

STATE OF SOUTH CAROLINA )  
COUNTY OF ANDERSON )  
) )  
) )  
Darnell E. Hudson, #227328, )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-04-01305

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed by Darnell E. Hudson, a.k.a Darnell Hudson East, (Applicant) on July 3, 2018, and an amendment thereto filed September 12, 2018. Respondent made its return and motion to dismiss on or about March 5, 2019, 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 Anderson County Clerk of Court. During its February 2001 term, the Anderson County Grand Jury indicted Applicant for seven counts of kidnapping (2001-GS-04-365; -366; -367; -368; -369; -370; -371). Thereafter, during its June 2001 term, the Anderson County Grand Jury indicted Applicant for one count of armed robbery (2001-GS-04-1621). Dorothy Manigault, Esquire, represented Applicant on these charges. On August 7-9, 2001, Applicant proceeded to a jury trial before the Honorable John W. Kittredge. Following deliberations, the jury convicted Applicant as indicted for all charges. Judge Kittredge sentenced Applicant to eight concurrent terms of life imprisonment for each charge.

Applicant filed a timely notice of appeal, and Wanda H. Haile, Esquire, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. The lower court erred in denying [Applicant's] directed

*[Faint, illegible text]*

2. verdict motions on the kidnapping charges; [and]  
The lower court erred in denying [Applicant's] motion for a directed verdict on the indictment alleging that [Applicant] kidnapped one Richard Ausburn when said victim was not present at trial to testify to this effect.

Following briefing, the South Carolina Court of Appeals affirmed Petitioner's convictions and sentences in a published opinion on March 17, 2003. *State v. Darnell Hudson East*, 353 S.C. 634, 578 S.E.2d 748 (Ct. App. 2003). The remittitur was issued on April 2, 2003.

**2003-CP-04-03394**

Applicant subsequently filed an application for post-conviction relief on October 29, 2003, alleging he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel at trial and sentencing; [and]
  - a. See *Strickland v Washington*, 466 US 668, 104 S Ct 2052 (1984).
2. Ineffective assistance of appellate counsel.
  - a. See *Evitts v Lucey*, 469 US 387, 105 S Ct 830 (1985).

On May 11, 2004, Petitioner submitted an amended application in which he asserted the following additional allegations:

1. Ineffective Assistance of Trial Counsel;
  - a. Was defense counsel ineffective in failing to prepare for the trial; [and]
  - b. Was defense counsel ineffective in failing to object to the prosecutor's pitting of witnesses and vouching for State's witnesses in his closing to the jury?
2. Subject Matter Jurisdiction;
  - a. Did the trial court lack subject matter jurisdiction to enter conviction and impose sentences upon indictments 2001-GS-04-365 through 371 for kidnapping;
  - b. Did the trial court have subject matter jurisdiction on the indictment for Richard Ausburn for kidnapping; [and]
  - c. Did the State's Amendment to the indictment divest the court of subject matter jurisdiction?
3. Section 17-25-50 Violation;

4. Prosecutorial Misconduct;
  - a. Was S.C. Code Ann., Section 17-25-50 violated in the sentencing phase of the trial?
5. Did the trial court interfere [sic] with counsel's ability to represent her client by denying her Motion for Directed Verdict;
6. Did the trial Court error [sic] in not excluding the Applicant's alleged statement from the trial of this case; [and]
7. Was evidence entered into the trial obtained in violation of the 4<sup>th</sup> Amendment?

Respondent made its return on September 17, 2004, requesting an evidentiary hearing be held. An evidentiary hearing into the matter was subsequently convened on August 14, 2007, at the Anderson County Courthouse before the Honorable Alexander S. Macaulay. Applicant was present at the hearing and represented by Scott Robinson, Esquire. Thereafter, on September 7, 2007, Judge Macaulay issued an order denying and dismissing the application with prejudice. Said order was filed September 12, 2007.

Applicant filed a notice of appeal November 21, 2007. On February 12, 2008, the South Carolina Supreme Court dismissed the appeal for Applicant's failure to provide the Court with the date on which he first received notice of entry of the order as requested. The remittitur was issued on February 29, 2008.

