

STATE OF SOUTH CAROLINA)
COUNTY OF KERSHAW)

IN THE COURT OF COMMON PLEAS)
FOR THE FIFTH JUDICIAL CIRCUIT)

Ricky Shepard, #155575)

2020-CP-28-686)

Applicant)

v.)

CONDITIONAL ORDER OF DISMISSAL)

State of South Carolina,)

Respondent)

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JANET C. HASTY
CLERK OF COURT
KERSHAW COUNTY, S.C.

This matter comes before the Court by way of Applicant, Ricky Shepard's action for post-conviction relief (PCR) filed August 10, 2020. Respondent made its Return and motion to dismiss on October 15, 2021. The Court hereby grants Respondent's motion to dismiss because the action is untimely, successive to Applicant's prior PCR actions, and fails to make a *prima facie* showing of newly discovered evidence.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the November 1988 term, the Kershaw County Grand Jury indicted Applicant for kidnapping (1988-GS-28-496) Applicant was additionally indicted during the January 1989 term for two counts of first degree criminal sexual conduct (1989-GS-28-85; -86). Leon Banks and Michael Stenger, Esquires, represented Applicant.

Applicant proceeded to trial on January 18-19, 1989, before the Honorable James M. Morris, and a jury. The jury found Applicant guilty as indicted and Judge Morris sentenced Applicant to life imprisonment for kidnapping, and thirty year's imprisonment for each count of criminal sexual conduct.

Applicant filed a timely Notice of Appeal. Applicant was represented on appeal by Robert M. Pachak of the South Carolina Office of Appellate Defense. On July 2, 1990, the South Carolina Court Supreme Court affirmed Applicant's conviction and denied the appeal pursuant to Rule 23 and cited authorities. *State v. Ricky J. Shepard*, No. 90-MO-186 (filed July 2, 1990).

i. First PCR Action and Appeal (1991-CP-28-649)

Applicant subsequently filed an application for PCR on December 9, 1991, in which he alleged the following grounds for relief:

1. "Ineffective assistance of counsel."
 - a. "Trial counsel did not properly cross-examine the State's witnesses."
 - b. "Trial counsel improperly advised the Applicant not to take the stand and testify in his own defense."
2. "Prosecutorial misconduct: solicitor told the Applicant that he would receive the maximum sentence if he went to trial instead of pleading guilty."
3. "The Applicant was intoxicated and therefore could not form criminal intent."
4. "Double jeopardy violation: the Applicant was convicted of two counts of criminal sexual conduct arising out of the same act."

Respondent made its return on March 23, 1992. An evidentiary hearing into the matter was convened on November 30, 1993, at the Richland County Courthouse before the Honorable Luke N. Brown. Applicant was present at the hearing and was represented by John R. Harper, II, Esquire. Applicant testified on his own behalf, and testimony was provided by Leon Banks, Esquire. On January 7, 1994, Judge Brown, issued the Order of Dismissal denying Applicant's application for post-conviction relief with prejudice.

On February 18, 1994, Appellate Defender M. Anne Pearce filed a petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. On June 1, 1995, the South Carolina Supreme Court denied the petition. The Remittitur was issued on June 19, 1995.

ii. Second PCR Action and Appeal (1996-CP-28-016)

Applicant filed a second application for PCR on January 10, 1996, in which he alleged the following grounds for relief:

1. "Ineffective assistance of counsel on direct appeal."
2. "Ineffective assistance of counsel in the lower court."
3. "Constitutional statutory violation of the United States and South Carolina statutes."

Respondent made its Return and motion to dismiss on November 4, 1996. On September 15, 1997, the Honorable L. Henry McKellar, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response to the Order. On April 21, 1998, Judge McKellar, issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice. On December 14, 1998, Appellate Defender Melissa J. Reed Kimbrough filed a *Johnson*¹ petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. The South Carolina Supreme Court denied the petition. The Remittitur was issued on December 9, 1999.

iii. Third PCR Action and Appeal (2002-CP-28-007)

Applicant filed a third application for PCR on January 10, 2002, in which he alleged the following grounds for relief:

1. "Ineffective assistance of counsel."
 - a. "Counsel failure to conduct DNA test of Applicant and victim."

Respondent made its Return and motion to dismiss on May 21, 2002. A hearing was convened on November 12, 2002 at the Richland County Courthouse. Applicant was present and was represented by John W. Wells, Esquire. On December 6, 2002, the Honorable James R.

¹ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

Barber, III, issued an Order of Dismissal, denying and dismissing the PCR action with prejudice. Applicant timely filed a notice of appeal on December 17, 2002. The South Carolina Supreme Court denied Applicant's petition for writ of certiorari and issued its remittitur July 12, 2004.

iv. Fourth PCR Action and Appeal (2004-CP-28-537)

Applicant filed his fourth application for PCR on July 23, 2004, in which he alleged the following grounds for relief:

1. "Unconstitutional application of S.C. statute."

