RECEIVED

Oct 19 2023

S.C. SUPREME COURT

RECEIVED
JUL 26 2021
GENERAL COUNSEL

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 Tammy Mickelmer (***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 Greenville)

AFFIDAVIT OF PERSONAL SERVICE

On this 21 day of July **2021**, I served the **Conditional Order of Dismissal (2020-CP-23-00908)**, on ***Inmate*** **Robert Watkins** ***SCDC Inmate*** **#243803** by delivering personally and leaving a copy of the same at **Perry Correctional Institution.** Deponent is not a party to this action.

s/ Tammy Mickelmer

SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 21 day of July, 2021

Tamara Conwell (L.S.)

Notary Public for South Carolina

My Commission Expires: My Commission Expires September 25, 2023

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal (2020-CP-23-00908)** is admitted at the South Carolina Department of Corrections (Perry Correctional Institution), Pelzer, Greenville County, SC this 21 day of July, 2021.

s/ Robert Watkins
Inmate
SCDC *Inmate #*: 243803

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Robert Watkins, #243803, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2020-CP-23-00908 ENTERED COMPUTER **CONDITIONAL ORDER OF DISMISSAL**

FILED-CLERK OF COURT
PAM B. WORKMAN
GREENVILLE CO. S.C.
2021 JUN 25 PM 2:15

This matter comes before this Court by way of an application for post-conviction relief filed by Robert Watkins ("Applicant") on February 13, 2020. The State ("Respondent") made its return and motion to dismiss on or about June 7, 2021, moving for the summary dismissal of the application.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its February of 2002 term, the Greenville County Grand Jury indicted Applicant for armed robbery (2002-GS-23-01063) and possession of a weapon during the commission of a violent crime (2002-GS-23-01063). Applicant was represented by James Wofford Bannister, Esquire, and Assistant Solicitor Judith Mary Munson of the Thirteenth Circuit Solicitor's Office prosecuted him. On October 23-25, 2002, Applicant proceeded to a jury trial with the Honorable C. Victor Pyle, Jr., presiding. At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Pyle sentenced Applicant to imprisonment for thirty years for armed robbery and for five years for possession of a weapon during the commission of a violent crime, with both sentences running concurrently.

Bannister filed a timely notice of appeal. Senior Assistant Appellate Defender Wanda H. Haile of the South Carolina Office of Appellate Defense represented Applicant on appeal. Haile

filed a motion to be relieved as counsel and a brief pursuant to Anders v. California, 386 U.S. 738 (1967), arguing that Judge Pyle erred in failing to instruct the jury on the defense of alibi. Applicant filed a pro se Anders brief, arguing that Judge Pyle erred in: (1) admitting evidence that resulted from an illegal search and seizure, (2) failing to instruct the jury on the defense of alibi, (3) failing to ask Applicant in what way Applicant wanted to plead, (4) not directing the jury's verdict, (5) instructing the jury on an inference that shifted the burden of proof from the State, and (6) giving a unanimous decision instruction to the jury. The South Carolina Court of Appeals granted Haile's motion to be relieved as counsel and dismissed the appeal. State v. Watkins, Op. No. 2004-UP-406 (S.C. Ct. App. filed June 22, 2004) (per curiam), cert. denied, State v. Watkins, S.C. Sup. Ct. Order filed September 23, 2004. The remittitur was issued on September 27, 2004.

2004-CP-23-7064

Applicant filed an application for post-conviction relief on October 22, 2004, raising the following claims:

1) Ineffective assistance of counsel:
    a) "Fail to comply with SCRCrP Rule 5 alibi";
    b) "Fail to articulate 4th Amendment claims";
    c) Failed to object to "prosecution misconduct";
    d) Failed to "request for a directed verdict of acquittal, and state authority and facts supporting motion";
    e) Failed to "object to language in the indictment";
    f) Failed to "object to state violating sequester";
    g) "Assist[ed] the State in introducing inadmissible hearsay testimony into evidence"; and
    h) Failed to object to "improper charge to jury."

Applicant was represented by Rodney W. Richey, Esquire, and Karen C. Ratigan of the South Carolina Attorney General's Office represented Respondent. An evidentiary hearing was convened before the Honorable Larry R. Patterson at the Greenville County Courthouse on April 8, 2005. On January 17, 2006, Judge Patterson issued an order denying the application for post-conviction relief and dismissing it with prejudice.

Richey filed a timely notice of appeal. Appellate Defender Robert M. Pachak of the South Carolina Commission on Indigent Defense represented Applicant on appeal. Pachak filed an appendix and a petition for a writ of certiorari, arguing that Bannister had been constitutionally ineffective for failing to comply with Rule 5, SCRCrimP, with regards to Applicant's alibi defense. The South Carolina Supreme Court granted Applicant's petition for a writ of certiorari, and directed the parties to brief the issue. Watkins v. State, Sup. Ct. Order filed on April 25, 2007. The Supreme Court held that Judge Patterson erred in finding that Bannister had not been constitutionally ineffective for failing to comply with the requirements of Rule 5, SCRCrimP, and granted post-conviction relief to Applicant. Watkins v. State, Op. No. 2008-MO-001 (S.C. Sup. Ct. Order filed January 14, 2008) (per curiam). The remittitur was issued on January 31, 2008.[1]

2002-GS-23-01063 (retrial)

On September 22-24, 2008, Applicant was tried again before a jury, with Judge Patterson presiding. Applicant was a pro se defendant at that trial, with Stephen John Henry, Esquire, serving as standby counsel. At the conclusion of trial, the jury found Applicant guilty as indicted. Judge Patterson sentenced Applicant to imprisonment for twenty-five years for armed robbery and for five years for the possession of a weapon during the commission of a violent crime, with both sentences running consecutively.

Applicant filed a timely notice of appeal. Applicant was represented on appeal initially by Appellate Defender Elizabeth A. Franklin-Best of the South Carolina Commission on Indigent Defense, and then subsequently by Appellate Defender David Alexander. Applicant's lawyers argued that Judge Patterson: (1) abused his discretion by allowing Applicant to proceed as a pro

[1] Since Applicant's 2002 convictions were reversed when the Supreme Court held that he was entitled to post-conviction relief, the 2002 trial will not be discussed again in this order.

PHC

se defendant and (2) erred by denying Applicant's motion to recuse Judge Patterson from presiding over Applicant's trial when Judge Patterson had also presided over Applicant's April 8, 2005, post-conviction relief hearing. The South Carolina Court of Appeals reversed Applicant's convictions, finding that Judge Patterson erred in denying Applicant's motion for recusal, and declining to address the remaining issue. State v. Watkins, Op. No. 2011-UP-091 (S.C. Ct. App. filed March 8, 2011) (per curiam), reh'g denied, State v. Watkins, S.C. Ct. App. Order filed April 21, 2011.

The remittitur was issued on June 2, 2011. The Court of Appeals granted Respondent's request to recall the remittitur since it had not received notice of the Court of Appeals' denial of the petition for rehearing. State v. Watkins, S.C. Ct. App. Order filed June 30, 2011. Respondent petitioned for a writ of certiorari, arguing: (1) that the Court of Appeals erred in finding that Judge Patterson was required to recuse himself at Applicant's trial and (2) that the Court of Appeals erred in failing to address the issue of whether Judge Patterson properly allowed Applicant to proceed at trial as a pro se defendant. The South Carolina Supreme Court granted Respondent's petition for a writ of certiorari. State v. Watkins, S.C. Sup. Ct. Order filed November 6, 2012. The Supreme Court granted Respondent's motion to argue against precedent. State v. Watkins, S.C. Sup. Ct. Order filed October 15, 2013. The Supreme Court reversed the Court of Appeals, determining that there was no merit to Applicant's argument that he was not properly warned as required by Faretta v. California, 422 U.S. 806 (1975), finding it "questionable" whether Applicant had preserved the issue of whether Judge Patterson was required to recuse himself from Applicant's trial, rejecting the rule announced by the Court of Appeals that a trial judge has to recuse himself upon request if the trial follows a post-conviction relief hearing over which that same judge also presided, and finding that Applicant had failed to present any evidence of bias on Judge Patterson's part. State v. Watkins, 406 S.C. 360, 361-64, 752 S.E.2d 261, 261-63 (2013). The remittitur was issued on

PHG

December 20, 2013.

