STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Albert Scruggs, #136701	)	2021-CP-40-2323
Applicant	)	
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent	)	

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RICHLAND COUNTY
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This matter comes before the Court by way of Applicant Albert Scruggs's application for post-conviction relief (PCR) filed on May 18, 2021. Respondent made its return and motion to dismiss on August 23, 2021. The Court grants Respondent's motion to dismiss because the action is untimely, successive, bared by the doctrine of *res judicata*, and fails to establish a *prima facie* showing of newly discovered evidence.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the June 2002 term, the Richland County Grand Jury indicted Applicant for second degree burglary (2002-GS-40-5055), kidnapping (2002-GS-40-5056) and assault with intent to commit criminal sexual conduct – first degree (2002-GS-40-5057). James P. Rogers, Esquire represented Applicant. Applicant proceeded to trial on January 13-15, 2003, before the Honorable G. Thomas Cooper Jr., and a jury. Applicant was found guilty as indicted and Judge Cooper sentenced Applicant to life imprisonment without parole for kidnapping and assault with intent to commit criminal sexual conduct, and fifteen years for burglary. Applicant appealed.

Appellate Defender Robert M. Pachak of the Office of Appellate Defense filed a brief on Applicant's behalf appealing Applicant's conviction for assault with intent to commit criminal sexual conduct. Applicant raised the sole ground of whether the trial court had subject matter jurisdiction to try appellant for the offense when the indictment was amended after it was true-billed by the grand jury. The South Carolina Court of Appeals remanded the case to the circuit court for a factual determination regarding whether the indictment had been re-presented in its amended form to the grand jury prior to Applicant's trial. On remand, Judge Cooper issued an order that the indictment had been re-presented to the jury in November 2002. Thereafter, the Court of Appeals dismissed Applicant's appeal and affirmed the conviction in an unpublished opinion. *State v. Scruggs*, Op. No. 2005-UP-537 (S.C. Ct. App. filed Oct. 3, 2005). The Remittitur was issued October 19, 2005.

i. First PCR Action (2004-CP-40-4395)

Applicant subsequently filed an application for PCR on September 20, 2004, in which he alleged the following grounds for relief:

1. Subject matter jurisdiction;
   a. The service of the LWOP notice was faulty and therefore conviction and sentencing is invalid.
2. Ineffective Assistance of Counsel;
   a. Counsel failed to object to the sentence of life without parole under section 17-25-45.
   b. Counsel failed to investigate, including the interviewing of defense witnesses and advice about the use of his prior record to impeach
   c. Counsel failed to request mental evaluation prior to trial concerning his competency to stand trial.
3. Improper jury instructions.
   a. Instructions shifted burden of proof when instructions referred to "absolute certainty."
   b. Counsel was ineffective in failing to object to the instruction.

As Applicant filed this action prior to the resolution of his direct appeal, the action was dismissed without prejudice on September 21, 2005.

ii. Second PCR Action and Subsequent Appeal (2005-GS-40-5306)

Applicant then filed his section application for PCR on October 14, 2005, which was merged with the original application by written order on November 23, 2005.

Respondent made its return on January 5, 2009. An evidentiary hearing into the matter was convened on February 25, 2009, at the Richland County Courthouse. Applicant was present at the hearing and was represented by Tara D. Shurling, Esquire. Applicant testified on his own behalf, and testimony was also provided by trial counsel James Rogers. On August 26, 2009, the Honorable L Casey Manning, issued the order of dismissal denying Applicant's application for post-conviction relief.

Applicant timely appealed and on April 30, 2010, Appellate Defender Katherine H. Hudgins perfected Applicant's appeal by filing a petition for writ of certiorari in the Supreme Court of South Carolina. The petition was granted by the South Carolina Supreme Court by order dated August 18, 2011. Following briefing, the Court dismissed the petition as improvidently granted. *Scruggs v. State*, Op. No. 2012-MO-022 (S.C.S.Ct. filed June 13, 2012). The Remittitur issued June 29, 2012.

iii. Federal Habeas Corpus Petition (5:12-2940-TLW-KDW)

Applicant thereafter filed a *pro se* petition for federal habeas corpus pursuant to 28 U.S.C. § 2254 on October 8, 2012, seeking relief on the following grounds:

1. Subject Matter Jurisdiction:
    a. "There was no evidence that indictment was taken back to the grand jury. See Paperwork No Proof of letter from Ms. Scott or affidavit from Mr. Pascoe. My appeal lawyer dropped my appeal without proof that indictment went back before grand jury.
2. Ineffective trial counsel
    a. Failure to move for mistrial based on state's closing argument.

