supreme Court dismissed the notice of appeal pursuant to Rule 203(d)(1)(B)(ii) of the South Carolina Appellate Court Rules for failing to provide a copy of the order of dismissal. The remittitur was issued on August 26, 2014.

Applicant filed a Writ of Habeas Corpus on November 17, 2014 (C.A. No. 8:14-4100-JFA-JDA). The Honorable Jacquelyn D. Austin issued her report and recommendation that the petition be dismissed without prejudice due to Petitioner's failure to obtain permission to file a successive application on November 17, 2014.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Lack of jurisdiction
 - a. Conviction and sentence obtained on basis of invalid indictment.
 - b. By a failure to comply with state statute 17-7-20...
2. Guilty plea obtain in violation of Brady v. Maryland
3. Guilty Plea obtained in violation of Jackson v. Denno.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that this application for Post-Conviction Relief should 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. S.C. Code Ann. §17-27-45(a) reads as follows:



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

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on June 7, 1988. This Application was filed on November 3, 2015, which was over twenty seven years after the statutory filing period had expired.

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) (1985) 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."

Additionally, this Court finds that the application should be summarily dismissed because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

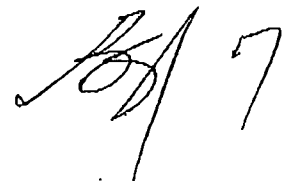
All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or 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 point to 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." [Emphasis in original]. Id., 305 S.C. 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. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980). In regards to the allegations set forth in Applicant's Amendment to the PCR application, these are the same allegations raised by Applicant in a previous PCR application and therefore, by very definition, are successive in nature.

Additionally, this Court finds this application for post-conviction relief is barred by the doctrine of laches. The Applicant has filed this application over twenty seven years after he was convicted. The doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir, 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. 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." McElrath, 276 S.C. at 283. Rule 9(a)



of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore, the South Carolina legislature has recognized this problem and instituted a one year statute of limitations. See S.C. Code Ann. §17-27-45(a). The Applicant's delay has greatly prejudiced the Respondent. A transcript of the Applicant's guilty plea is now unavailable. Potential witnesses might also now be unavailable. If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these problems would exist. Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being barred by the doctrine of laches.

This Court finds that the current application for post-conviction relief must be summarily dismissed because the doctrine of *res judicata* bars the Applicant's claims. *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.

The Applicant had a full opportunity to litigate all allegations in prior proceedings. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court summarily dismisses these claims as barred by *res*



judicata.


Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the Clarendon County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Julie A. Coleman, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 22 day of August, 2016.



GEORGE C. JAMES, JR.
Resident Judge
Third Judicial Circuit


_____, South Carolina.



Clarendon County Clerk of Court Office



BEULAH G. ROBERTS
CLERK OF COURT
POST OFFICE BOX 136
MANNING, SC 29102
PHONE: (803) 435-4443
FAX: (803) 435-4844

MARILYN WILSON
FAMILY COURT
POST OFFICE BOX 490
MANNING, SC 29102
PHONE: (803) 435-4210
FAX: (803) 433-8008

Fax Transmittal

RECEIVED

OCT 30 2017

S.C. SUPREME COURT

Date: *10/30/2017*
Attn: *Ashley*
From: *Clarendon County Clerk of Court*
Re: *Conditional Discharge - Marcus Joseph*

Message:

Total number of pages faxed including transmittal sheet ____

If the total number of pages faxed is not received, please contact the sender at:
(803) 435-4443.

