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STATE OF SOUTH CAROLINA COUNTY OF BAMBERG	)	IN THE COURT OF COMMON PLEAS FOR THE SECOND JUDICIAL CIRCUIT
JUAN M. NIMMONS, S.C.D.C. #256828, Applicant,	)	Case No.: 2020-CP-05-00204 2021-CP-05-00077 2021-CP-05-00515
v. STATE OF SOUTH CAROLINA, Respondent.	)	**ORDER MERGING THE POST-CONVICTION RELIEF APPLICATIONS AND CONDITIONAL ORDER OF DISMISSAL**

This matter is before this Court based on the three successive post-conviction relief applications filed by Applicant Juan M. Nimmons on December 2, 2020 (CP No. 2020-CP-05-00204), March 29, 2021 (CP No. 2021-CP-05-00077), and October 25, 2021 (CP No. 2021-CP-05-00515). In response, Respondent the State of South made its return[1] to the applications, moved to merge the two application filed in 2021 into the 2020 application, and moved to summarily dismiss the actions as procedurally barred as successive, untimely, and for failing to make a prima facie showing of newly discovered evidence pursuant to the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014 After a review of the record and pleadings, this Court agrees this application should be summarily dismissed as untimely, successive and for failing to state a claim, and provisionally dismisses the action based on the following:

[1] Respondent's returns to the first 2 applications were due to be filed within ninety days of receipt. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the returns required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts these returns as timely filed. 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 and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections following his convictions in Bamberg County. Applicant was indicted at the March 1999 term of the Bamberg County Grand Jury for murder (1999-GS-05-0028) and armed robbery (1999-GS-05-0029). The charges resulted from the robbery and murder of Zola "Pat" Robinson, Applicant's mother, on August 6, 1998 in Denmark, South Carolina. The deceased victim was found the following morning lying on the couch of the trailer in which she lived with Applicant. The victim was struck thirteen times in the head with a hammer and died of cerebral injury caused by blunt force trauma. App. 128; 144; 150. The cash she had received from the bank on the day she was murdered was not found in her home or in the money purse she kept on her body. App 190. Two witnesses testified Applicant was wearing a plaid striped shirt on the night of August 6, which description matched the bloody flannel shirt found in the laundry hamper in Applicant's trailer. App. 177; 205; 241. Applicant was with witnesses on the night in question, but left for a couple hours and returned with cash that he used to purchase drugs. App. 200; 682. On August 9, 1998, Applicant gave a voluntary statement to law enforcement confessing to his mother's murder. App. 338-348.

Applicant was represented on the charges by Joshua Koger, Esquire. Applicant proceeded to a jury trial before the Honorable Gary E. Clary, after which he was convicted as indicted. On March 10, 1999, Judge Clary sentenced Applicant to life without parole for murder and to a consecutive term of thirty years imprisonment for armed robbery.

A notice of appeal was filed and an appeal perfected. Applicant was represented on appeal by Assistant Appellate Defender Robert M. Pachak, who filed an Anders[2] brief on Applicant's behalf and petitioned to be relieved as counsel. Applicant then filed his own *pro se* brief. The South Carolina Supreme Court dismissed the appeal and granted counsel's petition to be relieved. State v. Nimmons, Op. No. 2002-MO-051 (S.C. Sup. Ct. filed June 13, 2002). Applicant's Petition for Rehearing was denied, and the remittitur was sent on August 7, 2002.

Initial Post-Conviction Relief Action (2003-CP-05-0068) and Subsequent Appeal

Applicant filed his first application for post-conviction relief on May 1, 2003 (2003-CP-05-0068). Applicant raised the following issues in his first post-conviction relief application:

1. Ineffective assistance of counsel.
    a. Failure to submit notice of alibi defense and present alibi witnesses.
    b. Failure to object to solicitor's closing argument.
    c. Failure to object to sentence.
    d. Failure to request a Jackson v. Denno hearing.
    e. Failure to subpoena Rowland Dowling.
    f. Failure to move for directed verdict for charge of Armed Robbery.
    g. Failure to request jury charge on alibi.
    h. Failure to object to solicitor's pitting of witnesses.
    i. "...failing to motion to reveal Rule 404(b), S.C.R.Evid., State v. Lyle, evidence."
    j. Failure to move for continuance.
    k. "...failing to subpoena the coroner/toxicologist as there was not time of death, which could have changed outcome of proceedings because witnesses observed different individuals entering victim's residence this particular night."
2. Ineffective assistance of appellate counsel.
3. Court lacked subject matter jurisdiction on Armed Robbery charge.

[2] A brief filed pursuant to Anders v. California, 386 U.S. 738 (1967), effectively concedes the appeal lacks a meritorious claim.

Respondent made its return to the application on September 11, 2003 and requested an evidentiary hearing. Thereafter, Applicant, through counsel Sherri H. Stoney, filed an amended application. An evidentiary hearing was convened August 8, 2007, before the Honorable J. Michael Baxley, circuit court judge. Applicant was present and represented by counsel Stoney. Applicant testified on his own behalf and Respondent presented trial counsel Koger. At the conclusion of the hearing, Judge Baxley orally denied the application and asked counsel for Respondent to submit a proposed order for the court's consideration. A written order memorializing the Court's findings and denying the application was filed on October 4, 2007.

Applicant then filed a notice of appeal on November 1, 2007. He was represented by Appellate Defender Kathrine Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense. On August 29, 2008, Appellate Defender Hudgins moved for the appeal to be dismissed without prejudice, arguing that Applicant had pending motions in the circuit court. Specifically, she asserted that after the Court's oral ruling but before the formal order was filed, Applicant filed a *pro se* motion to amend his application and a motion to substitute counsel on August 27, 2007. Respondent filed a return in opposition to the motion to dismiss the appeal without prejudice. The South Carolina Supreme Court denied the motion to dismiss without prejudice. Thereafter, Applicant, through counsel Hudgins, filed a petition for writ of certiorari. Respondent filed its return to the petition. By order dated September 3, 2009, the Supreme Court denied certiorari. The remittitur was sent on September 21, 2009.

Second Post-Conviction Relief Action (2009-CP-05-0200) and Subsequent Appeal

Applicant filed his second post-conviction relief application on October 2, 2009 (2009-CP-05-0200). In this application, Applicant set forth the following grounds for relief:

1. "Was Applicant denied his one bite of the apple when PCR counsel failed to [e]nsure that all grounds for relief were raised in Applicant's prior PCR application and addressed at Applicant's PCR hearing?"
2. "Was Applicant denied due process of law and equal protection when trial counsel and PCR counsel failed to challenge the defects in the indictments that allowed Applicant to be tried and convicted on defective instruments that have unduly prejudiced Applicant and denied him of his constitutional rights?"
3. "Was Applicant denied due process of law and equal protection when PCR counsel failed to raise the issue of trial counsel conceding Applicant's guilt to the jury?"
4. "Was PCR counsel ineffective for failing to raise trial counsel's failure to ask the court that the sentences that were handed down be run concurrent as mandated by S.C. Code Ann. 17-25-50?

Respondent made its return to the application and moved to dismiss the action. On May 24, 2010, the Honorable Doyet A. Early, III, acting in his capacity as Chief Administrative Judge, signed a conditional order of dismissal, provisionally dismissing the application but allowing Applicant twenty days from the date of service to respond with sufficient reasons why the dismissal should not become final. After consideration of Applicant's responses to the Conditional Order of Dismissal, Judge Early issued a Final Order of Dismissal, signed on August 13, 2010, and filed August 17, 2010.

Applicant appealed the summary dismissal. The South Carolina Supreme Court issued an order of dismissal, dated September 28, 2010, dismissing the matter for failure to show an arguable basis why the determination by the lower court was improper pursuant to Rule 243(c), SCACR. The remittitur was sent on October 15, 2010.

Third Post-Conviction Relief Action (2010-CP-05-0205)

Applicant filed a third post-conviction relief application on October 7, 2010 (2010-CP-05-0205). In this application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of appellate counsel.
    a. "Counsel failed to raise meritorious issues."
    b. "Counsel acted under conflict of interest."

c. "Counsel failed to show-up or attend the PCR hearing."

Respondent made its Return and Motion to Dismiss on March 28, 2011 requesting the application be summarily dismissed as successive and barred by the statute of limitations. On March 29, 2011, Judge Early, acting in his capacity as Chef Administrative Judge, signed a conditional order of dismissal, provisionally dismissing the application but allowing Applicant twenty days from the date of service to respond with sufficient reasons why the dismissal should not become final. After failing to receive a response to the Conditional Order of Dismissal, Judge Early issued a Final Order of Dismissal, signed on July 6, 2011, and filed July 12, 2011. Applicant did not pursue an appeal.

Fourth Post-Conviction Relief Action (2012-CP-05-131) and Subsequent Appeal

Applicant filed his fourth application on July 17, 2012, alleging he was being held in custody unlawfully based on the following allegations:

1. "Applicant is entitled to a new trial based upon the after-discovered evidence of his actual innocence wherein another individual admitted to commission of the crime for which Applicant was convicted."
    a. "On or about September 27, 2011, an individual sent an email to another member of Applicant's family in which that person admitted to the murder of Applicant's mother and that Applicant did not commit the crimes. Applicant was contacted and received this information in February 2012."

       "The email and affidavit(s) or deposition(s) of the person receiving the email and law enforcement authorities receiving the information to South Carolina authorities will be presented at the evidentiary hearing."

       "This evidence would change the result if a new hearing was held; it has been discovered within the past one (1) year; could not have been discovered before trial or the first post-conviction proceeding by exercise of due diligence; is material to the issue of guilt or innocence; and is not merely cumulative or impeaching. It is more likely than not no reasonable juror would have found Applicant guilty beyond a reasonable doubt."

On October 8, 2012, Respondent made its return to the application and moved to dismiss the action. By order signed October 11, 2012 and filed on October 17, 2012, Judge Early, acting

in his capacity as Chief Administrative Judge, provisionally dismissed the action but gave Applicant twenty days from the date of service to provide sufficient reasons why the application should not be summarily dismissed.

Applicant filed a response asking Judge Early to recuse himself for a conflict of interest, requested an evidentiary hearing, and moved for discovery. Judge Early issued an order recusing himself from the case. Thereafter, the Honorable Clifton Newman, circuit court judge, granted Applicant's Discovery Motion and ordered an evidentiary hearing.

An evidentiary hearing was convened on September 30, 2016, at the Orangeburg County Courthouse before the Honorable Edgar W. Dickson, circuit court judge. Both parties waived venue to allow the hearing outside of the Second Judicial Circuit. Applicant was present at the hearing and was represented by Janek Kazmirsky, Esquire. At the hearing, Applicant presented testimony from witness Darryl Williams in support of his claim of newly discovered evidence. Following the hearing, both parties submitted memoranda to the court for consideration. Judge Dickson issued an Order Denying Post-Conviction Relief signed on March 10, 2017, and filed March 24, 2017.

Applicant filed a timely Notice of Appeal on April 3, 2017. Applicant's Petition for Writ of Certiorari were filed on November 6, 2017. Respondent then filed its Return to the Petition for Writ of Certiorari. By order dated June 27, 2018, the South Carolina Supreme Court denied certiorari. The remittitur was sent on July 13, 2018.

Petition for Habeas Corpus in United States District Court

On July 26, 2018 Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. See Nimmons v.

Warden of Lieber Corr. Inst., 8:18-cv-01919-JFA-JDA.[3] Respondent filed a return and motion for summary dismissal. United States Magistrate Judge Jacquelyn D. Austin issued a report and recommendation recommending Respondent's motion for summary judgment be granted.

On August 15, 2019, United States District Judge Joseph F. Anderson, Jr. issued an order adopting the report and recommendation of the Magistrate, granting Respondent's motion for summary judgment, and denying the petition for habeas corpus. A certificate of appealability was also denied.

Applicant filed a notice of appeal to the Fourth Circuit Court of Appeals. Pursuant to Local Rule 45, the Court dismissed the proceeding for failure to prosecute.

CURRENT APPLICATIONS BEFORE THE COURT

Applicant has since filed three new post-conviction relief applications. First, Applicant filed his fifth post-conviction relief action on December 2, 2020 (2020-CP-05-00204). In this fifth application, Applicant asserts he is entitled to post-conviction relief:

-Applicant was denied due process when trial counsel conceded his guilt in closing argument;

-Juror misconduct and bias based on juror's concealing that they knew Applicant;

-Applicant was denied due process when his confession was admitted without a suppression hearing when he was under the influence of drugs;

-trial counsel was ineffective for failing to call Jerome Owens as an alibi witness; and

-trial counsel was ineffective for failing to object to the malice jury instruction;

Applicant then filed a sixth post-conviction relief on March 29, 2021 (2021-CP-05-0077),

[3] In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a United States Magistrate Judge.

asserting he was entitled to post-conviction relief based on purported newly discovered evidence in the form of a witness, Odell Crum, who he asserts saw two people enter the victim's home on the night of the murder.

Applicant then filed a seventh application for post-conviction relief application on October 25, 2021 (2021-CP-05-00515), asserting he is entitled to post-conviction relief based on a claim of newly discovered evidence based on a claim that Applicant's family members recently met with Deputy Solicitor David Miller, who advised them that there was a plea offer, of which Applicant now contends he was not aware. In support of this, Applicant attached a portion of an email conversation, purportedly from Deputy Solicitor David Miller, where he states it is his understanding there was an offer to pled to murder but he is unsure if there was a particular sentence recommendation.

In response to these three applications, Respondent moved to merge the three actions into one, with the 2020 case being the surviving case and the 2021 cases being summarily dismissed and the applications be considered amendments to the 2020 filing. Respondent also moved to summarily dismiss the actions in full based on untimeliness, successiveness, for failure to make a *prima facie* showing of newly discovered evidence, based on the doctrine of res judicata, and for frustration of finality in convictions. Attached to this return and before this Court are the Bamberg County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and appeals therefrom; Applicant's federal habeas records; and the records of the current three PCR action.

MERGER OF THE THREE PENDING ACTIONS

As discussed above, Applicant has three pending nearly applications for post-conviction relief challenging the same convictions and sentences, the fifth filed on December 2, 2020 (CP No. 2020-CP-05-00204), the sixth filed on March 29, 2021 (CP No. 2021-CP-05-00077), and the seventh filed on October 25, 2021 (CP No. 2021-CP-05-00515).

An applicant is not generally allowed to have multiple post-conviction relief proceedings in regard to the same conviction. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (PCR rules "contemplate adjudication on the merits of the original petition, one bite as the apple as it were."); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (successive applications for post-conviction relief strongly disfavored); S.C. Code Ann. § 17-27-90 ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application."). Accordingly, Respondent moved to have the three proceedings merged and that the sixth and seventh applications for post-conviction relief filed in 2021, be considered **amendments** to the fifth application for post-conviction relief filed on December 2, 2020 (CP No. 2020-CP-05-00204).

This Court agrees merger of the three cases is appropriate, with the action filed on December 2, 2020 (CP No. 2020-CP-05-00204) being the surviving case and the applications filed on March 29, 2021 (CP No. 2021-CP-05-00077), and October 25, 2021 (CP No. 2021-CP-05-00515) be dismissed and that the filings be associated therewith be considered as amendments to the surviving 2020 application.

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); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Summary Dismissal Based On Successiveness

Respondent moved to summarily dismiss these applications because it is successive to Applicant's four previous post-conviction relief 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.

Section 17-27-90 is clear—successive post-conviction relief 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 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).

