THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge
Case No. 2018-CP-42-03181

Appellate Case No.: ________________

John Alexander, #194748, ... Appellant,

v.

State of South Carolina, ... Respondent.

NOTICE OF APPEAL

John Alexander hereby appeals from the FINAL ORDER OF DISMISSAL signed by the Honorable R. Keith Kelly, Circuit Court Judge, on March 27, 2023, and entered of record on March 27, 2023. A copy of the order under appeal is attached hereto and incorporated herein by attachment and by reference.

Respectfully submitted,

S/ J. Falkner Wilkes

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March 31, 2023.

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	) IN THE COURT OF COMMON PLEAS) FOR THE SEVENTH JUDICIAL CIRCUIT
John Alexander, #194748, Applicant, v. State of South Carolina, Respondent.	) Case No.: 2018-CP-42-03181) **FINAL ORDER OF DISMISSAL**

This matter comes before the Court pursuant to a post-conviction relief application filed by Applicant John Alexander on September 14, 2018. Respondent moved to summarily dismiss the application on August 4, 2020, for untimeliness, successiveness, for failure to establish a *prima facie* case of newly discovered evidence, and barred by the doctrine of *res judicata*.

Pursuant to this request, and after reviewing the attached pleadings pertinent to this matter, this Court issued a conditional order of dismissal dated August 31, 2020, provisionally summarily dismissing the application, but affording Applicant twenty days from service of the conditional order to provide sufficient reasons as to why this order should not be finalized. Applicant was personally served with this conditional order of dismissal on September 25, 2020, as evidenced by the attached affidavit of personal service.

Applicant has filed many documents with the Court since the return and motion to dismiss was filed and the conditional order of dismissal executed. On August 14, 2020, Applicant filed "Applicant's second motion for a hearing on the motion for an ex parte order (for approval of indigent funding request) and motion for discovery; and motion for a hearing on the motion for order for mental health examination, motion for appointment of counsel, and motion for summary disposition." In this filing, Applicant requested an ex parte order on this application

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or, in the alternative, a "hearing to show cause why the motion should be granted." Applicant requested discovery, consisting of "grand jury [e]mpanelment documents." Applicant requested a mental health examination. He also requested counsel be appointed to represent him. Applicant requests the matter be summarily dismissed in his favor because of the State's untimeliness.

On August 17, 2020, Applicant filed a "motion for a stay or, in the alternative, to hold post-conviction relief proceeding in abeyance." In this response, Applicant requests the case be stayed or held in abeyance because Applicant does not have access to the law library. Applicant request either the appointment of counsel or the court wait to move forward on this case until SCDC's "modified quarantine order" is lifted.

On August 24, 2020, Applicant filed an "amendment to the motion for a stay or, in the alternative, to hold the post-conviction relief proceeding in abeyance." In this amendment, Applicant requested Respondent produce Grand Jury Empanelment Documents and "all other documents, audio and video recordings, CDs, written reports, etc. not previously disclosed in the *Brady* motion." Applicant requested a stay or the case be held in abeyance, pending a decision before the Court of Appeals in *Alexander v. Alan Wilson*, case number 2020-000679. Applicant claims that there was exculpatory evidence awarded in the complaint yields material evidence of overwhelming proof that the Applicant was not properly indicted and that he was tried, convicted, and sentenced in violation of his federal and state constitutional rights.

On October 29, 2020, Applicant filed a letter, requesting copies of the three verdict forms sent to the jury for the underlying convictions.

On May 19, 2021, Applicant filed a document entitled "motion seeking verification." In this response, Applicant stated that he was proceeding forward in this case *pro se* and requested the Court verify whether or not a conditional order of dismissal in the case existed and that all

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further orders or rulings be sent directly to Applicant unless and until another attorney is hired to represent him.

On May 19, 2021, Applicant filed a document entitled "notice". In this document, Applicant stated he retained Mr. William Yarborough, III, for this action. However, Mr. Yarborough filed a 2020 action instead while this matter remained pending. After the return and motion to dismiss was filed, Mr. Yarborough sent Applicant a letter, abruptly ending his representation of Applicant.[1] In his response, Applicant stated he was intending to proceed forward *pro se* in both actions and requested the Court resume sending him all paperwork concerning his case directly.

