STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BERKLEY) FOR THE NINTH JUDICIAL CIRCUIT

FILED
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LEAH GUERRY DUPREE
CLERK OF COURT
BERKELEY COUNTY, SC

Don-Survi Chisolm, #347831,) CASE NO. 2022-CP-08-01782

Applicant,

v.

State of South Carolina,

Respondent.

RECEIVED
AUG 16 2023
SC Court of Appeals

CONDITIONAL ORDER OF DISMISSAL AND ORDER DENYING APPLICANT'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR DEFAULT JUDGMENT

This matter is before this Court by way of an application for post-conviction relief (PCR) filed by Don-Survi Chisolm (Applicant) on July 28, 2022, and amended on February 20, 2023. On May 8, 2023, Applicant has also filed a Motion for Entry of Default and for Default Judgment, a Motion for Summary Disposition/Judgment on the Pleadings, and a Brief in Support of Motion for Judgement on the Pleadings. Respondent made its return and moved to dismiss on several grounds. Respondent also filed a return opposing Application's Motion for Entry of Default and for Default Judgment, a Motion for Summary Disposition/Judgment on the Pleadings Judgment. For the reasons set forth below, this Court grants Respondent's motion to dismiss and denies Applicant's motion for default judgment and motion for judgment on the pleadings.[1]

[1] Respondent's return was due to be filed within 60 days of receipt. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for [PCR] 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."). Respondent has relayed that it received this application on September 1, 2022, and the reason for delay was due to turnover in the PCR division as well as an excessive workload due to understaffing. 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 this return 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 time limit prescribed by the statute is not mandatory but discretionary with the trial court, and the trial court may extend the time for filing).

CERTIFIED TRUE COPIES OF RECORD IN THIS COUNTY
DATE 29 JUN 2023
CLERK OF COURT
C.P. & G.S.
BERKELEY COUNTY, SC

CC: D.DIXON; D.CHISOLM 06/29/2023

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections serving a life sentence. In August 2010, the Berkeley County Grand Jury indicted Applicant for murder (2010-GS-08-1425), assault and battery with intent to kill (ABWIK) (2010-GS-08-1424), and possession of a firearm during the commission of a violent crime. These charges arose after the fatal shooting of Michael Severs and the shooting of Donsa Chisolm in the face on April 1, 2010.

On October 16, 2012, Applicant pled guilty as indicted before the Honorable R. Markley Dennis, Jr.[2] Public Defender Ashley Pennington represented Applicant, and Solicitor Scarlett Wilson represented the State. The plea was pursuant to a negotiated sentence of life imprisonment for murder; in exchange, the State agreed not to seek the death penalty. Judge Dennis sentenced Applicant to life for murder and concurrent sentences of twenty years for ABWIK and five years for the weapon charge.

Applicant filed a direct appeal. On February 11, 2013, the Court of Appeals dismissed Applicant's appeal due to his failure to provide a sufficient reason for appealing from a guilty plea. The remittitur was sent February 27, 2013.

On February 18, 2013, Applicant filed his first PCR application (2013-CP-08-422), raising the following grounds:

1. Ineffective assistance of counsel.
    a. "Defendant's right to proceed *pro se* was impeded without request and a plea was entered in a form that forced hybrid representation. But for this formality and counsel's ineffectiveness, the Defendant would not have proceeded to trial."
2. Involuntary guilty plea.
3. Constitutional violations.
    a. 6th amendment right to self-representation/ prohibition against hybrid representation.
    b. Violation of due process.

[2] Applicant pled pursuant to Alford for the murder charge.

On February 19, 2015, an evidentiary hearing convened before the Honorable Eugene C. Griffith, Jr. At the hearing, Applicant proceeded on claims that plea counsel was ineffective for failing to investigate, failing to research, and failing to apprise Applicant of lesser-included offenses. On July 14, 2015, Judge Griffith issued an order denying and dismissing with prejudice Applicant's PCR application.

