

NOTICE OF APPEAL IN A CIVIL CASE  
THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED  
NOV 27 2017  
S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
Deadra L. Jefferson, Circuit Court Judge

Curtis J. Lemon

Appellant

v.

Rasheeda Cleveland

Respondent

NOTICE OF APPEAL

Curtis J. Lemon appeals the order (judgment) of the Honorable Deadra L. Jefferson dated November 15, 2017. Appellant received written notice of this order (judgment) on November 21, 2017.

November 22, 2017

Rasheeda Cleveland, AAG  
Post Office Box 11549  
Columbia, SC 29211-1549

Curtis Lemon  
Curtis J. Lemon #256984  
MacDougall C.I. B-2-D-2-B  
1516 Old Gilliard Road  
Ridgeville, SC 29472  
Appellant

PROOF OF SERVICE OF A NOTICE OF APPEAL  
THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

NOV 27 2017

APPEAL FROM CHARLESTON COUNTY S.C. SUPREME COURT  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2016-CP-10-5738

Curtis J. Lemon

Appellant,

v.

Rasheeda Cleveland

Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal to Rasheeda Cleveland by depositing a copy of it in the United States Mail, on November 22, 2017.

November 22, 2017

Curtis Lemon  
Curtis J. Lemon #256984  
MacDougall C.I. B-2-D-2-B  
1516 Old Gilliard Road  
Ridgeville, SC 29472  
Appellant

MAGDOUGALL CORR. INST.  
151. OLD MILLIARD RD.  
RIDGEBVILLE SC 29472

CHARLESTON SC 29404

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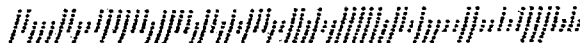
The Supreme Court of South Carolina  
Daniel E. Shearouse, Clerk of Court  
Post Office Box 11330  
Columbia, South Carolina 29211

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STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
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Curtis J. Lemon, #256984, )  
)  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
)  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS FOR  
THE NINTH JUDICIAL CIRCUIT

2016-CP-10-5738

**FINAL ORDER OF DISMISSAL**

FILED  
2017 NOV 16 PM 4:03  
JULIE J. ARBISTROM  
CLERK OF COURT

This matter comes before the Court by way of application for post-conviction relief (PCR) filed by Curtis J. Lemon ("Applicant") on October 25, 2016. Respondent made its Return on or about July 27, 2017 requesting that the application be summarily dismissed as untimely, successive, barred by the doctrine of *res judicata*, and for failing to state a claim upon which relief may be granted. The Court issued a Conditional Order of Dismissal on August 4, 2017 provisionally denying and dismissing this action, and giving the Applicant twenty days from the date of service to show why the dismissal should not become final. Applicant filed an objection the Conditional Order of Dismissal on August 22, 2017. For the reasons stated herein, the Court dismisses the application with prejudice.

**I. PROCEDURAL HISTORY**

Applicant is presently 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 March 1998 term of the Charleston County Grand Jury for Murder (1998-GS-10-1815) and Criminal Sexual Conduct in the First Degree (1998-GS-10-1814). Applicant proceeded to a jury trial before the Honorable Gerald C. Smoak, Jr. on March 15, 1999. Applicant was represented by

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Juan W. Tolley, Esquire and Melissa Gay, Esquire at trial. On March 18, 1999, Applicant was convicted of Voluntary Manslaughter and Criminal Sexual Conduct in the First Degree by the jury. Judge Smoak sentenced Applicant to confinement for a period of thirty (30) years on each charge, to be served concurrently.

Applicant subsequently appealed his conviction, and a timely Notice of Appeals and Anders brief were filed on his behalf.<sup>1</sup> However, Applicant's appeal was denied by the Supreme Court of South Carolina in an unpublished opinion dated March 14, 2002. See State v. Curtis Jerome Lemon, No. 2002-UP-032. The Remittitur was issued on April 26, 2002.

