

THE STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT  
APPEAL FROM SPARTANBURG COUNTY  
Court of Common Pleas  
HONORABLE BRIAN M. GIBBONS  
2021-CP-42-01425

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MAR 22 2023  
S.C. SUPREME COURT

RASHAAD THOMAS, SCDC# 344003

APPELLANT,

vs.

STATE OF SOUTH CAROLINA,

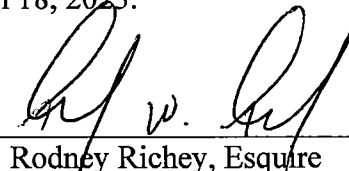
RESPONDENT.

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**NOTICE OF APPEAL**

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Rashaad Thomas appeals the denial of his Post-Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Brian M. Gibbons, Circuit Judge on October 17, 2022 an Order issued on March 10, 2023 and filed on March 17, 2023. The Appellant received notice of the judgment on March 18, 2023.



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STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )

IN THE COURT OF COMMON PLEAS MAR 22 2023  
FOR THE SEVENTH JUDICIAL CIRCUIT  
S.C. SUPREME COURT

Rashaad Thomas, #344003, )  
Applicant, )

Case No.: 2021-CP-42-01425

v. )

**ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

This matter comes before this Court by way of Applicant's post-conviction relief application filed May 6, 2021. Respondent made its return on March 25, 2022, requesting an evidentiary hearing be convened. A motion to dismiss hearing was held on October 17, 2022, at Spartanburg County Courthouse. Rodney Richey, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the motion to dismiss hearing. Applicant's friend, Nicholas Cash, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. During the June 2017 term, the Spartanburg County Grand Jury indicted Applicant for Armed Robbery (2017-GS-42-2883) and Second-Degree Violent Burglary (2017-GS-42-2884). Travis A. Moore, Esquire represented Applicant. Assistant Solicitor Spenser H. Smith, Esquire prosecuted the case. On February 7, 2018, Applicant pleaded guilty as indicted to all charges before the Honorable Roger L. Couch.

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circuit court judge. Judge Couch sentenced Applicant to twenty years' imprisonment on the robbery charge and fifteen years' imprisonment on the burglary charge, sentences running concurrently. Applicant did not appeal his conviction or sentence.

***First PCR Action: (2018-CP-42-00703)<sup>1</sup>***

Applicant subsequently filed his first PCR application on February 26, 2018, in which he alleged the following grounds for relief:

1. "Ineffective Counsel":
  - a. "I informed my counsel of evidence I possess proving my innocence. Counsel refused to call and subpoena witnesses and other evidence (pictures, video, phone messages) while pushing me into a guilty plea. If evidence had been obtained, my alibi could have been verified and a not guilty verdict could have been made in a trial."

Respondent made its return on May 8, 2018. On March 7, 2019, an evidentiary hearing was held at the Spartanburg County Courthouse. Applicant was present was represented by Rodney W. Richey, Esquire. Johnny Ellis James, Jr., Esquire, of the South Carolina Attorney General's Office, represented Respondent. On June 28, 2019, the Honorable Thomas A. Russo, presiding judge, issued the order of dismissal denying Applicant's PCR application.

A notice of appeal was filed by Counsel Richey on July 12, 2019. A motion withdrawing the appeal was filed on October 24, 2019. The appeal was dismissed, by written order, on October 25, 2019, pursuant to Rule 221(b) SCACR. The remittitur was issued on November 14, 2019.

***Second PCR Action: (2020-CP-42-01044)***

Applicant filed his second PCR application on March 18, 2020, alleging:

1. "After discovered evidence pursuant to Rule 29(b)."  
Appellant has stated arguments and evidence from alibi witnesses that will prove 1) the

<sup>1</sup> Applicant has previously pursued another PCR action (2012-CP-42-4975), based upon unrelated charges, that was dismissed on April 11, 2014.

evidence is not cumulative or impeaching, 2) evidence could not have been present at trial, 3) evidence will change the result if a new trial is held, 4) evidence has been discovered since trial, 5) evidence is material to the issue of guilt or innocence.”

The State made their return and motion to dismiss on June 24, 2020, requesting the Court summarily dismiss the application for June 17, 2020. The Honorable J. Mark Hayes, II, circuit court judge, issued a conditional order of dismissal on June 29, 2020. The final order of dismissal was signed by Judge Hayes on September 23, 2020.