Applicant amended his petition June 13, 2013 to include the following additional ineffective assistance of counsel grounds:

a. Counsel failed to object to the sentence of life without parole under section 17-25-45.
b. Counsel failed to investigate, including the interviewing of defense witnesses and advice about the use of his prior record to impeach
c. Counsel failed to request mental evaluation prior to trial concerning his competency to stand trial.
d. Counsel was ineffective in failing to object to the instruction.

Respondent filed its return and motion for summary judgment January 17, 2013. Appicant filed a motion to stay April 8, 2013. On May 23, 2013, the Honorable Kaymani D. West, United States Magistrate Judge, issued a report and recommendation, recommending Applicant's motion to stay be construed in part as a motion to amend the petition, and the remainder of the motion denied. Judge West also recommended Respondent's motion for summary judgment be denied with leave to refile as further set forth. *Scruggs v. Stevenson*, 5:12-2940-GRA-KDW, 2013 WL 2897045 (D.S.C. May 23, 2013). Respondent filed objections to the report and recommendation on June 10, 2013. On June 13, 2013, the Honorable G. Ross Anderson, Jr., United States District Judge, adopted the report and recommendation in light of Respondent's objections, construing Applicant's motion to stay as a motion to amend the petition. *Scruggs v. Stevenson*, No. 5:12-CV-02940-GRA, 2013 WL 2897047 (D.S.C. June 13, 2013).

Respondent filed a second motion for summary judgment on July 15, 2013. Judge West issued a second report and recommending the Court grant Respondent's motion to dismiss. The Honorable R. Bryan Harwell, United States District Judge, granted the motion and dismissed Applicant's petition with prejudice on March 11, 2014. *Scruggs v. Stevenson*, No. 5:12-CV-02940-RBH, 2014 WL 958280 (D.S.C. Mar. 11, 2014). A certificate of appealability was not provided.

iv. Third PCR Action and Subsequent Appeal (2014-CP-40-2099)

Applicant subsequently filed his third application for PCR on March 31, 2014, alleging the following grounds for relief:

1. Ineffective assistance of PCR counsel
2. Ineffective assistance of trial counsel

Respondent made its return and motion to dismiss, requesting the Court dismiss the application as untimely and successive. The Court issued a Conditional Order of Dismissal filed August 31, 2015, provisionally denying and dismissing this action, while giving Applicant 20 days from the date of service to show why the dismissal should not become final. Applicant replied to the Court's Conditional Order of Dismissal on September 29, 2015. After reviewing the responses and filings in their entirety, a Final Order of Dismissal was filed by the Honorable DeAndrea G. Benjamin on September 15, 2016.

Applicant timely appealed the denial of his PCR action. By order date December 16, 2016, the South Carolina Supreme Court dismissed Applicant's appeal for failing to show an arguable basis for asserting the lower court determination was improper pursuant to Rule 243(c), SCACR. The remittitur issued January 4, 2017.

v. Second Federal Habeas Corpus Petition (5:17-00211-RBH-KDW)

Applicant then submitted another *pro se* petition for relief, interpreted by the court as a request for relief pursuant to 28 U.S.C. § 2254. The Honorable Kaymani D. West issued a report and recommendation recommending the petition be dismissed without prejudice because it was successive to Applicant's original habeas action, and because Applicant did not obtain authorization from the Fourth Circuit Court of Appeals to file a successive petition. *Scruggs v. Bush*, 5:17-00211-RBH-KDW, 2017 WL 9289373 (D.S.C. Apr. 21, 2017). On May 26, 2017, the Honorable R. Bryan Harwell adopted the report and recommendation, dismissing Applicant's

petition without prejudice and denying a certificate of appealability as Applicant had not made "a substantial showing of the denial of a constitutional right." *Scruggs v. Bush*, No. 5:17-CV-00211-RBH, 2017 WL 2297590 (D.S.C. May 26, 2017).