Applicant filed his first application for post-conviction relief on August 13, 2002 alleging ineffective assistance of counsel. The State made its Return on January 13, 2003. An evidentiary hearing into the matter was convened on June 16, 2004 at the Charleston County Courthouse before the Honorable Doyet A. Early, III. Applicant was present at the hearing and represented by Bob J. Conley, Esquire. On September 7, 2004, Judge Early issued a written order denying and dismissing the application with prejudice. A timely Notice of Appeal was filed on Applicant's behalf. In an Order dated October 30, 2007, the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari. The Remittitur was issued on November 15, 2017.

Applicant then filed a petition for writ of habeas corpus in the Federal District Court for the District of South Carolina on March 24, 2008. Respondent made its Return and Memorandum in Support of Summary Judgment on August 15, 2008. On January 23, 2009, the Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued a Report and Recommendation in which he recommended that the State's motion for summary judgment be granted and the habeas petition dismissed with prejudice. The Honorable R. Bryan Harwell, district court judge, thereafter granted

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<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

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the State's motion for summary judgment and denied Applicant's habeas petition with prejudice by written order dated March 19, 2009. Applicant appealed the denial of his habeas petition; the Fourth Circuit Court of Appeals denied a certificate of appealability and dismissed Applicant's appeal on October 6, 2009.

On November 12, 2013, Applicant filed an Application for Forensic DNA Testing. A hearing was convened on this matter on June 24, 2014. Applicant was represented by Michael A. Urrichio, Esq. at this hearing. At the conclusion of the hearing and after careful consideration of the motion, supporting and opposing material and arguments, the Honorable Roger M. Young, Sr., denied the Application for Forensic DNA Testing. Applicant thereafter filed a *pro se* Notice of Appeal. The South Carolina Court of Appeals dismissed the appeal on November 24, 2014 pursuant to Rule 207 of the South Carolina Appellate Court Rules for failure to provide the Court with a transcript of the proceedings. The Remittitur was issued on November 15, 2017.

Applicant subsequently filed a second application for post-conviction relief on March 13, 2015 alleging ineffective assistance of counsel. Respondent made its Return on or about August 17, 2015 requesting that the application be summarily dismissed as successive, untimely, and for failing to state a claim. On August 24, 2015, the Honorable R. Markley Dennis, Jr. issued a Conditional Order of Dismissal. A Final Order of Dismissal was issued on April 1, 2016. Upon issuance, the Applicant filed a timely Notice of Appeal. The Supreme Court of South Carolina dismissed Applicant's appeal on June 14, 2016 on the basis that Applicant "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper." The Remittitur was issued on July 1, 2016.

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## II. CURRENT APPLICATION

Applicant filed his third and current application for post-conviction relief on or about October 25, 2016. In this application and supporting memorandum, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of PCR Counsel
  - a. "PCR counsel was ineffective by failing to timely seek appellate review from denial of his PCR application for Forensic DNA. Applicant was informed by counsel that an appeal would be filed, yet counsel failed to timely file and perfect Notice of Appeal, thus depriving Applicant of his right to Appellate review of his PCR Forensic DNA Testing."
  - b. "Applicant is entitled to an evidentiary hearing to determine if he, in fact, requested and was denied his right to Appellate review by DNA counsel's failure to timely file and perfect Notice of Appeal."
2. Denial of Procedural Due Process and Right to Appellate Review
3. Violation of § 17-27-90, § 17-27-100, Supreme Court Rule 50(a), U.S.C.A. Const. Amend. 6, SCRC Proc. 71.1(g).

Respondent made its Return on or about July 27, 2017 requesting that the application be summarily dismissed as untimely, successive, barred by the doctrine of *res judicata*, and for failing to state a claim upon which relief may be granted. 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 1, 2017 and filed August 4, 2017, provisionally denying and dismissing this action while giving the Applicant 20 days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated October 4, 2017 serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant filed a document captioned "Objection to State's Conditional Order of Dismissal" on October 19, 2017. In this document, Applicant reasserts his right to appeal the Final Order of Dismissal that denied his request for Forensic DNA Testing. Applicant further claims that he was denied the opportunity appeal this Order by PCR counsel. Applicant also requests "a



hearing to determine whether he knowing, intelligently, and voluntarily waived his right to appellate review from the denial of his PCR Forensic DNA testing application.” Applicant filed an identical document, similarly titled "Objection to State's Conditional Order of Dismissal" on October 27, 2017.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the Applicant’s Objection to the Conditional Order of Dismissal in its entirety, as well as the original pleadings, and finds that the Conditional Order of Dismissal should become final for the reasons detailed below.