**2008-CP-04-01567**

Applicant filed his second application for post-conviction relief on May 19, 2008, alleging he was being held unlawfully for the following reasons:

1. Ineffective assistance of "PCR" counsel.
  - a. PCR Counsel failed to file (59E) after order denying relief failed to address all claims raised at PCR hearing; [and]
  - b. PCR Counsel failed to file a timely notice of intent to appeal.

Respondent filed its return and motion to dismiss on September 2, 2008, requesting the application be summarily dismissed as untimely and because Applicant received appellate review of the denial of his first post-conviction relief application. On September 5, 2008, Judge Macaulay issued a conditional order of dismissal provisionally denying and dismissing the application while giving Applicant twenty days to show why the conditional order should not become final. Thereafter, Applicant was granted an evidentiary hearing, and a hearing was held on October 7, 2009, at the Anderson County Courthouse before the Honorable J. Cordell Maddox, Jr. Applicant was present at the hearing and represented by David Brousseau, Esquire. On November 13, 2009, Judge Maddox issued an order granting Applicant a belated appeal from the denial of his first post-conviction relief application. Said order was filed on November 17, 2009.

Applicant filed a timely notice of appeal, and Elizabeth Franklin-Best, Esquire, perfected an appeal on Applicant's behalf. On appeal, Applicant raised the following issues:

1. Did counsel render ineffective assistance of counsel by denying her client's right to be present at a pre-trial hearing when she made a motion for a continuance, at the start of trial? [and]
2. Did counsel render ineffective assistance of counsel by failing to inform the trial court judge that she was only recently retained on his case, and had not meaningfully discussed the case with him prior to trial?

The South Carolina Court of Appeals subsequently denied Applicant's petition for a writ of certiorari by written order on July 11, 2012. The remittitur was issued on July 30, 2012.

**2012-CP-04-02734**

Applicant filed his third application for post-conviction relief on August 14, 2012. In that application, Applicant alleged he was being held in custody unlawfully based on:

1. Ineffective Assistance of P.C.R. Counsel (see attach [sic] statement of facts and legal argument; Exhibits #a)
  - a. Martinez v. Ryan; 566 U.S. \_\_\_ (2012) Opinion of

- the Supreme Court of the United States.
- b. At the P.C.R. evidentiary hearing P.C.R. Counsel precluded [Applicant] to raise [sic] a [sic] issue of ineffective assistance of appellate counsel.

Thereafter, on February 25, 2013, Applicant amended his application to include the following additional grounds:

1. The State prosecution violated Applicant's rights by the Fourteenth Amendment of the United States Constitution and by the South Carolina Constitutional Law under the Due Process Clause when it failed to disclose in its Rule (5) Brady disclosure that one of the State's witnesses had a prior conviction which was favorable evidence to the defense.

Applicant filed another amended application on April 4, 2013, raising the same issue in his first amended application for post-conviction relief. On January 27, 2014, Respondent made its return and motion to dismiss, requesting the application be summarily dismissed as untimely and as successive. On September 2, 2014, Petitioner filed a petition for writ of mandamus to the South Carolina Supreme Court. Thereafter, the Court informed Petitioner it would take no action on the writ.

Subsequently, on April 27, 2015, Respondent filed an amended return and motion to dismiss, again requesting the application be summarily dismissed as untimely and as successive. Judge Maddox subsequently issued a conditional order of dismissal on May 1, 2015, and filed May 4, 2015, provisionally denying and dismissing the application with prejudice while giving Applicant twenty days to show why the order should not become final. Applicant failed to respond to the conditional order within the allotted time. Thereafter, Judge Maddox issued a final order of dismiss, denying and dismissing the application with prejudice. Applicant did not appeal Judge Maddox's final order.

