STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
John E. Wilson, Jr., SCDC No. 295493	)	Case No. 19-CP-16-1007
Applicant	)	**CONDITIONAL ORDER DISMISSAL**
v.	)	
State of South Carolina	)	
Respondent.	)	

This matter comes before the court by way of Applicant John E. Wilson, Jr.'s September 23, 2019 application for post-conviction relief. Respondent made its return and motion to dismiss, requesting that the application be dismissed for failure to raise a *prima facie* case of newly discovered evidence and failure to file within the time mandated by the Uniform Post-Conviction Procedure Act. The Court has reviewed the record, grants the State's motion, and summarily dismisses this PCR action.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. Applicant was indicted in May 2006 by the Darlington County Grand Jury for armed robbery, kidnapping, and possession of a weapon during the commission of a violent crime. (2006-GS-16-1051, -1052, -1053). Applicant represented himself *pro se* and Solicitors William A. Rogers, Esq., and Tonya Coleman-Little, Esq., of the Fourth Circuit Solicitor's Office prosecuted the case. On September 19, 2006, a jury convicted Applicant on the armed robbery and weapons charges. The Honorable J. Michael Baxley sentenced Applicant to thirty (30) years for armed robbery and five (5) years for the weapons charge, to run consecutively with credit for time served.

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Applicant filed a notice of appeal and the appeal was perfected by Wanda H. Carter, Esq., of the South Carolina Office of Appellate Defense. Applicant's counsel filed an *Anders* brief, arguing that the State's closing argument denied Applicant the right to a fair trial, that the trial court erred in admitting a photo line-up into evidence, failed to evaluate him to determine his competence to stand trial, and failed to ask if he need counsel to be appointed before selecting a jury.[1] The Court of Appeals dismissed Applicant's claims. *State v. Wilson*, Op. No. 2009-UP-071, (S.C. Ct. App. Filed February 10, 2009). The remittitur was sent on February 26, 2009.

***First and Second PCR Applications*: 2009-CP-16-0146; 2009-GS-16-0503**

Applicant filed his first application for post-conviction relief on February 26, 2009. Applicant filed a subsequent application for post-conviction relief on July 7, 2009.[2] Applicant alleged that he was being held in custody unlawfully for the following reasons (verbatim):

1. I was convicted without counsel or standby counsel after Iv asked for counsel by (3) three Judges.
2. Evidence was not disclosed in my case ater iv asked and motioned for; tape, mugshot's, photo line up's.
3. Trial Judge suppressed "Mug Shot Photo's," but brought/introduced mug shot's in court to the attintion to the Jury & Court.
4. Violation of due process
5. Violation of Fifth Amendment rights.

An evidentiary hearing was convened on September 15, 2009 at the Darlington County Courthouse before the Honorable Paul M. Burch. Applicant was represented by Charles T. Brooks, Esq., at the hearing. The application was denied and dismissed by Judge Burch via an order signed October 27, 2009.

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

[2] The two applications were merged under a single docket number, 2009-CP-16-0146, at the evidentiary hearing.

Applicant filed a petition for a writ of certiorari, and the South Carolina Supreme Court transferred the matter to the South Carolina Court of Appeals. Applicant was represented by Elizabeth A. Franklin-Best, Esq., of the South Carolina Commission on Indigent Defense. Respondent filed a return to Applicant's petition on October 7, 2010. The petition was denied by an order dated March 7, 2013. The remittitur was sent on March 25, 2013.

***Third PCR Application*: 2009-CP-16-0670**

On September 15, 2009, Applicant filed a third application for post-conviction relief. Applicant alleged he was being held in custody unlawfully for the following reason (verbatim):

1. victim was in & out of court – identification as inconsistent.

Respondent made its return on January 29, 2010 and moved for summary dismissal based upon the Uniform Post-Conviction Procedure Act's prohibition against successive PCR applications and the failure to state a cognizable claim for relief. A conditional order of dismissal was filed February 11, 2010. Applicant filed an "'Opposition of Motion to Dismiss' - & Return" on February 5, 2010. Applicant argued that he could not have raised his allegations in his previous application because there was insufficient room on the form. The Honorable Paul M. Burch found that this reason was insufficient and signed a final order of dismissal on April 18, 2010.