Applicant filed a petition for a writ of certiorari from the denial of his PCR application. Appellate Defender Laura R. Baer filed a petition on Applicant's behalf arguing the PCR court erred in finding plea counsel effective when plea counsel (1) impeded Applicant's right to represent himself under the federal and state constitutions and (2) failed to advise Applicant of the lesser-included offense of involuntary manslaughter. On July 25, 2017, the Supreme Court of South Carolina issued an order denying certiorari. The remittitur was sent August 10, 2017.

On November 7, 2017, Applicant filed a petition for habeas corpus relief in the federal district court (4:17-2934-RBH-TER). The State filed a return and motion for summary judgment. On March 7, 2018, the federal magistrate judge issued an order recommending the State's motion be grated. On April 17, 2018, the district court judge issued an order adopting the magistrate's recommendation, granting the motion for summary judgment, and denying and dismissing the petition for habeas corpus with prejudice. The Court also denied a certificate of appealability.

CURRENT APPLICATION

Applicant *untimely* filed this successive PCR application on July 28, 2022. Applicant alleges he is being held in custody unlawfully based on (a) violations of Brady vs. Maryland, ineffective assistance of counsel and PCR counsel, and (b) violation of due process and involuntary plea of no contest/guilty. In support of these allegations, Applicant alleges, "Based upon newly discovered evidence previously withheld from the defendant there were violations of due process

which resulted in an involuntary plea of no contest in the matter." As relief, Applicant requests "reversal of no contest / guilty plea, vacate sentence, new trial in matter."

On February 20, 2023, Applicant filed an amended application raising the following:[3]

> a. Lack of jurisdiction both personal and of subject matter: Your record reveals [Applicant] has been neither arrested nor arraigned, lawfully, by Berkeley County, SC authorities;[4]
>
> b. Violation of due process: Your record reveals [Applicant] was subjected to a shamed [sic] legal process, as defined by SC law, at all previous points in this matter relevant to lawful service and process;[5]
>
> c. Extrinsic fraud upon the court: Your record reveals that [Applicant] was unable to secure rights and/or use defenses lawfully available to him due to willful acts of extrinsic fraud, committed by agents of the prosecution all dates proceeding but not limited to

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[3] In this amended application, Applicant raised an issue with charges he purports he was sentenced to on July 25, 2014, and August 8, 2014. In support, Applicant attached the sentencing sheets from the charges raised in his current application and a "South Carolina Department of Corrections Offender Summary" that states: "Audited on 10/04/11 by AGWHITE . . . entered offenses #2-4 and removed the detainers . . . 7/25/14 . . . . KFOGLE. . . //Modified plead on offense #4 . . . 8/8/14. . . KFOGLE." (ellipsis in original). Respondent submits this record from SCDC is not evidence that Applicant has received any additional sentence in Berkeley County. Respondent notes the sentencing sheets in this case reflect a sentencing date of October 16, 2012—the same day Applicant entered his plea. Respondent is not in possession of any other sentencing sheets from Berkley County. Respondent further notes Applicant's SCDC's records only contain the three convictions Applicant pled to on October 16, 2012, and a Dorchester County conviction for murder. Respondent submits any issue Applicant has with the Dorchester County sentence should be raised in an application filed in Dorchester County.

[4] In support, Applicant references exhibit F to his amended application, which is his criminal history report prepared by SLED on July 1, 2010. This criminal history report predated his August 2010 indictments issued in this case.

[5] In support, Applicant references exhibit G to his amended application, which contains responses to requests to admit in an unrelated state lawsuit involving Applicant as the Plaintiff and SCDC and the wardens of McCormick Correctional Institution as Defendants. In those filings, SCDC and the wardens admit (1) "the SLED check obtained on September 21, 2011 . . . does not reflect an arrest on November 13, 2007 for 'murder' but does list an arrest on November 12, 2007 for the charge of 'Solicitation to Commit Murder'"; (2) "the SLED check does not list any arrests for the date of June 16, 2010; (3) Applicant is currently listed as serving sentences in connection to charges in Berkeley County with start dates of Apr 14, 2010 and Aug 10, 2012; and (4) Applicant "is also serving a life sentence stemming from a charge in Dorchester County with a start date of November 12, 2007.

10/16/2012;[6]

> d. Ineffective assistance of counsel: Your record reveals [Applicant] was unable to secure rights and/or use defenses lawfully available to him due to ineffective assistance of counsel of every stage of process including but not limited to assignment of counsel on June 17, 2010 and 12/21/2011.
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> e. Violation of Brady v. Maryland: On or about Nov 29, 2021 and Dec 20, 2021 through March 13, 2022 [Applicant] received documentation, newly discovered, which were previously available to the prosecution, which were not made available to the defense, that would change the outcome in this matter.[7]

Before this Court are the Berkeley County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; the guilty plea transcript; the records from Applicant's direct appeal; the records of Applicant's prior PCR action, including the appeal from that matter; the records of Applicant's federal habeas corpus petition; and the records of the current PCR action.

MOTION TO DISMISS

Respondent moved for summary dismissal pursuant to section 17-27-70 of the South Carolina Code, asserting no genuine issues of material fact necessitate an evidentiary hearing. Respondent further requested this Court issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for doing so. 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) (finding summary disposition appropriate

[6] Although Applicant references exhibit H, none of the attachments to his amended application are labeled exhibit H.

[7] In support, Applicant references exhibit I, page 3, to his amended application, which contains a "Reply to Response in Opposition to Defendant's Motion for Summary Judgment" in an unrelated federal lawsuit involving Applicant as the Plaintiff and Chaplain Moultrie and Lieutenant Staggs as Defendants. In that Reply, the defendants of that lawsuit aver Applicant "was previously provided his Warden's Jacket and Central Records file on November 29, 2021."

when no facts need to be developed and the applicant is not entitled to relief). This Court has reviewed the application, the amended application (including all attachments), and the records in this case and finds there are no genuine issues of material fact. Therefore, summary dismissal is appropriate. Set forth below are the Court's findings:

Statute of Limitations

This Court finds Applicant's claims related to ineffective assistance of counsel, violation of due process and Brady, involuntary guilty plea, lack of jurisdiction, and extrinsic fraud[8] should be summarily dismissed for failing to comply with the statute of limitations. "An application for relief pursuant to [the PCR act] *must* be filed within one year after the entry of judgment . . . or within one year after the sending of the remittitur . . . ." § 17-27-45(A). The statute of limitations applies to all PCR 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 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). The circuit court may "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." § 17-27-70(c).

Here, Applicant was sentenced on October 16, 2012. He filed a direct appeal, and the remittitur was sent February 27, 2013. The PCR application was therefore due on or before February 27, 2014. This application was filed July 28, 2022—well after the filing period expired. To the extent Applicant is raising a claim related to PCR counsel's conduct, this Court finds any

[8] This Court construes this as a claim of prosecutorial misconduct and finds any such claim should have been raised in Applicant's first application. This Court further finds any claim related to prosecutorial misconduct relates to the guilty plea itself and is thus barred by the statute of limitations.

claim related to PCR counsel should have been raised within one year of the remittitur of the appeal from the first PCR application. The remittitur was sent August 10, 2017; thus, Applicant had until August 10, 2018, to raise any claim against PCR counsel before the statute of limitations would bar the consideration of any such claim.[9] Based on the foregoing, this Court finds Applicant's application should be summarily dismissed as untimely.[10]

Successive

This Court finds Applicant's claims related to ineffective assistance of plea counsel, violation of due process and Brady, involuntary guilty plea, lack of jurisdiction, and extrinsic fraud should be summarily dismissed as successive to Applicant's 2013 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.

Section 17-27-90 is clear—successive PCR applications are forbidden unless an applicant can

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[9] As discussed below, claims related to ineffective assistance of PCR counsel are prohibited except in very narrow circumstances, which this Court finds Applicant has not demonstrated. This Court further finds any claim related to PCR counsel is barred by the statute of limitations.

[10] The statute of limitations for newly-discovered evidence is "one year after the date of actual discovery of the facts by the applicant or fter the date when the facts could have been ascertained by the exercise of reasonable diligence." §17-27-45(C). However, as discussed below, Applicant has not set forth a prima facie claim of newly-discovered evidence.

indicate a "sufficient reason" why new grounds for relief were not raised or properly raised in previous applications or actions challenging these convictions. See Aice, 305 S.C. at 452, 409 S.E.2d at 395 ("[Applicant] 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.").

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. The 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). 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.

Here, Applicant's claims related to ineffective assistance of plea counsel, violation of due process and Brady, involuntary guilty plea, lack of jurisdiction, and extrinsic fraud could have been raised in his 2013 PCR application. Applicant has not met his burden of showing these claims—which relate to the plea proceeding itself and plea counsel's conduct—could not have been raised in his 2013 PCR application. Applicant had a full opportunity to litigate these claims in his previous PCR action and has failed to show a successive application is appropriate or why he could not have raised these claims in his prior collateral actions; thus, these allegations are successive and barred under section 17-27-90. See Aice, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were"). Applicant has failed to meet the burden imposed upon him; thus, these claims are dismissed as successive.

Newly-Discovered Evidence

This Court finds Applicant's claim of newly-discovered evidence lacks merit and should be summarily dismissed. 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." § 17-27-45(C).

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). 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 finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014). It is a "rare case" where the interests of justice require the vacation of a knowing and voluntary guilty plea involving an admission of guilt and a waiver of trial. Id.

In support of his claim of newly-discovered evidence, Applicant asserts, "Based upon

newly discovered evidence previously withheld from the defendant there were violations of due process which resulted in an involuntary plea of no contest in the matter." In his amended application, he contends, "Violation of Brady v. Maryland: On or about Nov 29, 2021 and Dec 20, 2021 through March 13, 2022 [Applicant] received documentation, newly discovered, which were previously available to the prosecution, which were not made available to the defense, that would change the outcome in this matter." In support of this claim, Applicant submitted a Reply to Response in Opposition to Defendant's Motion for Summary Judgement from an unrelated federal lawsuit filed by Applicant. In that Reply, the defendants of that lawsuit aver Applicant "was previously provided his Warden's Jacket and Central Records file on November 29, 2021." Applicant does not, however, set forth what information in the Warden's Jacket and Central Records file he references. Without more information, it is impossible to discern whether these documents existed at the time of Applicant's trial, whether they could have been discovered with reasonable diligence, and what effect—if any—they could have had on the outcome of a trial. See Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) ("A party requesting a new trial based on after-discovered evidence 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."). Overall, Applicant has not set forth specific facts to support his claim of newly-discovered evidence, as required by the PCR Act. See S.C. Code Ann. § 17-27-50 (providing a PCR application must "specifically set forth the grounds upon which the application is based"). Further, Applicant has not set forth sufficient facts to show the allegedly "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 [his] guilty plea to

be vacated." Jameson, 410 S.C. at 470, 765 S.E.2d at 130. Because Applicant has not set forth a prima facie case of newly-discovered evidence, this claim is summarily dismissed.

