

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM OCONEE COUNTY

COURT OF COMMON PLEAS

R. LAWTON MCINTOSH, CHIEF ADMINISTRATIVE JUDGE

STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

RODERICK MCRAE # 236188,

APPELLANT.

NOTICE OF APPEAL

Roderick McRae # 236188 appeals the Final Order of Dismissal of the Honorable R. Lawton McIntosh dated July 24, 2018. (Attached). Appellant received written notice of entry of this Order on July 30, 2018.

August 27 2018



Roderick McRae # 236188

F3-B-233

McCormick Correctional Institution

McCormick, SC 29899

Pro se


PROOF OF SERVICE

I, Roderick McRae # 236188, do swear or declare that on this date, 8-22-18 2018, as required by South Carolina Supreme Court Rule 203 (d) (1) (B), I have served the enclosed NOTICE OF APPEAL on each party to the above proceeding or that party's counsel; and on every other person required to be served, by depositing an envelope containing the above document in the United States mail properly addressed to each of them and first-class postage prepaid.

The names and addresses of those served are as follows:

Clerk of the Supreme Court
1231 Gervais Street
Columbia, SC 29201

OFFICE OF THE SOLICITOR
County of Oconee
415 South Pine Street
Walhalla, South Carolina, 29691


Roderick McRae, pro se
22 August 2018
J Franklin, Notary
Exp 12-16-2019

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STATE OF SOUTH CAROLINA)
 COUNTY OF OCONEE)
)
 Roderick McRae, #236188,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

SC SUPREME COURT

2018-CP-37-100

FILED OCONEE COUNTY, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2018 JUL 27 P 1:25

FINAL ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief filed by Roderick McRae (Applicant) on February 9, 2018. Respondent made its Return and Motion to Dismiss on June 4, 2018, requesting the application be summarily dismissed as time barred, as successive, as barred by the doctrine of *res judicata*, and for failing to set forth a *prima facie* showing which would permit this untimely application for newly discovered evidence.

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 filed June 11, 2018, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is a Certificate of Service dated June 29, 2018, serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant has failed to respond to either the Respondent's Motion to Dismiss or this Court's Conditional Order of Dismissal. Therefore, this Court finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

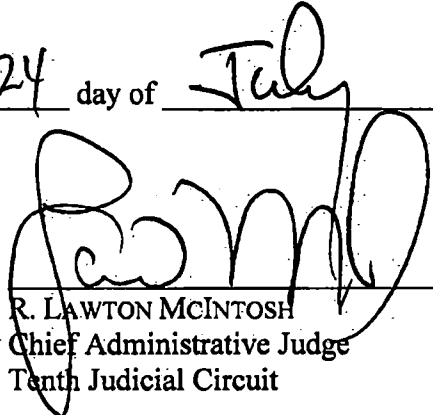
Copies to:
 Atty (P) _____ (D) _____
 DSS _____ other _____
 Mailed Boxed _____ handed _____



IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's Conditional Order of Dismissal, the application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant 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 24 day of July, 2018.



R. LAWTON MCINTOSH
Chief Administrative Judge
Tenth Judicial Circuit

Anderson, South Carolina.

FILED OCAWEE COUNTY, SC
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CLERK OF COURT
2018 JUL 27 P 1:25

Applicant filed a timely notice of appeal, and Richard H. Warder, Esquire, perfected an appeal on his behalf. Following briefing, the South Carolina Court of Appeals affirmed Applicant's convictions and sentences. *State v. McRae*, Op. No. 99-UP-303 (S.C. Ct. App. filed May 18, 1999). The Remittitur was issued on June 8, 1999.

2000-CP-37-00006

Applicant filed his first application for post-conviction relief on January 6, 2000, alleging ineffective assistance of counsel. Respondent made its Return on March 23, 2000, requesting an evidentiary hearing be held. Thereafter, through his counsel, Applicant filed an amended application for post-conviction relief. In this amended application, Applicant raised the following grounds:

1. "Ineffective assistance of trial counsel for failure to seek a mistrial based on prosecutorial misconduct, the jury's improper exposure to the Applicant's prior record through a newspaper article, and the jury's alleged discussions about the article;"
2. "Ineffective assistance of trial counsel for failing to object to curative instruction given by the court regarding the newspaper article;" and
3. "Ineffective assistance of counsel for failure to challenge the constitutionality of the South Carolina 'three strikes' statute, S.C. Code Ann. § 17-25-45(B), pursuant to which the Applicant was sentenced to life imprisonment."

An evidentiary hearing into the matter was convened on August 6, 2003, at the Anderson County Courthouse before the Honorable J. Cordell Maddox, Jr. Applicant was present at the hearing and was represented by James Price, Esquire. By Order dated August 27, 2004, Judge Maddox denied and dismissed Applicant's application for post-conviction relief with prejudice. Thereafter, by Order dated October 1, 2004, Judge Maddox issued a "Consent Order to Amend Order of Dismissal," correcting a scrivener's error in the original Order of Dismissal.