#### *Statute of Limitations*

The Court holds that the instant application for post-conviction relief is hereby dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act, S.C. Code. Ann. § 17-27-10 to § 17-27-160 ("The Act"). Specifically, the Act provides:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remitter 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, 1995. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted and sentenced on March 18, 1999. Applicant unsuccessfully appealed his conviction, and the Remittitur was issued on April 26, 2002. Applicant was, therefore, required to file this Application on or before April 26, 2003. However, Applicant did not file his current application for post-conviction relief until October 25, 2016; over seventeen years after the statutory filing period.

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A motion requesting summary judgment, like Respondent's Return, 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). Moreover, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application [for post-conviction relief] where 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." Accordingly, this Court dismisses the Applicant's current application for failure to file within the time frame mandated by the Act.

### *Successive*

This Court also finds that Applicant's current application for post-conviction relief is successive to his previous PCR applications. South Carolina 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. 614, 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 offense 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.

S.C. Code Ann. § 17-27-70.

Thus, 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 393 (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. That is to say, the applicant may not assert grounds for relief in a post-conviction application if he could have asserted those same allegations in a previous application. See id. The applicant bears the burden of showing that the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant currently alleges ineffective assistance of counsel on his prior post-conviction relief action. However, this claim is not sufficient to warrant a successive application for post-conviction relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987). Indeed, 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, 752, 111 S. Ct. 2546, 2566 (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, 304 S.C. at 452, 409 S.E.2d at 395. This is because the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Id. (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). "The contention that prior PCR counsel was ineffective is not *per se* a sufficient reason for allowing a successive PCR application under § 17-27-90." Id. "[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.

Thus, Applicant's contention that prior PCR counsel was ineffective by "failing to appeal DNA testing," even if true, is not a sufficient reason to warrant a successive PCR application.

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Applicant has failed to meet the burden imposed upon him, and the Court must summarily dismissed the application as successive to Applicant's previous PCR application.

***Res Judicata***

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, 292, 414 S.E.2d 786, 789 (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, 190–91, 427 S.E.2d 918, 919 (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 his current allegations in his prior actions. The finality of the previous Court rulings should be respected. The application is therefore dismissed as barred by the doctrine of *res judicata*.

***Failure to State a Claim***

Lastly, the Court finds that Applicant has failed to state a claim upon which relief may be granted. Ineffective assistance of DNA counsel is not a cognizable claim under the PCR Act. An applicant may only commence a post-conviction relief action on the following grounds:

1. That the conviction or 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 (1976). Whether or not Applicant's post-conviction relief counsel performed adequately is not within the scope of the PCR Act. For this reason, Applicant's claim is dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

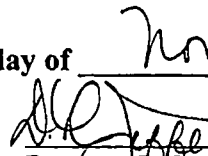
**CONCLUSION**

This Court has reviewed Applicant's Objection to the Conditional Order of Dismissal in its 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.

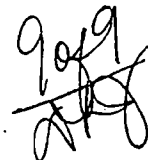
**IT IS THEREFORE ORDERED** that for the reasons set forth herein, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

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

**AND IT IS SO ORDERED** this 15<sup>th</sup> day of Nov., 2017.

  
DEADRA JEFFERSON  
Chief Administrative Judge  
Ninth Judicial Circuit

Charleston, South Carolina



cc  
AG  
AT

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

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

2016-CP-10-5738

Curtis J. Lemon, #256984,

Applicant,

) **CONDITIONAL ORDER OF DISMISSAL**  
)

v.

State of South Carolina,

Respondent.

