



twenty days from the date of service of said order in which to show why the dismissal should not become final. An Affidavit of Service from SCDC indicates the Conditional Order of Dismissal was personally served on Applicant on October 5, 2020.

The State then submitted a proposed Final Order of Dismissal to this Court on November 16, 2020, and sent a copy to Applicant. This Court issued the Final Order of Dismissal, signed December 1, 2020, and filed December 6, 2020. On December 9, 2020, the State mailed a copy of the filed Final Order of Dismissal to Applicant.

Applicant subsequently filed a document titled "Objection to Respondent [*sic*] Final Order of Dismissal" on January 26, 2021. On February 2, 2021, Applicant filed a document titled "Notice of Motion and Motion to Alter or Amend Judgment Pursuant to Rule 59(e) SCRCF." The State filed its response to these filings on February 3, 2021. This Court then sent Applicant a Memorandum dated February 4, 2021, which notified him that:

"[t]he court has received your Motion to Alter or Amend Judgement pursuant to Rule 59(e), SCRCF as well a Return to your Motion from the State. Both of these submission pertain to previously filed Final Order of Dismissal. After completing a review of the submissions from both parties a decision will be rendered accordingly."

After review of the record, this Court denies Applicant's motion to alter or amend under Rule 59(e), SCRCF in the following particulars:

1. Applicant contends that "Respondent was order [*sic*] by the Supreme Court March 23, 2020 to file it's[*sic*] return. Respondent's return was clock stamped filed by the Saluda County Clerk of Court March 24, 2020 2:06 PM a day after the deadline." Applicant misconstrues the Supreme Court's order, which directed the State to file a return to Applicant's petition for original jurisdiction that he filed *with the Supreme Court*. This post-conviction relief action Applicant filed

in the *circuit court* is an entirely separate proceeding—the Supreme Court did not and does not have jurisdiction over this *circuit court* action.<sup>3</sup>

2. Notwithstanding the fact that the Supreme Court’s order did not in any way apply to this post-conviction relief action, the State’s *return and motion to dismiss* were in fact mailed to Applicant and the Saluda County Clerk of Court on March 23, 2020, as indicated in the affidavit of service. See Rule 5(b)(1), SCRCPP (“Service by mail is *complete upon mailing* of all pleadings and papers subsequent to service” of the original application.). Additionally, this Court issued an order granting the State’s motion to file the return out of time following Applicant’s attempt to hold the State in default.
3. Applicant states this Court improperly and summarily dismissed his action based in part on the doctrine of *laches*. This is incorrect—the State did not raise the issue of *laches*, nor did this Court base any part of its ruling on *laches*.
4. Applicant argues the State submitted a “false fraudulent statement” to this Court. Specifically, Applicant contends he never received the filed Conditional Order of Dismissal. As discussed above, the Conditional Order of Dismissal was personally served on Applicant pursuant to Rule 4(d)(2), SCRCPP, by the South Carolina Department of Corrections Office of General Counsel on October 5, 2020. See *Fassett v. Evans*, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct. App. 2005) (“[A]n [officer’s] return of process creates the legal presumption of proper service that cannot be ‘impeached by the mere denial of service by the defendant.’”)

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<sup>3</sup> The State timely filed its return to Applicant’s petition for original jurisdiction with the Supreme Court. On August 24, 2020, the Court issued an order declining to entertain the matter pursuant to Rule 245, SCACR, and *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991).