Applicant filed a timely notice of appeal, and an appeal was perfected on his behalf by Tara Dawn Shurling, Esquire. Subsequently, the Supreme Court of South Carolina issued an

order denying the petition for a writ of certiorari on December 18, 2006. The Remittitur was issued on January 4, 2007.

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Applicant then filed a *pro se* petition for habeas corpus on May 24, 2007, in the United States District Court for the District of South Carolina. In his petition, Applicant raised the following grounds for relief:

1. "The trial judge erred in denying Petitioner's motion for a mistrial on the grounds that several members of the jury had read and discussed a newspaper article during the trial which revealed the petitioner's prior criminal record and possible life without parole sentence, which was a denial of due process of law."
2. "The trial judge erred in not declaring a mistrial on the court's own motion because during the trial on these charges the jury read and discussed a newspaper article which contained the defendant's prior record, and further because of prosecutorial misconduct in releasing to the media the defendant's prior record and possible sentence in this matter, this was a denial of due process of law."
3. "The disclosure of the newspaper article containing Petitioner's two (2) convictions for violent offenses is not harmless error because it violated Petitioner's due process rights."
4. "Defense counsel was ineffective for failing to seek a mistrial based on prosecutorial misconduct, which violated Petitioner's Sixth Amendment Right."
5. "Defense counsel was ineffective in failing to seek a mistrial where the record reflects that the jury engaged in premature deliberation, which violated Petitioner's Sixth Amendment Right."
6. "Defense counsel was ineffective in acquiescing in a curative instruction that was inadequate to remove the undue prejudice."

Respondent filed its Return and Motion for Summary Judgment on September 5, 2007. Thereafter, on July 24, 2008, the Honorable Bristow Marchant, United States Magistrate Judge, issued a Report and Recommendation, recommending Respondent's motion for summary judgment be granted. On September 2, 2008, the Honorable Henry F. Floyd, United States District Judge, accepted the Report and Recommendation for summary judgment and denied Applicant's petition. Applicant then appealed to the United States Court of Appeals for the Fourth Circuit. On August 12, 2009, the Fourth Circuit dismissed Applicant's appeal for lack of a certificate of appealability.

2012-CP-37-27

Applicant then filed a petition for writ of habeas corpus in circuit court on January 10,

2012. In this petition, Applicant alleged the following grounds for relief:

1. "Insufficient evidence (proof) to support convictions."
 - a. "[Applicant] submits that since the State failed to establish a Nexus between [Applicant] and the bag by sufficient evidence, he is entitled to relief."
2. "Solicitor (Prosecutor) Misconduct."
 - a. "[Applicant] submits that the Solicitor's act of introducing irrelevant evidence of guilt within it being exclusively supported by Perjury-type evidence, and Solicitor's act of vouching for the credibility of Witness Frazier, were acts amounting to Misconduct strong enough for this Court to grant the 'Demanded Relief.'"
3. "Judicial Misconduct."
 - a. "[Applicant] submits that the Trial Judge's decision to enter Exhibits which were irrelevant to showing [Applicant's] guilt, was a decision amounting to Misconduct, in light of ultimate Evidence entered, which would support this Court's grant of Demanded Relief."

Respondent made its Return and Motion to Dismiss on July 9, 2014, requesting the petition be summarily dismissed. By written Order dated July 17, 2014, the Honorable R. Lawton McIntosh denied and dismissed the petition with prejudice.

Applicant filed a timely notice of appeal. By Order dated December 23, 2014, the South Carolina Court of Appeals dismissed Applicant's appeal for failing to provide a sufficient explanation as required by Rule 203(d)(1)(B)(vi), SCACR. The Remittitur was issued on January 15, 2015.

2015-CP-37-504

Applicant filed his second application for post-conviction relief on June 29, 2015. In that application, Applicant alleged he was being held unlawfully for the following reasons:

1. Actual innocence, in that;

- a. "Applicant conviction and sentences [are] unjust whereby the trial court was without jurisdiction [to] impose sentences whereby fundamental [miscarriage] of justice occur during jury trial state's Solicitor did not specify the amount of [drugs] seized during the alleged search, and the chain of custody does not specify officer Raymond Douglas Frock of South Carolina Highway Patrol as being the officer's that found and handle the [alleged] drug which was in a black bag and the chain of custody Report does not specify black bag and a firearm weapon, and there is a break link in the chain of custody report."
 - b. Applicant thereafter argues that the alleged deficiency in the chain of custody "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial, unless, the Court is also satisfied, that the trial was free of [error], harmless constitutional error, the Applicant, should be allowed to pass through the gateway, and argue the merits of his underlying claim."
2. Newly-discovered evidence
- a. "Newly discovery evidence state's solicitor withheld Brady material chain of custody report which does not specify the amount of drugs and, does not alleges firearm weapon that was seize by state trooper C.E. Long, which would been most favor to the defendant and truly Brady material would been most favor to the accuse."
 - b. "Applicant [. . .] discovered newly discovery evidence by receive letter the South Carolina Law Enforcement Division on April 27, 2015 pursuant to chain of custody report[.]"