**Current Action Before this Court**

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. “Actual Innocence.”
2. “Invalid Guilty Plea”
3. “Probable Cause Violation/Actual Innocence/Legal Innocence.”
4. “Applicant discovered newly discovered evidence in the form of a screenish.”
5. “Approximately one month (1) prior to arrest the applicant acquired.”
6. “Applicant discovered false statements knowingly and intelligently.”

At the PCR hearing, Applicant proceeded forward on the allegations above as well as a claim of newly discovered evidence of an alibi witness. All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

**Summary of the Testimony**

***Applicant Testimony***

Applicant testified that the incident happened at Holden’s restaurant. He stated he did not commit a crime. He stated he had three co-defendants. He stated that he has newly discovered evidence of an alibi witness. He stated that Cash was not with him at the time and could not establish this defense. He claims prior PCR Counsel was ineffective for failure to get these

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witnesses to testify at the first hearing.

***Nicholas Cash Testimony***

Cash stated he is friends with Applicant. He stated he was with Applicant earlier that night of the incident. He stated that the crime occurred after he dropped him off. He stated he did not drop Applicant off at the scene of the incident. He stated Applicant probably could have committed the crime, but he does not believe it. He stated he was surprised by the charges.

**Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the motion to dismiss hearing. Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the plea transcript, the PCR application, and prior PCR and PCR appeals records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

***Res Judicata***

The application is barred by 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).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Indeed,

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Applicant's allegations are identical to those raised to and ruled upon by the Court in the previous action. Specifically, Applicant raised issues concerning his "actual innocence" and the invalidity of the plea in his first PCR action and newly discovered evidence claims concerning evidence and witnesses in his second application. 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*.

***Ineffective Assistance of PCR Counsel***

Applicant's claim he is entitled to relief on grounds that his prior PCR counsel was ineffective is not cognizable in a PCR action. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state PCR actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of PCR counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior PCR counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394; *see also Odom v. State*, 337 S.C. 256,

523 S.E.2d 753 (1999)  
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Here, Applicant already enjoyed two PCR actions and an appeal from the first action. It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Therefore, Applicant's allegations of ineffective assistance of PCR counsel do not fall within any exception to the rule barring such claims, and the allegations should be dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

### *Successiveness*

The application is summarily dismissed because it is successive to Applicant's previous PCR application. 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.

Under this statute, successive PCR applications are forbidden 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). 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

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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).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.

### *Statute of Limitations*

Respondent submits this application 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:

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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

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, South Carolina Code Annotated Section 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.

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Applicant pled guilty on February 7, 2018. The application was therefore due on February 8, 2019. This application was filed on May 6, 2021, well beyond the statutory filing period. Therefore, the application shall be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

***Newly Discovered Evidence (Plea)***

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 and immunity, is without merit. The Uniform Post-Conviction Relief Act states that 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 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).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. *State v. Rice*, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing *Hyman v. State*, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that:

(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the interest of justice requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the

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finality of guilty-plea convictions.

*Jamison v. State*, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Applicant raises four newly discovered evidence claims: newly discovered evidence he claims he discovered a month prior to his arrest, newly discovered evidence consisting of a witness who spoke to law enforcement and was the sole basis upon which law enforcement procured the arrest warrant, another concerning discovery of false statements, and a claim concerning an alibi witness. Evidence discovered prior to the arrest is not properly considered newly discovered evidence. Applicant has not shown why he did not discover the witness prior to the plea, what the testimony consisted of, or why he could not have discovered his existence prior to the plea, or why the testimony would require the plea be vacated. The only exception to that finding was Nick Cash's testimony which did not create an alibi, nor was it in anyway helpful to the defense. Concerning the "false statements". Applicant has not stated what they consist of, who proffered the statements, what impact they had on his decision to plead, why the discovery warrants a vacated plea, or why they could not have discovered this through reasonable diligence prior to the plea.

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 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 must be summarily dismissed with prejudice.

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**Conclusion**

Based on all the foregoing, this Court finds and concludes that Applicant has not

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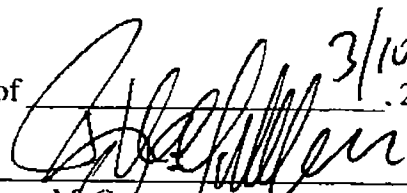
established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.


This Court notifies the Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCR provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

**IT IS THEREFORE ORDERED:**

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2023.

  
BRIAN M. GIBBONS  
Presiding Judge  
Seventh Judicial Circuit

  
\_\_\_\_\_, South Carolina.

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