***Federal Habeas Corpus Petition*: 9:13-cv-01003-RMG**

On April 15, 2013, Applicant filed a federal habeas corpus petition, and alleged he was being held in custody unlawfully for the following reasons (verbatim):

1. Failure of inquiry to petitioner Knowing & Intelligent Waiver of his (6th) and (14th) Amend to counsel rendered waiver of that right invalid.
2. Guaranteed by the (5th) (6th) & (14th) Amend, Due process, Petitioner right Was violated as petitioner Appellate Attorney'(s) Failure to disclose transcript & etc.
3. PCR counsel ineffectiveness violated petitioner (5th) (6th) & 14th) Amend due process, by not showing Appellant counsel ineffectiveness or transcript.

4. Supreme Court on petitioner Writ of Certiorari violated his (5th) (6th) & (14th) Amend due process by not granting certiorari For Waiver hearing.

The following fifth ground was not included in the petition but was raised and addressed by both parties in Applicant's motion for summary judgment:

5. The petitioner's right to the due process of Law, as guaranteed by the fifth [] Sixth and fourteenth Amendments, Was Violated by the State introduction of a suppressed mug shot during petitioners trial to the Victim & jury prejudice Petitioner to a Fair trial

The Honorable Bristow Marchant, United States Magistrate Judge, issued a report and recommendation on December 18, 2013, stating that Applicant had not expressed appropriate, justiciable grounds for relief. This report and recommendation was adopted with slight modification, over Applicant's objection, by the Honorable Richard M. Gergel, United States District Court Judge. Judge Gergel also granted the State's motion for summary judgment and denied a certificate of appealability in an order dated January 13, 2014.

Applicant filed a notice of appeal and petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. This appeal was dismissed in an unpublished *per curiam* opinion on July 1, 2014. *John Ervin Wilson v. Michael McCall*, No. 14-6281 (4th Cir., Filed July 1, 2014). On or about July 9, 2014, Applicant appealed this decision to the United States Supreme Court by filing a petition for a writ of certiorari. The State filed a waiver on August 8, 2014, and the Court denied the Applicant's petition via a letter dated October 6, 2014.

***Fourth PCR Application*: 2014-CP-16-0458**

Applicant filed a fourth application for post-conviction relief on June 9, 2014, and alleged that he was being held in custody unlawfully for the following reasons:

1. That the Conviction or the Sentence was in violation of the Constitution of the United States of the Constitution or laws of this state.
2. That the Court was with out jurisdiction to impose sentence.

3. That there exists evidence of material facts, not presented and heard, that requires vacation of the conviction or sentence in the interest of justice.
4. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or be is otherwise unlawfully held in custody or other restraint.
5. That the conviction or sentence is otherwise subject to collateral attack upon any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, . . . a proceeding under this chapter to secure relief. ("Excluding claims of insufficiency of evidence")."
6. Ineffective Assistance of Direct Appellate Counsel

Respondent made its return on September 16, 2015, and moved for summary dismissal based upon the Uniform Post-Conviction Procedure Act's prohibition against successive applications and Applicant's failure to comply with its statute of limitations. On October 2, 2015, Applicant filed a "Motion: 'In Opposition to the Respondent Motion to Dismiss'", arguing ineffective assistance of appellate counsel stemming from Applicant's direct appeal and ineffective assistance of PCR counsel for his failure to raise the issue of appellate counsel's alleged ineffectiveness. On March 2, 2017, the Honorable Roger E. Henderson dismissed the application, finding that Applicant's application was successive and his claim of ineffective assistance of PCR counsel was not a cognizable claim for relief under *Pennsylvania v. Finley*, 481 U.S. 551 (1987).

II. CURRENT APPLICATION

In his present application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. That the Applicant is an incarcerated individual, located at McCormick Correctional Institution in McCormick County, State of South Carolina.
2. That the Applicant was tried by jury, without co-defendants, and sentenced in the General Sessions Court of Darlington County, State of South Carolina under case/indictment number(s): 2006-GS-16-1051, 2006-GS- 16-1052 and 2006-GS-16-1053
3. That the Court dismissed the case 2006-GS-16-1052 (Kidnapping) during the course of the trial and the Applicant was found guilty by a Jury on the charges of 2006-GS- 16- 1051 (Armed Robbery) and 2006-GS-16-1053 (Possession of a Weapon during a Crime of Violence) and his sentence was imposed by the Honorable J. Michael Baxley on September 19, 2006.