FILED  
2017 AUG -14 PM 3:25  
JULIE J. ARMSTRONG  
CLERK OF COURT

This matter comes before the Court by way of the application for post-conviction relief (PCR) filed October 25, 2016. Respondent made its Return requesting the application be summarily dismissed.

**PROCEDURAL HISTORY**

Applicant is presently 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 March 1998 term of the Charleston County Grand Jury for murder (1998-GS-10-1815); and criminal sexual conduct, 1<sup>st</sup> degree (1998-GS-10-1814). He was represented by Juan W. Tolley, Esquire, and Melissa Gay, Esquire. On March 18, 1999, Applicant was convicted by a jury of voluntary manslaughter and criminal sexual conduct, 1<sup>st</sup> degree. He was sentenced by the Honorable Gerald C. Smoak, Jr., to confinement for a period thirty (30) years on each charge, to be served concurrently.

A timely Notice of Appeal and Anders<sup>1</sup> brief were filed on Applicant's behalf. On March 14, 2002, the Supreme Court of South Carolina denied Applicant's appeal in an unpublished

<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

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opinion. State v. Curtis Jerome Lemon, No. 2002-UP-032 (S.C. Ct. App. filed April 5, 2002).

The Remittitur was issued on April 26, 2002.

**First PCR Application: 2002-CP-10-3358**

Applicant subsequently filed an application for post-conviction relief on August 13, 2002, alleging the following grounds for relief:

1. Ineffective assistance of counsel.
  - a. Counsel failed to object to the submission of the voluntary manslaughter verdict;
  - b. Counsel failed to object to the court's charge upon the jury's request to be re-instructed on the law;
  - c. Counsel failed to request a more complete charge upon the jury's request to be re-instructed on the law;
  - d. Counsel failed to object to the trial court's Allen charge to the jury absent any indication that the charge was necessary;
  - e. Counsel failed to object to evidence of the Applicant's purchase and use of crack cocaine in order to preserve the issue for appeal of the court denial in limine to exclude such evidence;
  - f. Counsel was ineffective for failing to object to the solicitor's improper bolstering of the credibility of state witnesses;
  - g. Counsel was ineffective for failing to present favorable witnesses and evidence.

Respondent made its Return on January 13, 2003. An evidentiary hearing into the matter was convened on June 16, 2004, at the Charleston County Courthouse before the Honorable Doyet A. Early, III. Applicant was present and represented by Bob J. Conley, Esquire. Adrienne L. Turner, Esquire, of the South Carolina Attorney General's Office represented Respondent. Applicant testified on his own behalf at the PCR hearing; also present to testify was Juan W. Tolly, Esquire. Following the hearing, Judge Early issued a written order denying and dismissing the application with prejudice dated September 7, 2004.

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A timely Notice of Appeal was filed on Applicant's behalf. In an Order dated October 30, 2007, the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari. The Remittitur was issued on November 15, 2007.

**Federal Habeas Petition: 5:15-cv-02241-JMC-KDW**

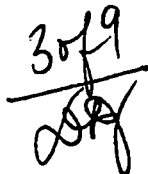
Applicant filed a petition for writ of habeas corpus in Federal District Court in the Federal District of South Carolina on March 24, 2008. Respondent made its Return and Memorandum in Support of Summary Judgement on August 15, 2008. On January 23, 2009, the Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued a Report and Recommendation, in which he recommended that the State's motion for summary judgment be granted and the habeas petition be dismissed with prejudice. In an Order dated March 19, 2009, the Honorable R. Bryan Harwell, United States District Judge, granted the State's motion for summary judgment and denied Applicant's habeas petition with prejudice.

The Fourth Circuit Court denied a certificate of appealability and dismissed Applicant's appeal on October 6, 2009.

**Application for DNA Testing**

Applicant subsequently filed an Application for Forensic DNA Testing on November 12, 2013. A hearing was convened on June 24, 2014. Applicant was represented by Michael A. Uricchio, Esquire. After careful consideration of the motion, supporting and opposing material and arguments, the Honorable Roger M. Young, Sr., denied the Application in an Order dated June 24, 2014.