On May 19, 2021, Applicant filed a document entitled "motion for change of venue." In this document, Applicant requested a change of venue because of his claim that Judge Cole presided over his jury trial in "a highly biased and prejudicial manner." He claimed Judge Hayes was also biased and prejudiced because he oversaw his first PCR hearing. Applicant claimed he was forced to challenge the "unlawful[], intentional and wi[ll]ful[] distortion and fudging of his post-conviction relief transcript of record by the court reporter. Applicant claims that it is impossible for him to receive a fair and impartial decision on this matter because of the conflicts, particularly because Judges Cole and Hayes are not in a position where they can easily vacate the convictions "absent retaliation and/or dread and anxiety of losing its legal professional career." Applicant claims that Respondent acknowledged this conflict and, in so doing, sent the conditional order of dismissal to Judge Kelly instead. Accordingly, Applicant requested the court grant his motion for change of venue to another county where Judges Cole and Hayes "cannot

[1] Mr. Yarborough did not move to relieve himself through the court and was listed as attorney of record in the 2020 action until the case's final resolution (2020-CP-42-03720).

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adversely influence an unjust or unfavorable outcome on any of his pre-hearing filings or in the post-conviction relief proceeding."

On May 19, 2021, Applicant filed a document entitled "notice and motion requesting to be served." In this document, Applicant restated that Mr. Yarborough sent him a letter attaching Respondent's return and motion to dismiss and abruptly ending his representation of Applicant via correspondence with Applicant. In this motion, he stated he wanted a copy of the conditional order of dismissal in the 2018 PCR case served on him, so he could respond to the conditional order.

On May 19, 2021, Applicant filed "objection to conditional order of dismissal; order granting motion to file return out of time and denying motion for summary disposition." In this response, Applicant requested the court declare the conditional order of dismissal, as executed by Judge Kelly, null and void because "South Carolina does not recognize[] duel or hybrid jurisdiction." Specifically, Applicant claims Judge Kelly does not have jurisdiction over the matter because Judge Kelly's office is in Gaffney and Applicant filed the application in Spartanburg. Applicant claims that by sending the order to Judge Kelly in Gaffney, Respondent unilaterally changed venue without cause and without requesting the Court that they be able to do so. Applicant attached a "petition for emergency request for judicial notice and action" addressed to Chief Justice Beatty. In this petition, Applicant stated that by sending the order to Judge Kelly and having him sign the conditional order, a conflict of interest and miscarriage of justice occurred to deny and deprive Petitioner of Due Process and Equal Protection rights to a fair and impartial PCR proceeding. Applicant stated that Respondent, aware that both Judges Hayes and Cole were conflicted out of the matter, sent the proposed order to Judge Kelly "with malicious intent and bad faith." Applicant claims that Judge Kelly signed the conditional order,

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within a number of weeks of Respondent's filings, but never ruled on Petitioner's many *pro se* filings. Applicant claims it is impossible for him to receive a "fair, just, and impartial post-conviction relief proceeding" in Spartanburg and requests the State Supreme Court take "judicial actions to order a change of venue."

On May 21, 2021, Applicant filed a copy of the complaint concerning Mr. Yarborough he sent to the disciplinary counsel. In the complaint, Applicant alleges Yarborough violated the rules of professional conduct for failing to act competently and diligently in representing him, for failure to return unpaid fees, by carelessly and abruptly withdrawing from representation, failure to communicate, for committing fraud, deceit, and representation, and for failure to visit him. The basis of the complaint was that Yarborough agreed to represent him for $12,000, $3,500 of which was paid up front. Yarborough was hired for this action, but filed a separate application instead. Yarborough stated he would meet with him once COVID was over, but the day after the State's return and motion to dismiss was filed, Yarborough sent Applicant a letter, returning $2,500 and abruptly ending representation. Applicant stated he paid $3,500 to Yarborough and was directed to route his stimulus checks to Yarborough's bank account. In addition to the allegations listed above, Applicant claims Yarborough failed to file an adequate PCR application, failed to amend the application, failed to send him relevant documents, failed to visit him, failed to register as counsel on record through SCDC or Global Tel Link so he could accept Applicant's collect calls, filed frivolous claims that were barred on procedural grounds, and abruptly withdrew representation. Applicant claims he should receive an additional $2,800 back from Yarborough because of the lack of work he did on the case. Applicant requested Yarborough be suspended from the practice of law. Attached to this complaint were several letters sent from Yarborough to Applicant during course of the representation.