Applicant subsequently filed another application on January 8, 2006 (2006-CP-28-036). Respondent moved to have the cases merged. On July 19, 2006, the Honorable James R. Barber, III, issued an Order of Merger, merging the two cases with file 2004-CP-28-537 being the surviving file. Respondent made its Return and motion to dismiss on July 17, 2006. On August 1, 2006, the Honorable James R. Barber, III, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response to the Order on August 28, 2006. On February 2, 2007, Judge Barber, issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice. Applicant thereafter appealed the denial of his fourth application. On April 18, 2007, by written order the South Carolina Supreme Court dismissed Applicant's appeal for failure to provide a sufficient explanation why the PCR judge's decision was in error pursuant to Rule 227(c), SCACR.

v. Fifth PCR Action (2009-CP-28-849)

Applicant filed his fifth application for PCR on July 24, 2009, and amended October 21, 2009, in which he alleged the following grounds for relief:

1. "Prosecution misconduct."

2. "Why did the judge erred in jury instruction persuade jury to prematurely deliberate the case?"
3. "Why was the Applicant compelled to self-incriminate against himself by the judge?"
4. "Why did the judge failure to instruct jury on Applicant was intoxicated at the time of the crime?"
5. "Why did the judge failure to give a limiting instruction on the jury's consideration of Applicant prior conviction?"
6. "Judge erred in sentencing Applicant."

Respondent made its Return and motion to dismiss on December 14, 2009. On December 21, 2009, the Honorable James R. Barber, III, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response to the Order on January 4, 2010. On February 18, 2010, Judge Barber, issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice.

vi. Habeas Corpus Actions

Applicant additionally filed three separate *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254; *Shepard v. Harrison*, No. 7:00-cv-2794-DWS; *Shepard v. Harrison*, No. 9:02-cv-1904-DWS, and *Shepard v. Warden, Perry Corr. Inst.*, No. 4:21-818-MGL-TER, (D.S.C. July 22, 2021). In Applicant's most recent petition, the Honorable Thomas E. Rogers, III, United States Magistrate Judge, issued the Report and Recommendation on April 14, 2021, taking judicial notice of Applicant's prior filings, the Order adopting the Report and Recommendation, and grant of summary judgement in favor of Respondent before recommending the petition be summarily dismissed as successive and unauthorized. On July 22, 2021, the Honorable Mary G. Lewis, United States District Judge, accepted the Report and Recommendation, dismissing Applicant's petition without prejudice.

CURRENT APPLICATION

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

1. "The innocence project sought untested forensic evidence that was not tested during the course of an hearing dated December 18, 2012. This evidence was to determine if there was any (additional) evidence to conclusively point to guilt of Applicant."²
 - a. "The innocence project tested untested DNA evidence connected to Applicant's case. This forensic evidence is pertaining to several items listed (see attached exhibit) I.E., victim bra. As a result of their findings (see attached exhibit A #3-1A Bra swabs page 7). The recovered trace DNA evidence from the bra swab 3-1A was determined to be a mixture of at least two contributors of whom at least one is male. As a result the test was insufficient to identify applicant as the source of the DNA found."

For purposes of this Conditional Order of Dismissal, the Court incorporates the Kershaw County Clerk of Court records, Applicant's SCDC records, Applicant's appellate records, the records from Applicant's prior PCR actions and subsequent appeals, the records from Applicant's prior 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. 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

² Respondent interprets this allegation as raising a claim of newly-discovered evidence.

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 of newly discovered evidence. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant was convicted January 19, 1989, and pursued a direct appeal. Applicant's conviction was affirmed July 2, 1990. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before July 3, 1991. Applicant did not file his application until August 10, 2020, nearly thirty years 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 make a *prima facie* showing 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).

Here, Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s multiple prior application for post-conviction relief; 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 could not have raised his current allegations in his previous applications for post-conviction relief. Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court shall summarily dismiss the application as successive to Applicant’s previous PCR actions.

Newly Discovered Evidence

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 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 an investigation by the Innocence Project into DNA testing of evidence from Applicant’s underlying convictions, but does not articulate how he believes this information is relevant or how it constitutes newly discovered evidence. Attachments to the current application include copies of several correspondence from the Innocence Project regarding Applicant’s investigation. One of which dated February 21, 2020, clearly states the DNA testing performed was insufficient to produce an identity of the source of DNA on the victim’s bra, “which we would need to argue that you are entitled to relief.” Attorneys from the Innocence Project additionally sent Applicant a letter June 4, 2020, confirming in formal

correspondence that the DNA results were not CODIS³ eligible and the Project would be closing Applicant's case. The mere fact that the Innocence Project performed DNA testing does not constitute newly discovered evidence. Significantly, the testing report results were inconclusive and fail to establish that Applicant was not a DNA contributor, thus the results are moot.

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 Kershaw 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

³ CODIS is the acronym for the Combined DNA Index System and is the generic term used to describe the Federal Bureau of Investigation's program of support for criminal justice DNA databases as well as the software used to run these databases.
<https://www.fbi.gov/services/laboratory/biometric-analysis/codis/codis-and-ndis-fact-sheet>

Applicant is cautioned that his response to this order must be actually received by the Kershaw 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 18 day of October, 2021.


L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina