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AG

STATE OF SOUTH CAROLINA)
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COUNTY OF CHARLESTON)
)
)
Terrell McCoy, #256070,)
)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
)
Respondent.)
_____)

IN THE COURT OF COMMON PLEAS

2013-CP-10-1994

**ORDER DENYING APPLICANT'S
RULE 60(b) MOTIONS,
MOTION TO STRIKE RESPONDENT'S
RETURN, AND PETITIONS FOR
WRIT OF MANDAMUS**

FILED
2023 AUG -2 PM 1:45
JULIE J. ANDERSON
CLERK OF COURT

This matter is before the Court by way of various Rule 60(b) motions to set aside judgement filed by Terrell McCoy (Applicant) as part of his 2013 post-conviction relief (PCR) action. Respondent has filed a return and amended return contending the motions are untimely, the claims are barred by res judicata, Applicant has failed to set forth a prima facie showing of extrinsic fraud, the claims related to trial court error and PCR court error should have been raised on direct appeal, Applicant misconstrues the meaning of the South Carolina Supreme Court's prior remand order in this case, and Applicant did not set forth a prima facie case of newly-discovered evidence. For the reasons set forth below, Applicant's Rule 60(b) motions to set aside judgment are DENIED.¹

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections serving a forty-year sentence. In July 2006, the Charleston County Grand Jury indicted Applicant for murder. (2006-GS-10-4987). On July 15, 2008, Applicant proceeded to a jury trial. He was

¹ Applicant also filed a Writ of Mandamus on June 7, 2022, and April 27, 2023, reiterating many of the allegations raised in his various Rule 60(b) motions. For the reasons set forth herein, this Court finds a hearing is not warranted and denies Applicant's Writ of Mandamus.

2006-GS-10-4987

represented by Lorelle Proctor, Esquire. Applicant's first trial ended in a mistrial after the jury could not reach a verdict.

On January 27, 2009, the Honorable R. Markley Dennis heard the Applicant's motion to relieve counsel and proceed *pro se*. Judge Dennis granted the motion and requested Proctor be available as standby counsel.

On February 2-6, 2009, a second jury trial was held before the Honorable Roger M. Young. Applicant proceeded *pro se* with Proctor as standby counsel. The jury convicted Applicant of murder, and Judge Young sentenced him to fifty years' imprisonment. Proctor subsequently filed a motion to reconsider the sentence, and Judge Young reduced the sentence to forty years.

Applicant filed a timely Notice of Appeal, which was perfected by Appellate Defender Robert Dudek. Dudek filed a brief arguing the trial court erred in allowing Applicant to proceed *pro se*. The Court of appeals affirmed. State v. McCoy, No. 2011-UP-471 (S.C. Ct. App. filed October 26, 2011). Applicant filed a petition for rehearing, which was denied. Applicant then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent March 8, 2013.

On April 4, 2013, Applicant filed a PCR application alleging he is being held in custody unlawfully due to (1) due process violation, (2) ineffective assistance of counsel, (3) ineffective assistance of appellate counsel, (4) lack of subject matter jurisdiction (fraudulent indictment), (5) prosecutorial misconduct (including Brady violation claims), (6) double jeopardy, (7) newly discovered evidence, and (8) actual innocence.

On December 14, 2015, an evidentiary hearing convened before the Honorable Deadra L. Jefferson. On May 6, 2016, Judge Jefferson issued an order denying relief and dismissing

A handwritten signature in black ink, appearing to be the initials 'R' and 'P' joined together, located at the bottom right of the page.

Applicant's PCR application with prejudice. Applicant filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which was denied.

Applicant filed a petition for a writ of certiorari, and the Supreme Court of South Carolina granted certiorari. On February 1, 2019, the Court remanded the order of dismissal back to the circuit court, instructing the circuit court to make findings of facts and conclusions of law to address each allegation raised by Applicant.

On June 14, 2019, the circuit court issued an amended order denying relief and dismissing Applicant's PCR claims with prejudice. Applicant filed a petition for a writ of certiorari, which was denied on May 18, 2022. The remittitur was sent October 20, 2022.²

Pending Rule 60(b) Motions

On June 7, 2022, Applicant filed a motion pursuant to Rule 60(b), alleging:

1. Police engaged in misconduct by purposely destroying exculpatory evidence;
2. Fraud upon the court is proven by a December 2015 affidavit from Kriston D. Neely, wherein she admits the City of North Charleston destroyed a 911 recording and CAD report pertaining to Applicant's criminal trial on June 25, 2006, and March 25, 2009, in compliance with its retention policy; and
3. The Supreme Court of South Carolina found the PCR court's first order of dismissal did not address all grounds raised.

As relief, Applicant requests the amended Order of Dismissal be vacated and the Court grant him the relief requested in his 2013 PCR application.

On October 24, 2022, Applicant filed a pro se motion to set aside the judgment pursuant to Rule 60(b)(3). Applicant asserted fraud upon the court in the following manners:

- I. "PCR Judge Deadra Jefferson knowingly committed fraud upon the court, and misconduct along with attorney general Rutledge

² On February 15, 2023, Applicant filed a petition for habeas in the Federal District Court; that action is still pending. C/A No. 9:23-00089-MGL-MHC.

Johnson. Both officers of the Court were made aware on December 14, 2014, that the State committed misconduct; Fraud/and or nondisclosure (2) Intentional nondisclosure of material facts (3) fraud upon the Court (4) spoliation of evidence.”

II. “During PCR hearing held on December 14, 2014, PCR Counsel Rodney Davis introduced an affidavit by Kristen D. Neely, which attest that on March 25, 2006, there was a 911 tape that existed, and later destroyed in June 2006. This material evidence prevented Petitioner/Applicant from presenting all of his case, and or deprived him of the opportunity to be heard on his defense.” “The evidence destroyed was material pursuant to Brady v. Maryland and could have been used in his defense.”

III. “Attorney General Rutledge Johnson and Samantha Weidner are fully aware that the State failed to produce documents during Petitioner’s trial held in 2009. Applicant has appealed, and filed a post-conviction relief application in April 4, 2013.”

IV. “Rutledge Johnson has filed fraudulent documents with the court preventing Applicant from fully presenting his case and being heard. This constitutes fraud.”

V. “The solicitors Burns Wetmore and Peter McCoy has presented perjured testimony during Petitioner’s trial. Trial judge Roger Young explained that perjury needed to be handled after Applicant’s trial once he received the trial transcript.”

VI. “Both solicitors explained that they did not subpoena material evidence, despite being served with a SCRCrimp Rule 5 and (6) motion by Applicant’s attorney.”

VII. “Detective Angela Bunker committed perjury by testifying that on March 25, 2006, she was not trained to collect evidence at a crime scene.”

VIII. “Coroner Rae Wooten testified that she observed blood on an open window leading to a back yard, and that crime scene investigators were present inside the bedroom when she discovered the evidence. Coroner Rae Wooten photographed the evidence which was presented at trial as Defendant [Exhibit 44 and 45].”

VIII. “Both officers admitted that the evidence was never collected or preserved by police. This constitutes fraud upon the court. The evidence was destroyed as a result. Both officers are trained by SLED.”

IX. "Applicant presented material evidence during his PCR hearing that a 911 tape did exist during March 25, 2006." "During Applicant's trial, Applicant was told the 911 tape did not exist." "The solicitors told the judge that neither did he or his office subpoena the 911 tape from their client (NCPD). This constitutes fraud upon the court." "Applicant explained to the trial judge he subpoena the 911 tape and wanted the jury to hear it, but was told it did not exist."

X. "PCR judge committed misconduct by stating in its order Applicant did not present trial counsel to PCR to testify eliminating the court's ability to make an independent factual determination as to what advice, if any, trial counsel provided regarding the consequences of his proceeding pro se. This is misconduct. During the December 14, 2014 PCR hearing, PCR counsel Rodney Davis attempted to call Lorelle Proctor, but PCR judge would not let trial counsel testify concerning the advice she gave Applicant to waive his Sixth Amendment right to counsel. This constitutes misrepresentation by trial counsel."

XI. "PCR judge explained there is no case in United States were [sic] pro se litigant argued ineffective assistance of trial counsel claims. This constitute fraud."

As relief, Applicant requests "equitable relief is granted." Applicant also requests a hearing on this motion.

On October 26, 2022, Applicant filed a pro se motion to supplement his Rule 60(b)(3) motion, alleging:

1. A party may seek to set aside a final judgment for fraud upon the court independent of Rule 60(b)(3) grounds for relief for fraud;
2. Applicant is not seeking a successive PCR; rather, he is moving pursuant to Rule 60(b)(3) based upon fraud upon the Court;
3. "PCR judge committed fraud upon the Court by stating in its order Applicant did not present trial counsel to PCR to testify eliminating the Court's ability to make an independent factual determination as to what advice, if any, trial counsel provided regarding the consequences of his proceeding pro se."

4. "This Order constitute[s] 'Fraud upon the court' which PCR counsel attempted to call Lorelle Procter and PCR Judge Dedra Jefferson denied trial counsel testimony. This constitutes fraud upon the court and more evidence of misconduct depriving Applicant the ability to present a case or . . . the opportunity to be heard. See Chewing v. Ford Motor Co., 346 S.C. 28, 550 S.E.2d 584 (2001)."

5. "PCR judge failed to acknowledged PCR counsel filed a SCRCP Rule 15(B) motion before the evidentiary hearing on grounds trial counsel was ineffective before she was relieved as counsel. Although Applicant proceeded pro se at trial, he could raised ineffective assistance of trial counsel claims only if the lawyer's ineffectiveness conclusively appears from the record. See U.S. Bernard, 708 F.3d 583 (2013) 4th Cir. PCR judge explained there is no case in the United States where pro se litigant argued ineffective assistance of counsel claims. This is fraud upon the Court."

6. "Applicant mailed the initial SCRCP Rule 60(B)(3) motion to the Clerk of Court 10/7/22 pursuant to Houston v. Lack. Applicant moves to amend pursuant to SCRCP Rule 15(b) to include the facts that this motion is timely."

7. "Solicitor Burns Wetmore and Peter McCoy committed fraud upon the court; the solicitor's office for the 9th Circuit General Sessions Court was served with a SCRimP Rule 5 & 6 motion requesting that all evidence be provided to Applicant's defense pursuant to Brady v. Maryland. Applicant presents material evidence that a 911 tape did exist during March 25, 2006. See Kriston D. Neely Affidavits as exhibits in this record. During Applicant's second trial, the solicitor told the judge that he neither his office subpoena the 911 tape from their client. (NCPD) See trial transcript page 634 line 6-25. This constitutes fraud upon the court."

7. "During Petitioner's trial, Applicant/Petitioner explained to the trial judge he subpoena the 911 tape and wanted the jury to hear it but was told it did not exist. Fraud upon the Court. See trial transcript page 633 line 1-9. It did exists but was intentionally destroyed."

As relief, Applicant requests the original action be vacated and the State “stop using Applicant’s name in conjunction with this case . . . where evidence was intentionally destroyed preventing the Applicant from being heard.”

On November 11, 2022, Applicant filed a “Notice of Motion pursuant to Rule 60(b)(5), SCRCP,” alleging

1. The South Carolina Supreme Court granted, vacated, and reversed the PCR judge order on February 2, 2019. The prior judgment upon which it is based has been reversed or otherwise vacated, due to the facts that the judge did not make specific findings of fact and conclusions of law on each issue presented during Applicant’s PCR hearing.
2. The PCR judge issued an amended order in which Applicant timely filed a SCRCP Rule 59(e) objecting to the sufficiency of the order. The Petitioner established his entitlement to relief by a preponderance of the evidence pursuant to SCRCP Rule 71.1(B) and SC Code Ann. 17-27-45(C); 17-27-80; 17-27-90. During the PCR hearing Petitioner presented affidavits by Kriston D. Neely which attest that the State committed misconduct by failing to disclose material evidence, which Applicant/Petitioner could have used in his defense to impeach witness, pursuant to Brady v. Maryland.
3. Applicant complained during trial that his attorney had made specific request for the evidence. Attorney Lorelle Proctor explained to the trial Judge Roger Young she made specific request for the material evidence.
4. The State committed misconduct under 60(b)(3), Solicitor Burns Wetmore and Peter McCoy explained that neither did they or their office subpoena the 911 tape (material evidence) from their clients.
5. The evidence was exculpatory. Applicant testified during PCR hearing that the 911 tape was material evidence and needed b/c it contradicted the witness testimony. This witness, Cerenda Snowden, gave multiple statements to police and admitted to lying to police.

6. Trial Judge Young state that he would allow Applicant to play the 911 tape to the jury, but the State informed the Court the 911 tape did not exist.

7. Applicant presented a affidavit by Kriston D. Neely which attest that the 911 tape did exist but was later destroyed. Applicant was unable to obtain a adverse jury instruction because of misconduct by State, in which the judge believed the evidence did not exist.

8. Applicant objected to the State using preemptory strikes to strike black jury member. Applicant is black male.

9. The SC Supreme court vacated the PCR judge order and mandated that the judge issue a order which comply with the law. The Supreme Court also mandate that the PCR judge issue a order within 30 days of the highest court order dated February 2, 2019. PCR judge failed to issue a order in a timely matter. The order was issued in June of 2019. Petitioner filed a notice of appeal and a SCRCF Rule 59(e) to preserve his rights.

10. Applicant is entitled to relief under Rule 60(B)(5) SCRCF prior judgment ahs been vacated by the SC Supreme Court.

Applicant requested equitable relief and that the Court set aside the judgement pursuant to Rule 60(b)(5)(3).

On April 20, 0223, Clarissa Warren Joyner, Esquire, filed a letter with the Clerk of Court clarifying she no longer represents Applicant in this PCR matter.

On May 10, 2023, Respondent filed a Return to Applicant's October 2022 Rule 60(b)(3) motion asserting it was untimely and barred by res judicata. Respondent also asserted Applicant did not set forth a prima facie showing of extrinsic fraud, and Applicant raised issues that were more suitable for an appeal rather than a Rule 60(b) motion.

On May 18, 2023, Applicant filed an affidavit asserting he acted with due diligence in discovering the 911 tape was destroyed before his criminal trial and detailing the steps he took to

obtain the tape. Applicant again averred the destruction of this evidence prevented him from fully defending his case.

On May 22, 2023, Applicant filed a pro se "Memorandum of law to support Applicant's Motion 60 B (3)(4)(5)." In it, he reasserted many of his prior arguments, to include:

1. Solicitor Burns Wetmore and Peter McCoy committed fraud by concealing evidence which was later destroyed before Applicant's trial. The conceal evidence was a 911 tape which could have been used in Applicant defense to show he did not commit the crime. Also the evidence could have been used to rebut the state theory of what occurred on March 25, 2006. The fraud upon continued through court appointed public defender who coerced Applicant to waive his Sixth amendment right to assistance of counsel and commitment perjury by informing the Court Applicant filed a motion to withdraw counsel. There is no record to support Lorelle Proctor arguments.
2. The fraud upon the court continues throughout Applicant's PCR hearing, where attorney general, Rutledge Johnson (deceased) was made aware of the State misconduct. Instead of moving for a new trial under . . . the State drafted a fraudulent order for PCR judge Deidra Jefferson to sign. This order constitutes fraud upon the court because it prevents Applicant from presenting his defense.
3. The PCR judge's order is more evidence of fraud upon the court committed by officers of the court. The order prevent Applicant from presenting his case.
4. The proposed order filed by the attorney general prevents Applicant from presenting his defense where evidence was proved to have been intentionally destroyed by the State. This misconduct is evidence of fraud upon the court under Rule 60(b)(3).
5. Affidavit of Kris Neely introduce into PCR record . . . is sufficient evidence the police destroyed material evidence in Applicant criminal case. This is evidence of fraud upon the court. .
6. State witness Cerenda Snowden gave false statements to police and committed perjury during Applicant's first and second trial.
7. North Charleston Police Angela Bunker committed perjury during second trial when she testified about the collection of DNA blood evidence.

8. The PCR judge did not allow Applicant to call counsel Lorelle Proctor as a witness, denying Applicant one bit of the apple. This denial is more evidence of fraud upon the court.
9. Solicitor Burns Wetmore admitted he did not subpoena the 911 tape. This is evidence of misconduct and fraud upon the court.
10. The trial court denied Applicant's motion for a charge on spoliation of evidence.

On June 12, 2023, Applicant filed a "Reply to Respondent's Return to Applicant SCRPC Rule 60(B)(3)(4)(5) motion, wherein he reiterated many of his prior arguments and asserted Respondent's return was another example of fraud upon the Court.

On June 22, 2023, Applicant filed a Motion to Strike Respondent's Return to Applicant's Rule 60(b)(3) motion, again asserting Respondent's return was an attempt to fraud the court. Applicant alleged:

1. Respondent's return is not supported by facts.
2. Kris Neely's affidavit was introduced at the PCR hearing, wherein she admitted the 911 tape was destroyed.
3. State witness Cerenda Snowden was not credible, gave different accounts to law enforcement, and committed perjury.
4. The solicitor admitted he did not subpoena the 911 tape, which is evidence of fraud upon the court.
5. The return does not address the fact the South Carolina Supreme Court vacated the PCR court's first order.
6. "The PCR judge's order does not comply with the law due to the existing facts that the State prevented Applicant from presenting his defense at trial and during civil proceeding (PCR). This constitute extrinsic fraud."
7. "The failure to collect DNA evidence, so that the evidence could have been sent to SLED for testing prevented Applicant from presenting his defense."
8. "The facts that Angela Burkner committed perjury constitutes fraud."

On June 29, 2023, Applicant filed a motion for a new trial based on newly-discovered evidence pursuant to Rule 60(b)(2). In that motion, he alleges new evidence in the form of an April 27, 2023 affidavit filed by his brother wherein his brother avers Applicant was with him in Georgia the day this crime was committed.

Respondent's Return Opposing Applicant's Motions

Respondent filed a return and an amended return opposing Applicants motions. In its amended return, Respondent submitted Applicant's various claims related to Rule 60(b) can be summed up as follows:

1. Claims of fraud related to the destruction of the 911 tape;
2. Claims related to the South Carolina Supreme Court vacating the first PCR order;
3. Claims related to trial court error;
4. Claims related to PCR court error;
5. Claims of fraud related to alleged false proposed order submitted by the former Assistant Attorney General;
6. Claims of fraud related to perjured trial testimony;
7. Claims of fraud related to the collection of DNA evidence;
8. Claims related to new alibi witness.

Respondent argued (1) these claims were untimely, (2) Applicant's claims related to the 911 tape and DNA evidence were barred by res judicata, (3) Applicant did not set forth prima facie evidence of extrinsic fraud, (4) Applicant's claims related to trial court error and PCR court error were more suitable for direct appeal, (5) Applicant did not make a prima facie showing that the amended PCR order of dismissal was void, and (6) Applicant did not make a prima facie showing of newly discovered evidence. Before this Court are the Clerk of Court records of the



underlying conviction, Applicant's records from the South Carolina Department of Corrections, Applicant's 2013 PCR application, the order of dismissal, the Supreme Court's order remanding this matter to the circuit court for more specific findings, the amended order of dismissal, the Court of Appeals' order denying certiorari, and the remittitur. For the reasons set forth below, this Court denies Applicant's Rule 60(b) motions to set aside the amended PCR court's order of dismissal.

The 60(b) Motions are Untimely

Rule 60(b), SCRCP, provides:

Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud, misrepresentation, or other misconduct of an adverse party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken. . . .

This Court finds Applicant's Rule 60(b) motions are untimely. In his Rule 60(b)



motions, Applicant raises allegations of fraud upon the court from his February 2009 trial, which occurred more than thirteen years before Applicant filed his first 60(b) motion. Pursuant to Rule 60(b)(3), Applicant did not timely raise these claims. To the extent any of his claims of fraud arise from the December 2014 PCR hearing, Applicant waited more than seven years to file this motion—making it untimely. Finally, to the extent any of these claims of fraud arise from the June 2019 Amended Order of Dismissal, Applicant waited three years to file this motion, making it untimely.

Likewise, Applicant did not timely raise his claim related to his purported alibi. Pursuant to Rule 60(b)(2), a party may move for a new trial based upon “newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).” On June 29, 2023, Applicant asserted for the first time he had an alibi witness. In support of this claim, Applicant submitted an affidavit from his brother alleging Applicant was with him in Georgia when the murder occurred. If true, this is information Applicant would have been aware of at his February 2009 trial. This Court finds Applicant could have discovered this alibi with due diligence in advance of his 2009 trial, and it is patently unreasonable to wait more than fourteen years to raise an alibi. Thus, this claim is barred as untimely.

Finally, Applicant did not bring his claim related to Rule 60(b)(5) within a reasonable time. On June 14, 2019, the PCR court entered an amended order of dismissal following remand by the South Carolina Supreme Court. On November 11, 2022—more than three years later—Applicant filed an amended motion contending the PCR court’s amended order is void because the South Carolina Supreme Court vacated the PCR court’s *first* order. This Court finds it is not reasonable to wait more than three years before claiming the June 2019 amended order is void. Thus, this Court finds this motion is untimely.

Applicant's claims are barred by res judicata

This Court finds Applicant's claims of Brady violations related to a 911 call and untested blood evidence are barred by res judicata. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. (quoting Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987) (alteration in original). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id.

Applicant's claims related to a 911 call and untested blood evidence were addressed by the PCR court in its Amended Order of Dismissal. Regarding the 911 call, the PCR Court found "[t]he trial record is abundantly clear that the Solicitor's office did not ever have the 911 tape in its possession"; Applicant—who proceeded pro se at trial—never sought to enter the CAD report into evidence; and appellate counsel was not ineffective for not raising the preserved issue related to the 911 call. Likewise, the PCR court addressed the issue of the untested blood evidence and found it did not constitute a Brady violation. This "missing" 911 tape and untested blood evidence was raised at trial in 2009 and again as part of Applicant's PCR action. These issues have been previously litigated as part of this same underlying conviction with the same parties and are thus barred by the doctrine of res judicata. Thus, this Court finds these claims are barred by res judicata.

Applicant has not made a prima facie showing of extrinsic fraud

This Court finds 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.

Applicant’s allegations of “fraud” all involve claims that were litigated at trial and in the PCR hearing. For example, his allegations of Brady violations were raised at trial and again at his PCR hearing. Applicant has had an opportunity to present a case and be heard on these issues; thus, they are claims of intrinsic rather than extrinsic fraud. Likewise, Applicant’s claims of perjury are claims of intrinsic fraud. See id. (“[P]erjury is intrinsic fraud and will not support an action to set aside the judgment.”). Finally, Applicant’s claims of fraud by the former Attorney General relate to the proposed order submitted by the Attorney General. Applicant has not made a *prima facie* showing of fraud in this regard, and as discussed below, the remedy for an inaccurate or incomplete order is through a direct appeal. Because Applicant has not made a *prima facie* showing of extrinsic fraud, this Court denies Applicant’s motion to set aside judgment based on fraud.

Rule 60(b) is not a substitute for an appeal

This Court finds Applicant’s allegations of “fraud” by the PCR judge are allegations more suited for an appeal. “A party may not invoke [Rule 60(b)] where it could have pursued

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the issue on appeal.” Tench v. S.C. Dep’t of Educ., 347 S.C. 117, 121, 553 S.E.2d 451, 453 (2001). “Relief from judgment under Rule 60 should not be considered a substitute for appeal from a final judgment, particularly when it is clear the party seeking relief could have litigated at trial and on appeal the claims he now makes by motion.” Smith Companies of Greenville, Inc. v. Hayes, 311 S.C. 358, 359, 428 S.E.2d 900, 902 (Ct. App. 1993).

Applicant alleges the PCR court committed fraud because (1) it was aware that the State committed misconduct, fraud, and/or nondisclosure; (2) the PCR court’s order stated Applicant did not present trial counsel to testify, whereas the PCR court would not allow counsel to testify concerning the advice she gave Applicant; and (3) the “PCR judge explained there is no case in United States were [sic] pro se litigant argued for ineffective assistance of trial counsel claims.” However, these are all allegations of PCR court error that he could have pursued on appeal. Applicant *did* appeal of the denial of his PCR application, but the Court of Appeals denied certiorari. Applicant cannot now seek to circumvent the decision of the Court of Appeals by filing a Rule 60(b) motion. Likewise, to the extent Applicant is now raising allegations of PCR court error that he did not raise in his appeal, Applicant cannot do so using a Rule 60(b) motion.