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On June 8, 2021, Applicant filed "Applicant's Response to Conditional Order of Dismissal; Order Granting Motion to File Return out of Time and Denying Motion for Summary Disposition." In this response, Applicant stated that he discovered new evidence after his trial and first PCR proceeding. He stated that this case should not be summarily dismissed because there was a failure on the part of the first PCR Court to afford him a full and fair evidentiary hearing. Applicant cites to portions of his prior transcript where he attempted to restate the allegations and the judge interrupted him, asking Counsel to ask questions about the allegations and having Applicant respond accordingly. Applicant claims the PCR transcript was distorted and Applicant was prevented from having his allegations ruled upon.

He claims he has newly discovered evidence of the prosecutor abusing the grand jury process in violation of Applicant's Due Process rights. Specifically, he stated that the State had sole possession of grand jury empanelment documents, which kept Applicant from knowing about the abuse until recently. He stated he obtained this in a 2020 FOIA matter. He stated that these documents show that the possession of a weapon charge was never presented to the grand jury.

Applicant also claims there were multiple procedural irregularities, including the denial of a self-defense jury instruction. Though Applicant recognized that Counsel's failure to object to the judge's decision not to issue the charge, he stated that the PCR Court went too far in finding that the charge would not have been issued even if Counsel objected. He claims this jury instruction was proper and should have been afforded. Applicant requested a PCR hearing to flesh this issue out more fully.

Applicant alleged newly discovered evidence consisting of the substance of an in-chambers meeting right before the jury trial. He stated that a self-defense defense was discussed

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at the meeting. He cited to the trial transcript in showing that a conversation in chambers occurred on this issue. Applicant claims he is entitled to another PCR hearing on this issue because *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), made clear that findings of fact and conclusions of law need to be placed on the record. Applicant claims that this new law entitles him to a new direct appeal or PCR.

Applicant claims there is newly discovered evidence of actual innocence. In establishing this claim, he argues that the Court should not have used the phrases inferred malice, implied malice, and malice aforethought. Applicant acknowledged that this issue was previously ruled on in his first PCR action, but stated that the law has recently changed, making mention of implied malice impermissible.

Applicant also claims he has newly discovered evidence indicating he is guilty of the lesser-included offense assault and battery. He claims this is substantiated by his lengthy history of mental health issues. He claims he told Counsel to investigate his mental health issues before the trial. He claims that he is not guilty based upon law that came out years after his trial.

Applicant claims his application is not barred for *res judicata* because issues concerning the grand jury documents were not known at the time of his first PCR action, because many of his allegations are supported by findings of the first PCR action, and because new law was released after the first PCR action, which impacts his convictions. Applicant claims he is entitled to a new PCR hearing because of the newly discovered evidence and in the interest of due process. Applicant also requests a new direct appeal.

On July 6, 2021, Applicant filed a letter with the clerk of court, informing the court that he has been transferred to Tyger River Correctional Institution and requested all further correspondence be sent to his new address. On August 21, 2021, current PCR Counsel,

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J. Falkner Wilkes, Esquire, entered his notice of representation in this case.

On October 26, 2021, Applicant filed a document entitled "affidavit." In this response, Applicant claims he had an evidentiary hearing in his prior PCR action before Judge Hayes on December 8, 2011. He stated that Judge Hayes stopped him from presenting his own arguments and evidence twice during that hearing because it "was not conductive to the Court's time." He stated the Court prevented him from presenting an additional ground at the first evidentiary hearing. He stated that the appellate court prevented him from presenting this issue as well. Applicant claims that PCR Counsel failed to file a 59(e) in the prior action and that when he filed a *pro se* 59(e), the Court informed Applicant that it was procedurally barred by hybrid representation. Applicant stated he petitioned the South Carolina Supreme Court and the United States District Court of South Carolina seeking alternative remedies to address this issue thereby, but was told that he needed to seek the assistance of an attorney and that they could not give him legal advice. Applicant stated he wanted this allegation addressed.