Lack of Jurisdiction

As an alternate ground, this Court finds Applicant's claim that the court lacked jurisdiction is without merit and should be summarily dismissed. Essentially, Applicant claims he "has been neither arrested nor arraigned, lawfully, by Berkeley County." Initially, Applicant *was* indicted by the Berkley County Grand Jury for these offenses. See Evans v. State, 363 S.C. 495, 514, 611 S.E.2d 510, 520 (2005) ("The regularity of grand jury proceedings is presumed absent clear evidence to the contrary."). Applicant's submission of a SLED background check that predates his indictments is not clear evidence that the grand jury proceedings were irregular. More critically, however, an indictment is merely a notice document that does not implicate the subject matter jurisdiction of the circuit court over general sessions cases. See State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 500 (2005) ("The indictment is a notice document."); id. at 101, 610 S.E.2d at 499 ("[S]ubject matter jurisdiction of the circuit court and the sufficiency of the indictment are two distinct concepts and the blending of these concepts serves only to confuse the issue. Circuit courts obviously have subject matter jurisdiction to try criminal matters."). Under Gentry, Applicant's claim that the court lacked jurisdiction fails as a matter of law. Thus, this claim fails as a matter of law and is summarily dismissed.

Extrinsic Fraud

As an alternate ground, this Court finds Applicant's claim of extrinsic fraud should be dismissed because Applicant has not made a prima facie showing of extrinsic fraud. "A judgment may be set aside on the ground of fraud only if the fraud is 'extrinsic' and not 'intrinsic.'" Hagy v. Pruitt, 339 S.C. 425, 431, 529 S.E.2d 714, 717 (2000). "Extrinsic fraud is collateral or external

to the trial of the matter." Id. "It is 'fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.'" Id. (quoting Hilton Head Center, 294 S.C. at 11, 362 S.E.2d at 177). "Intrinsic fraud, on the other hand, is fraud presented and considered in the trial." Id. at 431-32, 529 S.E.2d at 718. "For example, perjury is intrinsic fraud and will not support an action to set aside the judgment." Id. at 432, 529 S.E.2d at 718.

In support of his allegation of extrinsic fraud, Applicant merely alleges, "Your record reveals that [Applicant] was unable to secure rights and/or use defenses lawfully available to him due to willful acts of extrinsic fraud, committed by agents of the prosecution all dates proceeding but not limited to 10/16/2012." This allegation does not present sufficient facts as required by the PCR Act and thus should be summarily dismissed. See § 17-27-50 (providing a PCR application must "specifically set forth the grounds upon which the application is based"). In fact, it is unclear what exactly Applicant is alleging the prosecutor did or did not do—making it difficult to ascertain whether this allegation supports a claim of extrinsic (rather than intrinsic) fraud. To the extent Applicant's allegation raises sufficient facts to allege extrinsic fraud by the prosecutor, this Court finds such an allegation would be more properly framed as a claim of prosecutorial misconduct. This Court further finds such a claim would be barred by the statute of limitations and the doctrine against successiveness. Because Applicant has not made a prima facie showing of extrinsic fraud, the Court finds this claim should be summarily dismissed.

Ineffective Assistance of PCR counsel

As an alternate ground, this Court finds Applicant's claim of ineffective assistance of PCR counsel should be dismissed because Applicant has not set forth extraordinary circumstances to support such a claim.[11] A successive application for PCR is not allowed on the basis that the

[11] This Court reiterates its finding above that this claim is barred by the statute of limitations.

applicant's "first complete PCR application was insufficient due to ineffective PCR counsel." Aice v. State, 305 S.C. 448, 448, 409 S.E.2d 392, 393 (1991). In Aice, our Supreme Court noted its "general reluctance to consider successive PCR application." Id. at 450-51, 409S.E.2d at 394. Although the Court noted there have been narrow exceptions to the general rule against successiveness, it determined the claim Aice sought to raise—that his first PCR application was insufficient due to ineffective PCR counsel—was "an exception that may well swallow Rule 50(3)."[12] Thus, the Court held "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." Id. at 451, 409 S.E.2d at 394. Rather, such a claim is cognizable in "only the 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." Id. at 451 ,409 S.E.2d at 394.