Finally, Applicant’s claims of trial court error are issues that should have been pursued on direct appeal. Rule 60(b) is not an appropriate avenue for these claims; thus, this Court denies Applicant’s Rule 60(b) motion to set aside the PCR courts’ Amended Order based on allegations of trial court and PCR court error.

Applicant has not made a prima facie showing the Amended PCR order is void

Applicant avers the Amended Order of Dismissal is void because the Supreme Court of South Carolina vacated the PCR court’s first order of dismissal. Applicant misconstrues the meaning of the Supreme Court Order. Pertinently, the Supreme Court remanded the matter “to

the PCR judge to issue an order that contains specific findings on each of the allegations raised by Petitioner at the PCR hearing and in his Rule 59(e) motion.” Thereafter, pursuant to the remand order, the PCR court issued the amended order. The PCR court was acting in compliance with the Supreme Court’s remand instructions in issuing the amended order. Thus, this Court finds the Supreme Court’s vacating of the first order of dismissal does not void the amended order of dismissal.

Applicant has not made a prima facie showing of newly discovered evidence

On June 29, 2023, Applicant asserted for the first time he had an alibi witness. Applicant attempted to circumvent the untimeliness of his alibi evidence by couching it as newly-discovered evidence. In support of this claim, Applicant submitted an affidavit from his brother alleging Applicant was with him in Georgia when the murder occurred. If true, this is information Applicant would have been aware of at his February 2009 trial. This Court finds Applicant could have discovered this alibi with due diligence in advance of his 2009 trial. Thus, this evidence does not meet the high threshold of newly-discovered evidence, and Applicant has not set forth a basis for a new trial based upon newly-discovered evidence. 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.” (emphasis added)).

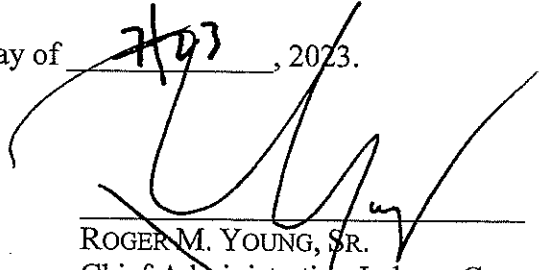
[Conclusion and Signature Page Follows]

Conclusion

Based on the foregoing, this Court finds Applicant's Rule 60(b) motions are untimely. On the merits, this Court finds the allegations related to the 911 call and DNA evidence are barred by res judicata; Applicant did not set forth a *prima facie* showing of extrinsic fraud; the claims related to trial court error and PCR court error are not appropriate for a Rule 60(b) motion; Applicant misconstrues the meaning of the Supreme Court's remand order, which did not void the subsequent amended order of dismissal; and Applicant has not made a showing of newly-discovered evidence.

IT IS THEREFORE ORDERED Applicant's Rule 60(b) motions set forth above are denied. Applicant's motion to strike Respondent's return is also denied.

IT IS SO ORDERED this ___ day of 7/23, 2023.



ROGER M. YOUNG, SR.
Chief Administrative Judge – Common Pleas
Ninth Judicial Circuit

CB, South Carolina



ALAN WILSON
ATTORNEY GENERAL

July 25, 2023

The Honorable Roger M. Young, Sr.
Chief Administrative Judge
100 Broad Street, Suite 368
Charleston, South Carolina 29401

Re: Terrell McCoy, #256070 v. State of South Carolina
Case No.: 2013-CP-10-1994

Dear Judge Young:

Enclosed please find the proposed Order Denying Applicant's Rule 60(b) Motions, Motion to Strike Respondent's Return and Petitions for Writ of Mandamus in the above-captioned case. Respondent's Amended Return to Applicant's Rule 60(b) Motions has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Charleston County Clerk of Court for filing.

If you have any questions, please do not hesitate to contact me.

Sincerely,

Danielle Dixon
Assistant Attorney General

DD/vh
Enclosure(s)

cc: Terrell McCoy, #256070