CURRENT APPLICATION

In his fourth and current application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Newly discovered evidence, Denial of my 6th Amendment right to effective representation, Counsel was ineffective assistance of counsel, Due process violations."
   a. "See the State writ of habeas corpus that is pending with the Richland county clerk of court."[1]

For purposes of this Conditional Order of Dismissal, the Court incorporates the Richland County Clerk of Court records, Applicant's SCDC records, the trial transcript, Applicants appellate records, the records from Applicant's prior PCR actions and subsequent appeals, the records from Applicant's prior federal habeas corpus actions, 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.

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[1] Applicant's pending writ includes allegations that the circuit court lacked subject matter jurisdiction over his charge because the indictment was jurisdictionally defective and because the indictment was materially amended after it was true-billed by the grand jury; that an aggravating circumstance was required for his first degree burglary conviction and there is no aggravating circumstance language in the indictment; that Applicant is actually innocent of the crime of burglary; and that Applicant was misidentified.

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 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. 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 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 that his counsel was ineffective and his other constitutional rights were violated. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was convicted and sentenced on January 15, 2003, and pursued a direct appeal. The Remittitur issued October 19, 2005. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before October 20, 2006. Applicant did not file his application until May 18, 2021, well beyond the statute of limitations. Moreover, sections 17-27-45(B) and 17-27-45(C) are inapplicable to Applicant's current PCR application as he alleges no new rights to be applied retroactively, and cannot establish a *prima facie* case of newly discovered evidence. 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 Applications

The Court further finds the application must be summarily dismissed because it is successive to Applicant's previous PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous 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.

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 are identical to the claims raised in Applicant's prior applications for post-conviction relief and various collateral actions; thus, the current application is successive and barred under section 17-27-90 of the South Carolina Code. Applicant has failed to establish any sufficient reason why he should be allowed to continuously plead the same allegations for post-conviction relief raised and adjudicated in his prior PCR actions. Therefore, he has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous post-conviction

application.[2]

Res Judicata

This Court finds the application is barred by the doctrine of *res judicata* and shall be summarily dismissed. *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 his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior applications for post-conviction relief. The prior PCR Court issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

Newly Discovered Evidence - Great Seal

This Court finds Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing is without merit. The Uniform Post-Conviction Procedure Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation

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[2] In addition to this application, Applicant has a petition for state habeas corpus pending before the circuit court filed on July 16, 2018 (2018-CP-40-3739). Applicant filed this successive PCR action despite acknowledging in his petition for state habeas that he has exhausted all available post-conviction remedies and that PCR is unavailable or inadequate for his requested relief. (Petition at 3).

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 a material fact not previously presented, under the discovery rule, the PCR 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 following 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)).

In his current application, Applicant references no specific facts or information upon which he bases his claim of newly discovered evidence. Rather, Applicant merely instructs the Court to reference his pending state habeas petition as evidence and support of his arguments. In review of this filing, this Court found no clear argument or articulation of what evidence Applicant alleges is newly discovered. Instead, the filing merely reiterates variations of the same arguments Applicant has raised in his multiple collateral proceedings over the last sixteen years, which does not constitute newly discovered evidence.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing 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 showing he is entitled to relief based on the information set forth above; therefore, he is not entitled

to an evidentiary hearing in the matter. Accordingly, this matter shall be summarily dismissed with prejudice.

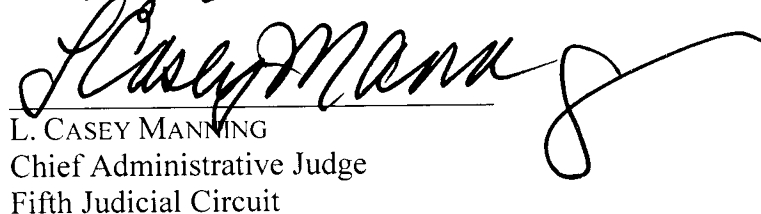
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 with the Richland 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 – Fifth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Richland 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 26th day of August, 2021.



L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

2021-CP-40-2323