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." Aice, 305 S.C. 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. Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these claims in his prior four post-conviction relief actions, as all of these claims, including his purported "newly discovered" information was readily available not only at the time of his trial but also the time of his initial post-conviction relief proceeding. Accordingly, this Court finds the application should be dismissed as successive to Applicant's prior post-conviction relief actions.

Summary Dismissal Based on the Statute of Limitations

Respondent also moved for summary dismissal 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 conviction is invalid because of due process violations, ineffective assistance of counsel, and newly discovered evidence. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45.

Applicant was convicted on March 10, 1999, and the remittitur was issued on August 7, 2002. Based on Section 17-27-45(A), Applicant needed to file an application for post-conviction relief based on claims that he knew or should have known within one year of the issuance of his remittitur. The current applications were not filed until 2020 and 2021, well after the one-year

statutory filing period expired. Therefore, this Court finds the applications should be summarily dismissed as barred by the statute of limitations.

Moreover, Applicant's claims of newly discovered evidence are also untimely pursuant to Section 17-27-45(C) because Applicant's claims regarding various witnesses could have been ascertained within one year of his trial and issuance of the remittitur during the filing period of his initial post-conviction relief action with the exercise of reasonable diligence. Accordingly, this Court finds this application is untimely pursuant to Section 17-27-45 and should be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Summary Dismissal based on Failure to State a Claim of Newly Discovered Evidence

This Court also 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 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, 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 this case, Applicant asserts he is entitled to post-conviction relief based on several claims of newly discovered evidence, including jurors concealing that they knew him, that a witness purportedly saw two people leave the victims home of the evening of the murder, and that there was an offer for Applicant to plead guilty (without any assertion that there was a recommendation as to sentence or any other provisions rather than a straight-up plea). However, for the vast majority of these claims, Applicant provides no support for these assertions. More importantly, Applicant fails to provide any sufficient explanation as to why his application should be considered timely, as all of these claims either were or should have been ascertained at the time of trial or within one year of the conclusion of his direct appeal and raised in his initial post-conviction relief action—not his fifth, sixth, and seventh applications two decades later.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch, 246 S.C. 258, 143 S.E.2d 455. Applicant's current allegations involve "facts" that were or could have been raised in the prior PCR action; thus, the current application is successive and barred by section 17-27-90. Therefore, this Court finds Applicant has failed to meet his burden, and this application should be summarily dismissed as successive to Applicant's previous PCR action.

Res Judicata

Because the allegations in the current applications were or could have been raised in Applicant's previous state proceeding, this action is further 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, 275 S.C. 615, 274 S.E.2d 415.

In Foxworth v. State, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. Id. at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered "the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the merits." Id. Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. Id. at 616-17, 274 S.E.2d at 415-16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

> The language of Section 17-27-90 is not restricted to State proceedings but rather refers to "any other proceeding" where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*, *supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant has litigated four previous PCR applications in the circuit court. Applicant had a full opportunity to litigate all his allegations known or should have been known at the time of his initial PCR action. The finality of the previous courts' rulings should be respected, and this Court intends to summarily dismiss this action as barred by the principles of *res judicata*.

Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in Aice explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C. 1990). . . [Here], Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.

305 S.C. at 451–52, 409 S.E.2d at 394–95.

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.'" United States v. Fugit, 703 F.3d 248, 252 (4th Cir. 2012) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring)). In his concurring and dissenting opinion in Mackey v. United States, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

> Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task

> to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after Mackey, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in Anderson v. Leeke, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

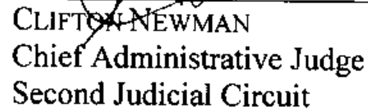
CONCLUSION

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 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 Bamberg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – Megan Harrigan Jameson
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Bamberg County Clerk of Court and opposing counsel within twenty days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 13th **day of** July, **2021.**



CLIFTON NEWMAN
Chief Administrative Judge
Second Judicial Circuit

Columbia, South Carolina