Respondent made its Return and Motion to Dismiss on March 2, 2017, requesting the application be summarily dismissed for failing to state a cognizable claim, for failing to make a *prima facie* case of newly-discovered evidence, as barred by the statute of limitations, as barred by the doctrine of laches, and as successive. Thereafter, in his capacity as Chief Administrative Judge for the Tenth Judicial Circuit, the Honorable J. Cordell Maddox, Jr. issued a Conditional Order of Dismissal on March 24, 2017. Subsequently, Judge Maddox issued a Final Order of Dismissal denying and dismissing the application with prejudice on July 7, 2017.

Applicant filed a timely notice of appeal therefrom. By written Order dated September 26, 2017, the Supreme Court of South Carolina dismissed the appeal for failing to show there

was an arguable basis for asserting that the determination by the lower court was improper as required by Rule 243(c), SCACR. The Remittitur was issued on October 12, 2017.

CURRENT APPLICATION

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

1. "The Respondent is relying upon a prior conviction that does not carry a maximum sentence of 30 yrs or more under 17-25-45 (The Applicant's sentence is constitutionally invalid);"
2. "Actual innocence, and factual innocence;"
3. "Legal innocence;"
4. "Fundamental miscarriage of justice;"
 - a. "Applicant conviction and sentences is [sic] unjust whereby the trial court was without jurisdiction impose [sic] sentences whereby fundamental miscarriage of justice occur [sic] during jury trial state's solicitor did not specify the amount of drugs seized during the alleges [sic] search, and the chain of custody does not specify officer Raymond Douglas Frock of South Carolina Highway Patrol as being the officers that found and handle [sic] the alledge [sic] drug which was in a black bag and the chain of custody report does not specify black bag and a firearm weapon, and there is a break link in the chain of custody report."
5. "After discovery [sic] evidence chain of custody, SCRCP 6 (Trial Counsel stipulated to this, see: Trial Transcript;" and
 - a. "Newly discovered evidence state's solicitor withheld Brady material chain of custody report which does not specify the amount of drugs and, does not allegedes [sic] firearm weapon that was seize [sic] by state trooper C.E. Long, which would been most favor [sic] to the defendant and truly Brady material would been most favor to the accuse [sic]."
6. "Trial counsel was ineffective for stipulating to drug quantity without investing the chain of chain of custody (SCR.Crim.Proc.6)."

Also before this Court are the records of the Oconee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief records and the appeals therefrom, Applicant's appellate records, Applicant's records from his prior federal and state habeas actions and the appeals therefrom, and the records from this current application.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Statute of Limitations

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 ("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 sentenced on August 14, 1996, and the Remittitur from his direct appeal was issued on June 8, 1999. Accordingly, Applicant was required to file this Application on or before June 9, 2000. Applicant did not file this application until February 9, 2018, which is well beyond the statutory filing period. Indeed, Applicant filed this application nearly *eighteen years* beyond the mandated filing period.

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, section 17-27-70(c) of the South Carolina Code 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.

Newly Discovered Evidence

This Court further finds Applicant’s application for post-conviction relief shall be dismissed for failing to set forth a *prima facie* case, which would permit this application based on newly discovered evidence. The Uniform Post-Conviction Relief Act states a person may institute a post-conviction relief action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed 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. S.C. Code Ann. §17-27-45(C). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Applicant has wholly failed to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant’s allegations involve “facts” that were, or could have

been discovered before his trial. Furthermore, each of Applicant's allegations have been raised at least once in his prior actions in state and federal courts. Before the Court will hold an evidentiary hearing, 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); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a *prima facie* showing he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter shall be summarily dismissed with prejudice.

Successive

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to Applicant's prior application for post-conviction relief.

Section 17-27-90 of the South Carolina Code provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application: *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991); *Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief, and, thus, the

current application is successive and barred under section 17-27-90 of the South Carolina Code. Applicant has failed to establish a sufficient reason why he could not have raised his current allegations in his first application for post-conviction relief; therefore, he has failed to meet the burden imposed upon him. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980); *Aice*, 305 S.C. 448, 409 S.E.2d 392 (1991).

Res Judicata

This Court further finds the application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

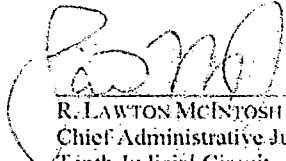
Applicant had a full opportunity to litigate all of his allegations in his prior actions. Specifically, Applicant raised the same allegations in this application which were raised in his 2015 application for post-conviction relief. These issues were fully litigated and were ruled on by the post-conviction relief court. The finality of the previous Court rulings should be respected, and this Court finds the application should be summarily dismissed as barred by the doctrine of *res judicata*.

Pursuant to section 17-27-70(b) of the South Carolina Code, this 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, factual or legal, with the Lexington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Kelly Oppenheimer, Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 7 day of June, 2018.


R. LAWTON MCINTOSH
Chief Administrative Judge
Tenth Judicial Circuit

Anderson, South Carolina.

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JUN 11 11 P 1:07

CERTIFIED TRUE COPY
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OCONEE COUNTY, SC

Roderick McRae #236188

M.C.I F3-B-233

386 Redemption way

McCormick, S.C. 29899



Clerk for supreme
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