4. That the Applicant did file an Appeal of his conviction in Darlington County with the Court of Appeal for the State of South Carolina after his sentencing and his appeal was denied by Unpublished Opinion 2009-UP-071 filed February 10, 2009.
5. That the Applicant is informed and believes that he has been held in custody unlawfully based on the absence of the Applicant's proper and informed waiver of counsel during a General Sessions trial in Darlington County on August 15, 2006, before the Honorable John M. Milling.
6. That before trial on the charges, the Applicant appeared before the Court on August 16, 2006, along with then-appointed Counsel for the Applicant and the Darlington County Solicitor for determination of several Motions filed in his pending General Sessions case(s) including the Applicant's (Defendant's) Motion to Proceed as Co-Counsel, Motion for Bond Reduction, Motion for Speedy Trial and a Motion for Rule 5/Discovery Supplemental Information.
7. That at the time and place above-mentioned, the Applicant's request to proceed as his own co-counsel was denied by the Court and the Court approved an Order Relieving Counsel for the Public Defender assigned to the Applicant during the course of his pending General Sessions matter.
8. That during the August 16, 2006, hearing, at which the Applicant was granted the authority to proceed in representing himself, pro-se, in that criminal proceeding, that the Court failed to properly inquire of the Applicant the guidelines set forth for waiver of right to counsel as set out in *Faretta v. California*, 422 US 802 (1975).
9. That the Applicant is informed and believes that under *Faretta*, that the trial court has a duty to ensure that the Defendant in a proceeding is fully made aware of several different factors regarding self-representation to ensure that a pro-se Defendant does so willingly and with proper knowledge.
10. That the Applicant has previously submitted an Application for Post Conviction Relief in regards to the conviction(s) concerned herein with the Darlington County Court of Common Please on February 26, 2009, and that Application was Dismissed by Order on October 27, 2009 by the Honorable Paul M. Burch.
11. That the Transcript of this August 15, 2006, hearing were never provided to the Applicant's Appellate Counsel and were also never made available to the Applicant's post-conviction relief counsel despite requests for the transcript being made. (Exhibits A and B attached hereto)
12. That the Applicant's Appellate Counsel as well as the Applicant's post-conviction relief Counsel both attempted to get copies of the aforementioned August 2006 transcripts and neither attorneys were successful in these attempts.
13. That the Applicant is informed and believes that the Court, during the Applicant's initial Post-Conviction matter, prevented the Applicant and his counsel at that time from proceeding on the *Faretta* grounds.
14. That the Applicant is informed and believes that if the August 2006 transcripts have now been provided in accordance with the requests for the

same that the Applicant would have been granted the initial Post-Conviction Application would have been granted by the Courts. (Exhibit C attached hereto)

15. That the Applicant was not in receipt of the transcripts for the August 2006 hearing until after the exhaustion of the Applicant's previous Post-Conviction relief remedies available.
16. That the Applicant is informed and believes that the August 2006 transcripts constitute newly discovered material or evidence relative to this matter specifically.
17. That the Applicant is informed and believes that had the August 2006 transcripts been made available to the Applicant and/or his Appellate Counsel or his Post-Conviction counsel that the Applicant's conviction in Darlington County for Armed Robbery and Possession of a Weapon.

Before the Court are the Darlington County Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, records from prior PCR and habeas corpus proceedings, transcripts from the trial and pretrial hearings, and the present application for post-conviction relief.

III. TIMELINESS OF THE RETURN

Respondent has moved the Court to accept its Return for filing out of time and deny Applicant's request for judgment by default in light of no demonstrable prejudice to Applicant as a consequence of the delay. See S.C. Code Ann. §17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing that the time limit prescribed by the statute is not mandatory but discretionary with the trial court.).

Concordantly, the Court denies Applicant's motion seeking judgment by default. The grant of post-conviction relief due to the State's failure to reply or lateness of reply is not appropriate. See Rule 55(e), SCRCP ("No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof unless the claimant establishes his claim to relief by

evidence satisfactory to the Court[.]"). A colorable claim for relief must be supported by evidence and testimony on the record, and a meritless application cannot be saved by inaction by the State. According the Court denies Applicant's motion for default judgment.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Based upon its review, this Court finds there is no genuine issue of material fact necessitating an evidentiary hearing; therefore, summary judgment is appropriate. Pursuant to §17-27-70(b) of the South Carolina Code (2014), this Court makes the following findings of fact and conclusions of law:

Summary Judgment

The State moved for summary dismissal pursuant to §17-27-70 of the South Carolina Code (2014) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the Court shall summarily decide this case. 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); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed Oct. 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court finds the State is entitled to summary judgment and summarily dismisses this action.

