STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
Charles H. Davis, #299511 Applicant	)	2020-CP-29-1195
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina, Respondent.	)	

This matter comes before this Court pursuant to Applicant Charles H. Davis's action for post-conviction relief (PCR) commenced on September 14, 2020. Respondent made its return and motion to dismiss on February 18, 2021. The Court grants Respondent's motion to dismiss because the action is untimely, successive to Applicant's prior PCR action, is barred by the doctrine of *res judicata*, and fails to make a *prima facie* case of newly discovered evidence.

PROCEDURAL HISTORY

Applicant is presently confined with the South Carolina Department of Corrections (SCDC). During the February 2013 term the Lancaster County Grand Jury indicted Applicant for assault and battery of a high and aggravated nature (ABHAN) (2007-GS-29-0867) and burglary, first degree (2007-GS-29-0866). The indictments arose out of an incident that occurred on February 11, 2007, when Applicant kicked in the door of his pregnant ex-girlfriend's apartment. Applicant entered and attacked the victim as he lay in bed. The victim was a friend of Applicant's ex-girlfriend and was staying with her at the time. Applicant beat the victim, causing trauma to the victim's head and face. Mark Grier, Esquire represented Applicant. Assistant Solicitor Randy Newman of the Sixth Circuit Solicitor's Office prosecuted the case.

On February 13, 2013, the State called Applicant's case for trial before the Honorable Brooks P. Goldsmith and a jury. Applicant, who had been released from pre-trial confinement on bond, failed to appear and was tried in his absence. The jury convicted Applicant as indicted, and Judge Goldsmith issued a sentence, which was sealed until the time Applicant could be detained and brought before the court for sentencing. Applicant was eventually apprehended, and on June 18, 2013, appeared before the Honorable J. Ernest Kinard, Jr., for a sentencing proceeding. At that time, Judge Kinard unsealed Judge Goldsmith's sentence of concurrent terms of ten years imprisonment for ABHAN and twenty years imprisonment for burglary. Judge Kinard then amended the sentence to reduce Applicant's sentence from twenty years to fifteen years imprisonment on the burglary charge.

Applicant filed a timely notice of appeal. Applicant was represented on appeal by Lara M. Caudy of the South Carolina Office of Appellate Defense, who filed an *Anders*[1] brief on his behalf. The appeal was denied and dismissed. *State v. Davis*, No. 2014-UP-290 (S.C. Ct. App. July 16, 2014). The Remittitur was issued on August 1, 2014.

i. First PCR (2014-CP-29-1049) and Subsequent Appeal

Thereafter, Applicant filed an application for post-conviction relief on August 5, 2015, in which he alleged the following grounds for relief:

1. Impeachment evidence/No warrants/ No commitment.
2. Fraud upon the Court.
3. No transmittal order.
4. Invalid indictment.

Respondent filed its return on December 31, 2014. On February 2-3, 2015 the Honorable DeAndrea G. Benjamin convened an evidentiary hearing on the application at the Lancaster

[1] *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

County Courthouse. Applicant was present and testified at the hearing and was represented by W. Michael Hemlepp, Jr., Esquire on the action. On November 30, 2015, the Honorable DeAndrea G. Benjamin issued an order denying Applicant's application for PCR with prejudice.

Applicant timely appealed and on August 12, 2016, Appellate Defender Kathrine H. Hudgins of the South Carolina Office of Appellate Defense filed a *Johnson*[2] petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On December 2, 2016, South Carolina Court Supreme Court issued an order denying the petition. The Remittitur was sent December 20, 2016.

ii. Second PCR (2017-CP-29-0080)

Applicant thereafter filed his second application for post-conviction relief on January 19, 2017 and amended on May 14, 2018, where he alleged the following grounds for relief:

1. Pursuant to Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064 (1984), Applicant was denied his Sixth Amendment right to effective assistance of counsel due to counsel's failure to adequately prepare for trial.
   a. "Trial counsel was not prepared to proceed with trial after requesting a continuance because Applicant was not present. The trial court denied the continuance and the trial proceeded in Applicant's absence. Trial counsel did not subpoena witnesses for the Applicant or introduced any evidence that would have assisted in creating reasonable doubt and undermining the State's witnesses."
2. Ineffective assistance of counsel in that trial counsel failed to contemporaneously object or move to release the venire men and summon a new jury pool after the incorrect and prejudicial reading of an indictment for ABHAN in the presence of the potential jurors, which incorrectly alleged the Applicant "once again" struck the victim "with a pistol."
   a. "Trial counsel failed to contemporaneously object/move to release the venire men and summon a new jury pool due to the reading of an indictment of ABHAN in the presence of the potential jurors that incorrectly alleged the Applicant "once again" struck the victim "with a pistol." The Court subsequently allowed the Solicitor to "pen mark through" the words "With a pistol" from the indictment after the indictment has been presented to the jury. This highly prejudiced the

[2] Pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

Applicant due to the jury being confused as to the actual charge, the elements that the prosecutor had to prove beyond a reasonable doubt, particularly due to the Solicitor's closing argument in which he told the jury he only had to prove one of the two elements, and when understanding the jury instructions. The confusion to the jury is evident in their questions to the trial court during deliberations for further instructions on the charges. The improper reading of "with a pistol" also prejudiced the Applicant because it erroneously provided a forecast to the jury of what evidence they would be presented with. "With a pistol" tainted the jury's view of Applicant and cast Applicant as a violent criminal."

3. Ineffective assistance of counsel in that trial counsel failing to sufficiently and correctly explain to him a plea offer made by the state.
   a. "Counsel did not have a clear and complete copy of the offer when he discussed it with Applicant. Applicant maintains that the copy of the plea offer shown to him was damaged from a fire and difficult to read."
4. Ineffective assistance of counsel for failing to request that the sentencing hearing be held before the trial judge, the Honorable Brooks P. Goldsmith.
   a. "The judge presiding over sentencing, the Honorable J. Ernest Kinard, declined to hear most of trial counsel's post-trial motions because he did not preside over the trial. Trial counsel failed to subsequently file the post-trial motions for Honorable Goldsmith's consideration."
5. Ineffective assistance of appellate counsel for filing an Anders brief when there were meritorious issues to be fully briefed and pursued for appeal.
   a. "Pursuant to Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985), "a defendant is constitutionally entitled to effective assistance of appellate counsel." Applicant was deprived of his constitutional right to appeal as a result of appellate counsel's filing of an Anders brief. Gilchrist v. State, 364 S.C. 173, 612 S.E. 2d 702 (2005)."

Respondent moved to dismiss the application on July 2, 2019, arguing the application was untimely and barred by the doctrine of *res judicata*. The Honorable Brian M. Gibbons, acting in his capacity as Chief Administrative Judge, issued a Conditional Order of Dismissal on August 8, 2019. Applicant submitted a motion for an extension of time to file an answer granted by the Court on September 9, 2019. Judge Gibbons then issued an amended Conditional Order of Dismissal on October 28, 2019 and a Final Order denying the application with prejudice on June 10, 2020. Applicant did not appeal the Final Order of the Court.

CURRENT APPLICATION

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

1. After Discovered Evidence/New Evidence
   a. "Alleged victim now states she gave Applicant a key to her home so he would have access to it as she was seven months pregnant with Applicant's twins and now firmly states that Applicant Davis did not commit Burglary of her home and had no intent to do so."
2. Fundamentally Contrary to the Interest of Justice
   a. "By Black Law definition of Burglary, First Degree, there had to be an 'intent to commit a crime' to which both alleged victims say there [sic.] was no crime committed. Black Law also defines Assault and Battery High and Aggravated Nature as a crime that has "circumstances of aggravation" and in the Applicant's case, the circumstances of aggravation was the "hitting of victim with a weapon" but prior to trial the prosecution removed the circumstances of aggravation from the indictment, there by invalidating the indictment."