Here, Applicant does not set forth any facts to support his claim of ineffective assistance of PCR counsel. Nevertheless, construed in the light most favorable to Applicant, nothing in his application or amended application (including the attachments) sets forth a situation, "only [in] the rarest of exceptions, when the system has simply failed [Applicant] and where to continue [his] imprisonment without review would amount to a gross miscarriage of justice." Id. Thus, Applicant has not set forth a sufficient exception to the general prohibition against claims related to ineffective assistance of PCR counsel, and this claim shall be summarily dismissed.

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

[12] "Under Section 8 of the [PCR] Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application could not have been raised by him in the previous application."

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. . . . [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 (citations omitted).

"[T]he 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, 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.

401 U.S. 667, 691 (1971) (Harlan, J., concurring 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). This Court finds Applicant's attempt to relitigate his convictions and sentences through this successive and time-barred application is contrary to the recognized need for finality of litigation.

MOTION FOR SUMMARY JUDGMENT

Applicant has filed a Motion for Summary Disposition/Judgment on the Pleadings, and a Brief in Support of Motion for Judgement on the Pleadings, alleging Respondent is in default and his PCR application should be granted based on after-discovered evidence "in which he raised the grounds of lack of subject matter jurisdiction, violation of Brady v. Maryland, Ineffective Assistance of Counsel, Fraud upon the Court, and Due Process Violations." See Applicant's Br. In Support of Judgment on the Pleadings, filed May 8, 2023. Respondent has filed a return opposing the motion. Because Applicant has submitted several attachments with his amended application, this Court construes this as a motion for summary judgment and finds this motion should be denied.

"Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." Id.

Viewed in the light most favorable to Respondent, Applicant has not shown he is entitled to judgment as a matter of law. Applicant does not set forth any additional facts in these filings to further support his claims. As this Court previously found, Applicant's claim of lack of subject matter jurisdiction is without merit. Further, these claims are barred by the statute of limitations

and successiveness. Finally, Applicant has failed to set forth sufficient facts to make a prima facie showing of after-discovered evidence, violation of Brady, Ineffective Assistance of Counsel, Fraud upon the Court, and Due Process Violations. Thus, viewed in the light most favorable to Respondent (the non-moving party in this motion for summary judgment), Applicant has not shown he is entitled to summary judgment as a matter of law, and this motion is denied.

RETURN TO MOTION FOR DEFAULT JUDGMENT

Applicant has also filed a Motion for Entry of Default and for Default Judgment, contending (1) he served his application on July 25, 2022, and his amended application on February 21, 2023; (2) the Rules of Civil Procedure require the State to respond within thirty to sixty days to an application challenging a plea, and within fifteen days to an amended application; (3) more than 272 days have elapses since he filed his application, and more than 65 days have elapsed since he filed an amended application, and (4) Respondent has not answered or otherwise contested the application. Respondent has filed a return opposing this motion. This Court finds Applicant's motion for default should be denied.

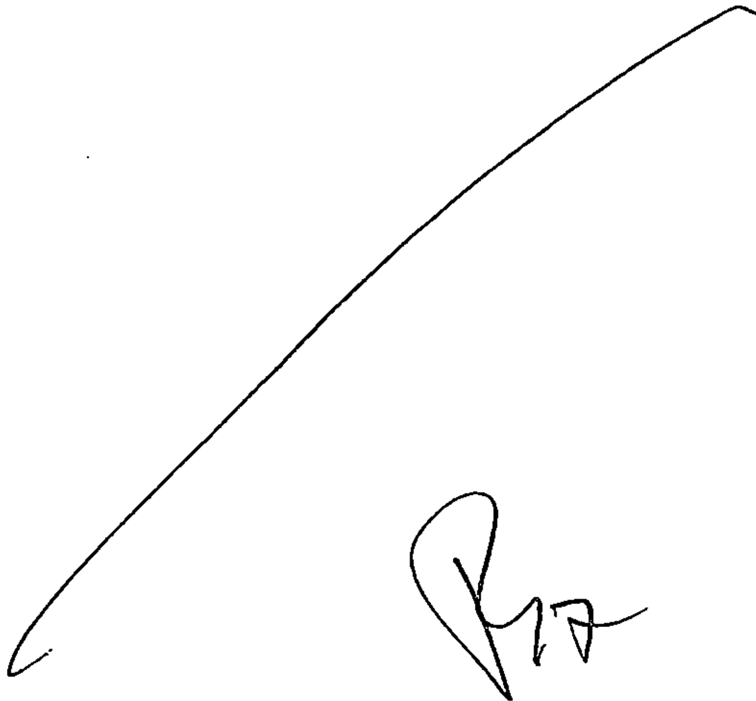
"[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial." Rule 12(a), SCRCP. However, this time limit is not mandatory but is discretionary with the trial court, and the trial court may extend the time for filing. Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973).