Applicant, through PCR Counsel J. Falkner Wilkes, Esquire, filed a memorandum in opposition to the conditional order of dismissal on November 17, 2021, and November 19, 2021.[2] In this response, he argues that the words "implied malice" were used during jury instructions during trial, in contrast to *Belcher*, which was decided when Applicant's direct appeal was pending. Though he acknowledges that this issue was raised in his first PCR action and on appeal, he claims it was not raised "effectively". He claims this issue was not properly preserved on appeal during the first PCR action, which prevented him from truly having his one bite at the apple. He claims that the factual issues raised support a second evidentiary hearing, allowing him to have the issues effectively presented and fully litigated.

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[2] It was seemingly the same memorandum that was filed on both dates.

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This Court has reviewed all responses in full and finds none are sufficient enough to warrant an evidentiary hearing. Consequently, this Court finds this application must be summarily dismissed with prejudice.

In Applicant's PCR application and subsequent filings, Applicant has continued to fail to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, or could have been, discovered before his trial. Allegations already raised in prior actions, including the self-defense argument and the implied malice issue, are not newly discovered. Allegations based upon discoveries in the trial transcript, including the in-chambers discussion, are not newly discovered because they were already known or could have been know through exercising reasonable diligence. New creations in the law that do not apply retroactively are not newly discovered evidence. Actual innocence is not newly discovered, as Applicant could have made that argument at the time. Accordingly, Applicant has failed to make such a *prima facie* 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 shall remain summarily dismissed.

Applicant had a full opportunity to litigate all his allegations in his prior actions. Several of Applicant's present allegations, including those regarding a self-defense instruction and implied malice, are indistinguishable from those offered in his prior PCR application and his prior federal habeas corpus application. Additionally, Applicant could have raised his additional allegation of "newly discovered evidence" in his prior actions. The prior PCR Court and the appellate courts 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*.

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Applicant was convicted of assault and battery with intent to kill and possession of a firearm during commission of a violent crime on June 14, 2007. The remittitur from the direct appeal was issued on May 17, 2010. This application was filed on September 14, 2018. Applicant has failed to sufficiently explain the over eight year delay between the remittitur of his appeal and this pursuit of remedy through the PCR process. Thus, the Court shall dismiss the matter as barred by the statute of limitations.

Further, Applicant's application is barred on successiveness grounds. Applicant's current allegations were or could have been raised in earlier proceedings based upon Applicant's prior PCR applications and Applicant has not sufficiently proven why these issues could not have been raised earlier. Thus, the current application is successive and barred.

Before this 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). Applicant has failed to make such a showing based on the information set forth in his responses, and, consequently, is not entitled to an evidentiary hearing. Thus, the Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed for untimeliness, successiveness, for failure to establish a *prima facie* case of newly discovered evidence, and barred by the doctrine of *res judicata*. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons in this Court's conditional order of dismissal, the PCR application is hereby denied and dismissed with prejudice. This court hereby advises Applicant that 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 243, SCACR, for the procedures following the filing and service of the notice of

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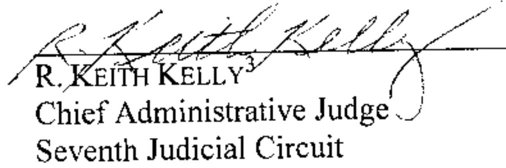
appeal.

AND IT IS SO ORDERED this 27th day of March, 2023.



R. KEITH KELLY[3]
Chief Administrative Judge
Seventh Judicial Circuit

Gaffney, South Carolina

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[3] The Honorable J. Mark Hayes, II is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit. However, because he presided over Applicant's prior PCR action, this final order of dismissal is being sent to the Honorable R. Keith Kelly, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.