For the purpose of this Conditional Order of Dismissal, the Court incorporates the Lancaster County Clerk of Court records regarding Applicant's convictions, Applicant's SCDC records, the trial transcript, the records from Applicant's prior PCR actions and subsequent appeal, and the records of this PCR action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application as there is no genuine issue of material fact, which would necessitate an evidentiary hearing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Statute of Limitations

The Court finds that this PCR application, except for allegations of newly discovered evidence, shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act[3] (the Act). Specifically, the act requires as follows:

> (A) 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 upon an appeal, whichever is later.
>
> (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
>
> (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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.

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). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party

[3] S.C. Code Ann. § 17-27-10 to -160.

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."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on allegations of newly discovered evidence. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was found guilty on February 18, 2013. Applicant pursued a direct appeal, and the Remittitur was sent August 1, 2014. Pursuant to Section 17-27-45(A), Applicant needed file his application for post-conviction relief on or before August 2, 2015. Applicant did not file his application until September 14, 2020, *five years* beyond the statute of limitations. Moreover, section 17-27-45(B) is inapplicable to Applicant's current PCR application as he alleges no new rights to be applied retroactively. Further, Applicant has failed to satisfy the requirements of a newly discovered evidence claim under section 17-27-45(C). Accordingly, this application is untimely pursuant to Section 17-27-45 and shall be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Successive

The Court finds Applicant's allegations shall be summarily dismissed because this action is successive to Applicant's prior PCR actions. 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 a prior PCR action. *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 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.

Pursuant to section 17-27-90, successive PCR actions are barred 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). The South Carolina Supreme Court held the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Id.* 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. 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. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive 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).

This Court finds Applicant's current allegations, except for allegations of newly discovered evidence, were or could have been raised in the proceedings based on Applicant's two prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations including that of newly discovered evidence in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application, except for allegations of newly discovered evidence, as successive to Applicant's previous post-conviction applications.

Res Judicata

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The Court further finds this application, except for allegations of newly discovered evidence, shall be dismissed based on 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). As discussed above, Applicant has pursued numerous prior collateral attacks on his convictions. Applicant had a full opportunity to litigate all allegations in his previous actions. The public interest in finality of judgment requires that litigation must eventually come to an end. Accordingly, the Court shall summarily dismiss this application, except for allegations of newly discovered evidence, as barred by *res judicata*.

Newly Discovered Evidence

This Court finds Applicant's assertion that he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to vacation of his sentence, to be without merit. The Uniform Post-Conviction Relief Act states that 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).

A defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
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, 611-12, 299 S.E.2d 854, 855 (1983); *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993). 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). In his current application, the evidence Applicant alleges is newly discovered are admissions from the victim and Applicant's ex-girlfriend that Applicant did have a key to her home at time he committed the offenses. However, the issue of whether Applicant was in possession of a house key was substantively documented and discussed by the court during direct and cross-examination of Applicant's ex-girlfriend. Moreover, the record confirms that Applicant's ex-girlfriend acknowledged that Applicant had a key to her home on three separate occasions during trial (Tr. at 38, 42, 74). The Court finds Applicant's allegations of newly discovered evidence clearly refuted by record of the issue being discussed at trial which was ultimately included as part of the record for Applicant's two previous collateral actions. Applicant has failed to make a showing that 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.

CONCLUSION

Pursuant to section 17-27-70(b) of the South Carolina Code, the Court intends to dismiss

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

Office of the Attorney General
Yasmeen E. Klein, Assistant Attorney General
PCR Division – Sixth Circuit
P.O. Box 11549
Columbia, SC 29211

Applicant is cautioned that his response to this order must be actually received by the Lancaster County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, 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 30th **day of** April, **2021.**

EUGENE C. GRIFFITH, JR.
Chief Administrative Judge
Sixth Judicial Circuit