Newly Discovered Evidence

This action shall be summarily dismissed for failure to present *prima facie* case of newly discovered evidence. The Uniform Post-Conviction Procedure act states that a person may institute

a PCR 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). To prevail, Applicant must show the newly-discovered evidence:

> (1) is such that it would probably change the result if a new trial were granted;
> (2) has been discovered since the trial;
> (3) could not in the exercise of due diligence have been discovered prior to the trial;
> (4) is material; and
> (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999).

Applicant argues that the Judge presiding over his pretrial hearing did not adequately warn him of the inherent risks involved when representing oneself *pro se*, as required by the Supreme Court of the United States in *Faretta v. California*, 422 U.S. 806 (1975). This alleged failure was compounded when the transcript of the hearing was allegedly withheld from both Applicant's appellate counsel and Applicant's PCR counsel. *Faretta* requires that a criminal defendant in a state criminal trial "be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'" when he exercises his constitutional right to self-representation. at 835 (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). When Applicant's counsel moved to have Applicant appointed as co-counsel at the pretrial hearing, the Judge told Applicant the following:

> Don't discuss the facts with me. There is a danger in serving as counsel for yourself, Mr. Wilson, because not having the training that an attorney has you may well miss some points of law, miss some points of procedure and no be able to represent yourself as well as an attorney can.
>
> And suffer prejudice because of that and, perhaps, end up being convicted or not convicted, but you know, you just don't know as well how to do it. You were getting ready to discuss on the record certain facts on the record that could have been prejudicial to you. So these are the types of things that you don't necessarily know about as an attorney.
>
> But there is no provision for you to serve as co-counsel with your attorney. You have the right to have an attorney, and Mr. Kilgo is your attorney. You have

> the right to proceed without an attorney. But I am not going to have a situation where at some point in time Mr. Kilgo is serving as your attorney and at other points in time you're making motions, asking questions and making objections yourself.
>
> So if you would like to have an attorney Mr. Kilgo will be your attorney. If you don't want to have an attorney you have that right as well to proceed without an attorney in spite of the fact that it's dangerous to do so. But I am not going to provide that you serve as an attorney yourself in connection with this matter along with Mr. Kilgo.
>
> It's either Mr. Kilgo or it's your, but it's not a combination. As the you know, of course, during the trial of the case if there is some information that you feel can be brought to Mr. Kilgo's attention that would be helpful in connection with the matter, then of course, you can have an opportunity to talk with him there at the table and say, "You know, Mr. Kilgo, how about thus and such question to the witness."
>
> Mr. Kilgo would determine whether or not it was an appropriate question. If it was appropriate to try to frame it in such a way that it would be admissible as a part of the evidence. But we're not going to have you serve as counsel along with Mr. Kilgo. It's one way or the other. So you simply tell me how you want to proceed with Mr. Kilgo as your attorney or do you want to proceed without an attorney and do it all yourself?

Despite this strong warning, Applicant responded by stating that he would "rather do it [him]self."

The transcript of the hearing clearly shows that Applicant was adequately informed under *Faretta*, and the allegation was not raised within a year of when it could have been ascertained by the exercise of reasonable diligence. Therefore, the evidence in question is not such that would probably change the result if a new trial were granted and the application is untimely. Applicant's claims are therefore without merit as his Appellate counsel and prior PCR counsel had no grounds to proceed on a *Faretta* claim, with or without a transcript of the proceeding. As such, there is no likelihood that Applicant would have received a new trial had the evidence been known at the time in question. Applicant's claims are clearly refuted by the record and shall therefore be dismissed for failure to raise a *prima facie* case of newly discovered evidence.

Statute of Limitations

The action shall also 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 (2014). Specifically the Act requires:

> 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(C).

Our Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, §17-27-70(c) authorizes this 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."

Applicant's allegations that the pretrial hearing transcript was not provided to appellate counsel and PCR counsel dates back to October 27, 2009, when his previous PCR application was dismissed. Applicant presumably knew that the transcript was missing from the record at that time based upon correspondence with his counsel. In any event, the transcript constituting the newly discovered evidence was included in the appendix to the State of South Carolina's September 16, 2015 return to his habeas corpus petition. At the very latest, the time for raising this claim was September 19, 2016. The present application was not filed until September 23, 2019, over three years after the window for presenting newly discovered evidence had expired. The application is

therefore untimely and shall be dismissed for failure to comply with the Uniform Post-Conviction Procedure Act's filing requirements.

V. CONCLUSION

Pursuant to §17-27-70(b), this 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, factual or legal, with the Darlington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 4th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 18th **day of** February, 2021.

Paul M. Burch
Chief Administrative Judge
Fourth Judicial Circuit

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