5. Applicant relies on *Bunkum v. Manor Properties*, 321 S.C. 95, 467 S.E.2d 758 (Ct. App. 1996) and *Ness v. Eckerd Corp.*, 350 S.C. 399, 566 S.E.2d 193 (Ct. App. 2002) in support of his subject-matter jurisdiction claim. Both of those cases state that issues relating to subject-matter jurisdiction may be raised at any time. However, the State did not argue, nor did this Court rule, that the subject-matter jurisdiction issue was time-barred. In fact, this Court addressed subject-matter jurisdiction *extensively* in its Conditional Order of Dismissal and Final Order of Dismissal. The issue was summarily dismissed when it was found to be without merit, and not because it was untimely. Accordingly, this Court finds Applicant has presented no sufficient reason why the Court should alter or amend its findings of fact and conclusions of law as to this issue.
6. Applicant again alleges the trial court lacked subject-matter jurisdiction to impose a second YOA sentence for his April 20, 1990 conviction for armed robbery in Lexington. At the time of the Lexington conviction, Applicant was already serving a YOA sentence for an armed robbery conviction in Aiken. The presiding judge in that matter sentenced Applicant to a consecutive six-year YOA sentence pursuant to Section 24-19-50 of the South Carolina Code. Both of these prior convictions were used as predicate offenses to sentence Applicant to life without parole under Section 17-25-45.
7. As thoroughly explained in this Court's Conditional Order of Dismissal and Final Order of Dismissal, at the time Applicant entered a plea of guilty in Lexington County and received a second YOA sentence, Section 24-19-50 allowed youthful offenders to be sentenced twice under the YOA. The current version of the

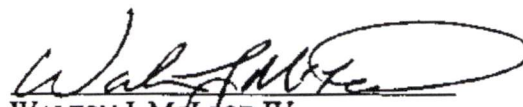
statute, which was amended in 1996, allows youthful offenders to be sentenced under the YOA only once. Because Applicant was sentenced in accordance with the applicable statute in 1990, there was no *ex post facto* violation. Accordingly, this Court finds Applicant has presented no sufficient reason why the Court should alter its findings of fact and conclusions of law as to this issue.

This Court has reviewed all its findings of fact and conclusions of law and based upon the foregoing finds no reason to alter or amend its Conditional Order of Dismissal and Final Order of Dismissal.

**IT IS THEREFORE ORDERED** that Applicant's motion to alter or amend pursuant to Rule 59(e), SCRPC, is **DENIED**.

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.**

  
WALTON J. McLEOD IV  
Circuit Court Judge  
Eleventh Judicial Circuit

March 1, 2021  
Lexington, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF SALUDA )  
)  
)  
Frank Tolen, Jr., SCDC #246966, )  
)  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
)  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE ELEVENTH JUDICIAL CIRCUIT

Case No. 2019-CP-41-0156

**FINAL ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Frank Tolen, Jr. (Applicant) on July 15, 2019.<sup>1</sup> The State made its return on March 23, 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 actions; it is barred by the doctrine of res judicata; 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, the Court issued a Conditional Order of Dismissal filed July 22, 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. Attached

<sup>1</sup> This Court would note that Applicant filed a "Petition for Original Jurisdiction" with our Supreme Court on February 5, 2020, asserting the Court should exercise its original jurisdiction and grant him injunctive relief in the form of a PCR hearing pursuant to Rule 245, SCACR, and Section 14-3-310 of the South Carolina Code. Specifically, Applicant argued he was deprived of his right to access this Court regarding the instant PCR action. The State filed its return to the petition on April 8, 2020. On August 24, 2020, the Court issued an order declining to entertain the matter pursuant to Rule 245, SCACR, and *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356, (1991).

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.

On August 10, 2020, Applicant filed a document titled “Objection and Reply to Respondent Second Conditional Order of Dismissal.” This Court has reviewed Applicant’s response in its entirety, in conjunction with the original pleadings, and after reviewing such response finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

Applicant first alleges this application is not untimely because the Fourth Circuit Court of Appeals dismissed his *federal habeas* appeal on August 3, 2018—eleven months prior to filing this action. 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 May 26, 2009. The dismissal of Applicant’s *federal habeas* action litigated in *federal court* action has no effect on the timeliness of this action.

Applicant next argues—as he did in the application and extensively addressed in this Court’s Conditional Order—that the circuit court lacked subject matter jurisdiction to impose a second YOA sentence for his April 20, 1990, conviction for armed robbery in Lexington. At the time of the Lexington conviction, Applicant was already serving a YOA sentence for an armed robbery conviction in Aiken. The Lexington judge sentenced Applicant to a concurrent six-year YOA sentence pursuant to section 24-19-50 of the South Carolina Code. Both of these prior convictions were used as predicate offenses to sentence Applicant to life without parole under section 17-25-45.