Applicant filed a *pro se* Notice of Appeal. In an Order filed November 24, 2014, the South Carolina Court of Appeals dismissed the appeal pursuant to Rule 207 of the South

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Carolina Appellate Court Rules, for failure to provide the Court with the transcript of the proceeding. The Remittitur was issued on January 28, 2015.

**2015-CP-10-1536**

In his second application for post-conviction relief, filed March 13, 2015, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel, specifically:
  - a. "Failure to protect my rights pursuant to S.C. Code Ann. § 17-27-100";
  - b. "Right to seek appellate review of the denial of my Application for Forensic DNA Testing PCR."

Applicant filed an amended PCR application on April 13, 2015, alleging the following additional grounds for relief:

1. Ineffective assistance of Counsel;
  - a. "Failure to protect my rights pursuant to S.C. Code Ann. § 17-27-100";
  - b. "Right to seek appellate review of the denial of my PCR application."

Respondent made its Return on or about August 17, 2015 requesting the application be summarily dismissed as success, untimely, and for failing to state a claim. On August 24, 2017, the Honorable R. Markley Dennis, Jr issued the Conditional Order Dismissal. The Final Order of Dismissal was issued on April 1, 2016. Applicant subsequently filed a timely notice of appeal. On June 14, 2016, the Supreme Court of South Carolina held that Applicant "failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. The Remittitur was issued on July 1, 2016.

**CURRENT APPLICATION**

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

1. "Ineffective Assistance of PCR Counsel."



- a. PCR counsel was ineffective by failing to timely seek appellate review from denial of his PCR application for Forensic DNA testing.
2. "Denial of Procedural Due Process and Right to Appellate Review."
3. "Violation of §17-27-90, § 17-27-100, "Sup.Ct. Rule 50(a), U.S.C.A. Const. Amend. 6, SCRC Proc. 71.1 (g)."

Also, before the Court are the records from the Charleston County Clerk of Court, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior PCR records, records from Applicant's DNA Testing application, record from Applicant's Federal Habeas action, and records from this PCR action.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### **Statute of Limitations**

The application 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 ("the Act"). 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 offense 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 was convicted of the offense he currently challenges on March 18, 1999. Following an unsuccessful direct appeal, the Remittitur was issued on April 26, 2002. Accordingly, Applicant was required to file this Application on or before April 26, 2003. Applicant did not file this Application until October 25, 2016; over *seventeen* 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). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). 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.” Therefore, this Court must summarily dismiss this application for failure to file within the time mandated by the Act.

### Successive

Respondent submits this application for post-conviction relief should be summarily dismissed because it is successive to the previous application for post-conviction relief. 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 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). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple as it were.’” Id. The “burden is on the applicant to establish that

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any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

To the extent Applicant is alleging he received ineffective assistance of counsel on his prior post-conviction relief application, Respondent submits such a claim 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 has 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 in “failing to appeal DNA testing,” even if true, is not a sufficient reason warranting a successive PCR application. Accordingly, he has failed to meet the burden imposed upon him, and the Court must summarily dismiss the application as successive to Applicant’s previous PCR application.

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### *Res Judicata*

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, 275 S.C. at 615, 274 S.E.2d at 415.

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant raised identical claims in his second post-conviction relief action. The finality of the previous Court rulings should be respected. Therefore, the application is summarily dismissed as barred by the doctrine of *res judicata*.

### **Failure to state a claim**

Respondent submits Applicant has failed to state a claim upon which relief may be granted. First, ineffective assistance of DNA counsel is not a cognizable claim under PCR act. 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

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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 (1976). Whether or not Applicant's post-conviction relief counsel performed adequately is not within the scope of the PCR Act.

For this reason, Applicant's claim is dismissed pursuant to Rule 12(b)(6), SCRPC.


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

Office of the Attorney General  
Attn: Judah VanSyckel, Esquire  
Rasheeda Cleveland, Esquire  
PCR Division – 9<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Charleston 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 1<sup>st</sup> day of August, 2017.

  
DEADRA L. JEFFERSON  
Chief Administrative Judge  
Ninth Judicial Circuit

 \_\_\_\_\_, South Carolina