Applicant subsequently filed a petition for writ of habeas corpus in the Anderson County Court of Common Pleas. In this petition, Applicant alleged the following grounds for relief:

1. Trial counsel render [sic] ineffective assistance of counsel by failing to call [Applicant] to the stand to testify when [Applicant] never knowingly, voluntarily, or intelligently waived his 5th Amend. Of the U.S. Const Amendment right to testify, denying [Applicant] the right to testify;
2. Trial counsel render [sic] ineffective assistance of counsel by failing to request to the trial court to question [Applicant] on the record whether or not [Applicant] was going to testify or waive his 5th Amendment right not to testify;
3. [Applicant] never knowingly, voluntarily, or intelligently waived his 5th Amendment right to testify;
4. The trial court erred in failing to question [Applicant] on the record of his decision to testify or not testify.
5. [Applicant] was denied the guaranteed right to confrontation and cross examination of one of the State's victims in this case (Richard Ausburn);
6. Trial counsel render [sic] ineffective assistance of counsel by failing to object to the State failing to enter any "sworn testimony" or subpoena to establish the unavailability of an alleged victim (Richard Ausburn) who was not in court to testify that they got kidnapped;
7. Trial counsel render [sic] ineffective assistance of counsel by failing to motion [sic] to depose (videotape or get a statement) of a allege [sic] victim that the State failed to produce at trial for the [Applicant] to confront and cross examine under oath that he was kidnapped by [Applicant];
8. Trial counsel render [sic] ineffective assistance of counsel by failing to motion [sic] to suppress identification testimony of the victims;
9. Trial counsel render [sic] ineffective assistance of counsel by failing to object to in-court identification of [Applicant];
10. [Applicant] was denied his 6<sup>th</sup> and 14<sup>th</sup> Amends. Rights of the U.S. Const. Amendments by being denied to confrontation and cross examination of a State witness (Detective Judy Cartee) which the State filed to produce at trial so [Applicant] could confront and cross examine under oath;
11. Trial counsel was ineffective in failing to object to the Prosecutor pitting of defense witness and vouching to the State witnesses in his closing to the jury;

12. The P.C.R. court violated the South Carolina Post-Conviction Relief Procedures Act, Code Ann § 17-27-80 by failing to make a specific finding of fact and state expressly its conclusion of law relating to each issue presented;
13. P.C.R. counsel render [sic] ineffective assistance of counsel by failing to file a Rule 59(e) motion to alter or amend the judgment of the P.C.R. court's Order of Dismissal; [and]
14. P.C.R. counsel render [sic] ineffective assistance of counsel by denying [Applicant] to his right to raise claim of ineffective assistance of appellate counsel at Petitioner's P.C.R. hearing.

Respondent made its return and motion to dismiss the petition for writ of habeas corpus on June 4, 2015, requesting the application be summarily dismissed because the allegations could have been raised in prior application for post-conviction relief and because State petitions for writ of habeas corpus must be filed in the original jurisdiction of the Supreme Court of South Carolina. The Honorable R. Lawton McIntosh issued an order dismissing the petition for writ of habeas corpus on June 9, 2015, and filed on June 10, 2015. Applicant did not appeal.

**4:15-690-JMC-TER**

Applicant subsequently filed a petition for writ of habeas corpus in the United States District Court, District of South Carolina on February 18, 2015. In the petition, Applicant raised the following grounds for relief:

1. [Applicant's] Due Process and Equal Protection Clause of the 5<sup>th</sup> and 14<sup>th</sup> Amends of the U.S. Const is [sic] being violated;
2. [Applicant] was denied effective assistance of trial counsel which violated his 6<sup>th</sup> and 14<sup>th</sup> Amends of the U.S. Const;
3. P.C.R. Counsel rendered ineffective assistance of counsel in [Applicant's] initial review collateral [sic] proceeding; [and]
4. [Applicant's] Due Process rights pursuant to the 5<sup>th</sup> and 14<sup>th</sup> Amends of the U.S. Const was [sic] violated which prejudiced him.

Respondent made its return and motion for summary judgment on June 10, 2015, requesting the action be summarily dismissed as the record conclusively showed Applicant was not entitled to any relief. Thereafter, the Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued a report and recommendation on September 9, 2015, recommending Respondent's motion for summary of judgment be granted in its entirety and the petition dismissed without an evidentiary hearing. The Honorable J. Michelle Childs, United States District Judge, subsequently issued an order, adopting Judge Rogers's report and recommendation, ordering Respondent's motion for summary judgment be granted in its entirety, and dismissing the petition without an evidentiary hearing.