> No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication, and who did not subsequently make appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

Rule 55, SCRCP.

Respondent has filed a return asserting the delay in its return is due to turnover within the PCR division as well as understaffing. Having now completed the return, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent asked this Court to accept 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"). This Court finds Respondent's return shall be accepted. This Court further finds that for the reasons set forth in this Conditional Order of Dismissal, Applicant has not established any claim for relief. Thus, Applicant's motion for default judgment is denied.

[Conclusion and signature page follows]



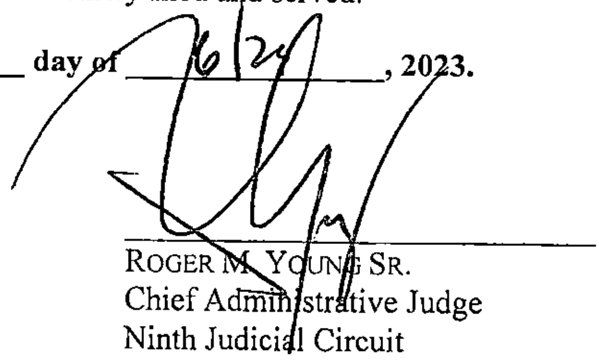
Conclusion

Pursuant to section 17-27-70(b) of the South Carolina Code, 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 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 Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

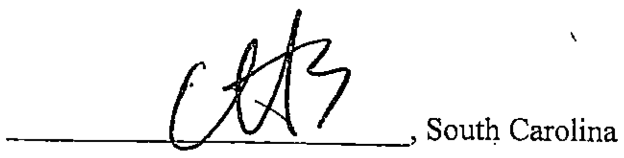
Office of the Attorney General
Danielle Dixon
Post-Conviction Relief Division – 9th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley County Clerk of Court and opposing counsel within twenty (20) days, and this Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this _____ day of 6/24, 2023.



Roger M. Young Sr.
Chief Administrative Judge
Ninth Judicial Circuit



______________, South Carolina

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated Lt. Mungo (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
COUNTY OF Lancaster)

AFFIDAVIT OF PERSONAL SERVICE

On this 12th day of July 2023, I served the **Conditional Order of Dismissal and Order Denying Applicant's Motion for Summary Judgment and Motion for Default Judgment (2022-CP-08-01782)**, on ***Inmate*** **Don-Survi Chisolm,** ***SCDC Inmate*** **#347831** by delivering personally and leaving a copy of the same at **Kershaw Correctional Institution.** Deponent is not a party to this action.

s/ Lt. Mungo
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 13th day of July, 2023

Catherine A. Amoson (L.S.)
Notary Public for South Carolina

My Commission Expires: 1-22-2029

RECEIVED
AUG 16 2023
SC Court of Appeals

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal and Order Denying Applicant's Motion for Summary Judgment and Motion for Default Judgment (2022-CP-08-01782)** is admitted at the South Carolina Department of Corrections (Kershaw ***Correctional Institution***), Lancaster County, SC this 12th day of July, ***2023.***

s/ [signature]
Inmate
SCDC ***Inmate*** **#:** 347831

2022-CP-08-01782