Applicant again bases this allegation on the **current** version of the statute, which only allows a person to be sentenced as a youthful offender once. At the time Applicant was sentenced, in 1990, the statute stated that “[n]o youthful offender shall be sentenced more than *twice* under the provisions of this chapter.” S.C. Code Ann. § 24-19-50(c) (amended 1996) (emphasis added). Applicant even cites the South Carolina General Assembly session in 1995–1996 wherein the old statute was amended to reflect the **current** version of section 24-19-50, which states that, “[i]n the event of a conviction of a youthful offender the court may. . . not sentence a youthful offender more than once under this chapter.” The statute was amended six years after Applicant received his second YOA sentence, and did not apply retroactively. Therefore, it is clear that the circuit court was within its discretion to sentence Applicant to a second YOA sentence.

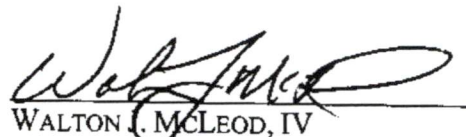
Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a showing based on the 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 based upon filing after the statute of limitation had expired; successiveness of the application; being barred by the doctrine of *res judicata*; and because the pursuit of this current application frustrates the need for finality of litigation.

**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 1 day of DECEMBER, 2020.

  
WALTON J. MCLEOD, IV  
Chief Administrative Judge  
Eleventh Judicial Circuit

Lexington, South Carolina



# Saluda County Eleventh Judicial Circuit Public Index



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## Frank Tolen Jr VS State of South Carolina

Case Number:	2019CP4100156	Court Agency:	Common Pleas	Filed Date:	07/15/2019
Case Type:	Common Pleas	Case Sub Type:	Post Convict Rel 500	File Type:	Non-Jury
Status:	Dismissed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Dismissed by Court - not Rule 40J	Disposition Date:	07/20/2020	Disposition Judge:	Mcleod, Walton J IV
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

### Case Parties

Click the  icon to show associated parties.

Name	Address	Race	Sex	Year Of Birth	Party Type	Party Status	Last Updated
<input checked="" type="checkbox"/> State of South Carolina					Defendant		07/15/2019
<input checked="" type="checkbox"/> State of South Carolina					Defendant Pro Se		07/15/2019
<input checked="" type="checkbox"/> Tolen, Frank Jr	L. C. I. Wando Unit C-159 P.O. Box 205 Ridgeville SC 29472				Plaintiff Pro Se		07/15/2019
<input checked="" type="checkbox"/> Tolen, Frank Jr	L. C. I. Wando Unit C-159 P.O. Box 205 Ridgeville SC 29472				Plaintiff		08/25/2020

### Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Tolen, Frank Jr	Order/Denying Motion to Alter or Amend	Order		03/02/2021-15:50		
Tolen, Frank Jr	Motion to Alter/Amend Pursuant Rule 59E	Filing		02/10/2021-10:07		
Tolen, Frank Jr	Objection to Respondent Proposed final Order of Dismissal	Filing		02/02/2021-13:19		
Tolen, Frank Jr	Other/objection to final order	Order		01/25/2021-10:39		
Tolen, Frank Jr	Order/final Order of dismissal	Order		12/06/2020-14:24		
Tolen, Frank Jr	Order/Dismissal	Order		07/20/2020-10:19	07/20/2020-10:19	
Tolen, Frank Jr	Order/Denying Motion for Default Judgement	Order		06/04/2020-10:39	07/20/2020-10:39	
Tolen, Frank Jr	Motion/ to file return out of time & response to.....	Motion		05/29/2020-14:56	07/20/2020-14:56	
Tolen, Frank Jr	Motion/Dismiss	Motion		03/24/2020-14:34	07/20/2020-14:34	
Tolen, Frank Jr	Post Conviction Relief	Filing		07/15/2019-16:04	07/20/2020-16:04	

**Financials**

Summary					
Fine/Costs:	\$25.00	Total Paid for fine/costs:	\$0.00	Balance Due:	\$25.00
Costs					
Description	Cost Code	Amount	Charge Action	Disbursed Amount	
Motion/Order Filing Fee \$25	MOTION	\$0.00		\$0.00	
Motion/Order Filing Fee \$25	MOTION	\$25.00		\$0.00	
Payments					
Payment Date	Receipt Number	Entered By	Transaction Type Code	Payment Amount	
None					