### **CURRENT APPLICATION**

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

1. Trial court subject-matter jurisdiction violations;
  - a. Prosecutor and court constructed amended Applicant's indictments.
2. Violations of S.C. Code Ann § 17-25-45(H) & 16-3-910; [and]
  - a. Trial court imposed an excessive sentence on kidnapping indictment;
3. Violations of Due Process and Equal Protection rights.
  - a. Trial court violated Applicant's Const rights when imposed sentences.

In his amendment to the application for post-conviction relief, Applicant raises the following additional grounds for relief:

1. The trial court of Anderson County General Sessions lacked subject matter jurisdiction over Applicant's criminal charges for the offense(s) of armed robbery and kidnapping pursuant to the Federal Hate Crime Act, 18 U.S.C.A. § 245(b)(1)(2) & (F)

Also before this Court are the Anderson County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction

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relief actions and the appeals therefrom, the records from Applicant's federal habeas corpus action, the records from Applicant's state habeas corpus action, and the records for this current post-conviction relief action.

### 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*

The Court finds this applications<sup>RS</sup> shall 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 conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held 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). 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."

Applicant was convicted as indicted on August 9, 2001, and the remittitur from his direct appeal was issued on April 2, 2003. The application was, therefore, due on or before April 3, 2004. This application was not filed until July 3, 2018, *more than fourteen years after* the statutory filling period had expired. Therefore, this Court shall summarily dismiss the application as barred by the statute of limitations.

### *Successive*

This Court further finds the application shall be summarily dismissed because it is successive to Applicant's previous post-conviction relief applications. Courts disfavor successive applications and place the burden on applicants to establish any new ground raised in a subsequent application could not have been raised in an earlier application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive

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applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations of ineffective assistance of counsel, prosecutorial misconduct, and lack of subject matter jurisdiction could have been, or were in fact, raised in Applicant's prior applications for post-conviction relief. Indeed, Applicant's current application is practically identical to his prior applications. Applicant has wholly failed to establish any sufficient reason why he could not have raised these current allegations in one of his numerous previous applications for post-conviction relief. Therefore, Applicant has failed to meet the burden imposed upon him, and the application is summarily dismissed as successive to Applicant's prior post-conviction relief action.

#### ***Res Judicata***

This Court similarly 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 not only raised in his original application for post-conviction relief but also raised at the evidentiary hearing. Indeed, Applicant voluntarily chose to waive his allegations of subject-matter jurisdiction at the evidentiary hearing for his first post-conviction relief application. Accordingly, these issues were

fully litigated and were ruled upon by the post-conviction relief court. The finality of the previous court rulings should be respected, and this Court finds the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

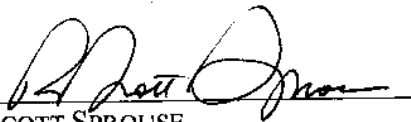
### CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), 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 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 Anderson County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Kelly Oppenheimer, Esquire  
PCR Division – 10<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 Anderson County Clerk of Court and opposing counsel within twenty (20) days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 8 day of March, 2019.

  
R. SCOTT SPROUSE  
Chief Administrative Judge  
Tenth Judicial Circuit

Walthalla, South Carolina



ALAN WILSON  
ATTORNEY GENERAL

March 5, 2019

The Honorable R. Scott Sprouse  
Chief Administrative Judge, Tenth Judicial Circuit  
Post Office Box 1277  
Walhalla, SC 29691

**Re: Darnell E. Hudson, #227328 v. State of South Carolina**  
**2018-CP-04-01305**

Dear Judge Sprouse:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. If this order meets your approval, please sign and forward it to the Anderson County Clerk of Court in the enclosed envelope. If you have any questions or concerns please do not hesitate to contact me by phone at 803-734-3737 or by electronic mail at [koppenheimer@scag.gov](mailto:koppenheimer@scag.gov).

Sincerely,

Kelly Oppenheimer  
Assistant Attorney General

KO/ch  
Enclosures

cc: Darnell E. Hudson, #227328