

RECEIVED

DEC 11 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Greenville County Court of Common Pleas
Alex Kinlaw, Jr. Chief Administrative Judge
Thirteenth Judicial Circuit

Case No. 2019-CP-23-1381

State of South Carolina.....Respondent

v.

Eugene Thomas.....Appellate

Notice OF Intent To Appeal

The undersigned hereby certify that he filed notice of Intent to Appeal from the Final Order of Dismissal signed by Honorable Alex Kinlaw, Jr. November 23, 2020, but issue November 17th, 2020 and received by me December 7, 2020. See Attachment Order of Dismissal.

Eugene Thomas 12-9-20
Eugene Thomas, #222351
386 Redemption Way
McCormick, SC 29899

STATE OF SOUTH CAROLINA)
 COUNTY OF GREENVILLE)
)
)
 Eugene Thomas, SCDC #222351,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FOR THE THIRTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-23-1381

FINAL ORDER OF DISMISSAL

ENTERED COMPUTED

2020-NOV-23 PM 1:34
 PAUL W. MCKENNA, CLERK
 FILED IN THE COURT OF COMMON PLEAS
 FOR THE THIRTEENTH JUDICIAL CIRCUIT
 GREENVILLE, SOUTH CAROLINA

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Eugene Thomas (Applicant) on March 15, 2019. The State made its return on April 15, 2020, requesting the application be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant’s prior PCR action; it is barred by the doctrine of *res judicata*; Applicant failed to make a *prima facie* case of newly discovered evidence; and Applicant’s claims are otherwise without merit.

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 August 24, 2020, 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.¹ Attached

¹ At the time this Court issued its Conditional Order of Dismissal, Applicant’s federal habeas corpus action was still pending. On September 25, 2020, the Honorable Margaret B. Seymour, Senior United States District Judge, issued an order accepting the Magistrate’s report and recommendation, granting the State’s motion for summary judgment, and dismissing the petition with prejudice. *Thomas v. Warden of McCormick Corr. Inst.*, 1:19-2176-MBS (D.S.C. Sept. 25, 2020).

[Handwritten Signature]
 Page 1 of 4

to this Final Order of Dismissal, is an Affidavit of Service dated October 5, 2020, serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant filed a timely response to the Conditional Order on July 22, 2020. Applicant first alleges this action is not untimely because his PCR appeal was still pending at the time he filed the instant application. As discussed in the Conditional Order, the one-year statute of limitations delineated in section 17-27-45(A) of the South Carolina Code begins to run on the date Applicant is *convicted* or the date the remittitur is issued on *direct appeal*, whichever is later. The remittitur from Applicant's direct appeal issued on November 3, 2014. The status of Applicant's prior PCR action does not affect the statute of limitations for purposes of the current PCR action.

Applicant next argues—as he did in the application and extensively addressed in this Court's Conditional Order—that PCR appellate counsel was ineffective for failing to raise certain issues on appeal, which precluded Applicant from raising these claims in his federal habeas action.² Applicant's complaint that appellate counsel should have raised every issue ruled on by the PCR court is meritless. *See Jones v. Barnes*, 463 U.S. 745 (1983) (“[An] indigent defendant has [no] constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points.”). Therefore, Applicant's allegations of ineffective assistance of PCR appellate counsel do not fall within any exception to the rule barring such claims.

² This Court would further note that failure to raise an issue on PCR appeal is not an absolute bar to raising the “procedurally defaulted” issue in a federal habeas petition. Review of the defaulted allegations is pretermitted unless Petitioner can establish either “cause for the default and actual prejudice as a result of the alleged violation of federal law” or “a fundamental miscarriage of justice.” *Lewis v. Wheeler*, 609 F.3d 291, 309 (4th Cir. 2010) (quoting *Vinson v. True*, 436 F.3d 412, 417 (4th Cir. 2006) (internal quotation marks omitted)). The district court found Applicant failed to meet this cause and prejudice standard.

Similarly, Applicant alleges he should be allowed to proceed on the merits of this successive PCR action because “multiple procedural irregularities” occurred due to ineffective assistance of trial counsel, appellate counsel on direct appeal, PCR counsel, and PCR appellate counsel based on “multiple procedural irregularities.” A PCR applicant who “seeks to have more than one procedural ‘bite’ at the apple” will rarely succeed under South Carolina law. *See e.g. Aice v. State*, 408 S.E.2d 392 (1991).

Applicant received a hearing in his first post-conviction relief action and timely appealed to the South Carolina Supreme Court therefrom. Following the filing of the State’s return to the petition for a writ of certiorari, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). The Court dismissed Applicant’s appeal. Accordingly, Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.”

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 showing based on the information set forth in his response, and, therefore, he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

This Court reasserts its finding in the Conditional Order of Dismissal that the current PCR application must be dismissed because it was filed after the statute of limitations had expired; it is

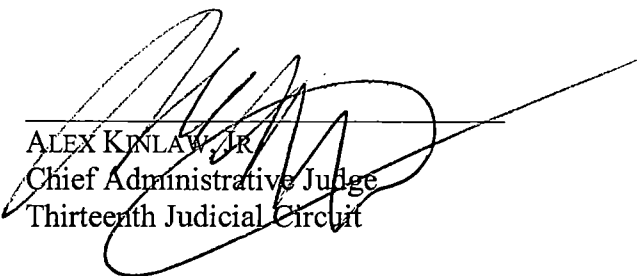
Handwritten signature and initials, possibly reading "AKH 3", written in black ink.

successive to Applicant's prior PCR action; it is barred by the doctrine of *res judicata*; Applicant failed to make a *prima facie* case of newly discovered evidence; and Applicant's claims are otherwise without merit.

IT IS THEREFORE ORDERED that for the reasons set forth in this Court's Conditional Order of Dismissal and above, this post-conviction relief action 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 23rd day of July, 2020.


ALEX KINLAW, JR.
Chief Administrative Judge
Thirteenth Judicial Circuit

C. Kelly, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

EUGENE THOMAS, #222351

Applicant,

v.

STATE OF SOUTH CAROLINA

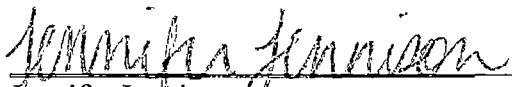
Respondent.

CERTIFICATE OF SERVICE


The undersigned hereby certifies that a true copy of the **Final Order of Dismissal** has been served upon the applicant by mailing one copy in the United States mail, postage prepaid, addressed to:

Eugene Thomas, #222351 (QF1A-0271-A)
McCormick Correctional Institution
386 Redemption Way
McCormick, SC 29899

This 2nd day of December, 2020.


Jennifer Jennison
Administrative Coordinator for Respondent

SWORN to before me this 2nd day of December, 2020



Notary Public for South Carolina.
My Commission Expires:

My Commission Expires September 11, 2029