3:13-1129-CMC-JRM

On June 10, 2013, Applicant filed his first petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. On June 26, 2013, United States District Judge Cameron McGowan dismissed the petition without prejudice because Applicant's state court proceedings were still ongoing.

2014-CP-23-00589

On January 31 2014, Applicant filed his first application for post-conviction relief, and later filed amendments thereto, raising multiple claims, which were:

(1) Henry was constitutionally ineffective for:
  (a) Failing to articulate during a pre-trial suppression hearing a Fourth Amendment claim pursuant to specified authorities;
  (b) Failing to call as witnesses during the pre-trial suppression hearing the victims, officers, and defendants in order "to make a substantial showing that a false statements was knowingly and intentionally made with reckless disregard for the truth";
  (c) Failing to challenge the validity of a search warrant;
  (d) Failing to move for the recusal of Judge Patterson;
  (e) Failing to inform Judge Patterson that Applicant was making a special appearance;
  (f) Failing to move to "[d]ismiss or squash" the indictment on the grounds that:
  (i) The indictment was obtained in violation of Applicant's equal protection and due process rights;
  (ii) Judge Patterson lacked personal jurisdiction over Applicant due to an illegal and unconstitutional practice, which violated the doctrine of the separation of powers;
  (g) Failing to inform Applicant had the had access to an identification expert;
  (h) Failing to inform Applicant about a State's witness's testimony would be so that Applicant would be prepared to cross-examine that witness;
  (i) Coercing Applicant to proceed at trial as a pro se defendant despite his having knowledge that Applicant did not understand the Rules of Criminal Procedure or the Rules of Evidence; and
  (j) Failing to disqualify himself due to a conflict of interest whenever Judge Patterson appointed him as Applicant's standby counsel;
(2) Franklin-Best was constitutionally ineffective for:
  (a) Failing to protect Applicant's right to a new trial, which was granted to him by the South Carolina Court of Appeals;

(b) Failing to oppose Respondent's motion to recall the remittitur; and
(c) Failing to move to vacate the Court of Appeals' order recalling the remittitur on the ground that Respondent had committed fraud upon the Court of Appeals;
(d) Failing to move for the dismissal of Respondent's petition for a writ of certiorari to the Court of Appeals on the grounds of fraud upon the court, misrepresentation, and misconduct; and

(3) Alexander was constitutionally ineffective for:
(a) Failing to bring to the attention of the Court of Appeals that Respondent made false statements in its motion to recall the remittitur;
(b) Telling Applicant that there was nothing that could be done when the Court of Appeals recalled the remittitur;
(c) Failing to oppose Respondent's motion to recall the remittitur;
(d) Failing to present evidence showing that Judge Patterson was biased against Applicant and should have been disqualified from presiding over Applicant's trial; and
(e) Failing to take any exception to the Court of Appeals' recall of the remittitur;
(f) Failing to move for the dismissal of Respondent's petition for a writ of certiorari to the Court of Appeals on the grounds of fraud upon the court, misrepresentation, and misconduct;
(g) Failing to petition the Supreme Court for rehearing after it reversed the Court of Appeals' opinion;

(4) Judge Patterson did not have subject matter jurisdiction over Applicant's indictments;
(5) The procedures "practiced" by the Thirteenth Circuit Solicitor's Office violated Rule 3, SCRCrimP;
(6) The Thirteenth Circuit Solicitor's Office violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963); and
(7) Judge Patterson's imposition of a sentence upon Applicant violated the double jeopardy clause of the Constitution because Applicant's previous convictions for those offenses had been reversed on appeal from Judge Patterson's denial of post-conviction relief to Applicant.

An evidentiary hearing was held before the Honorable Edward W. Miller at the Greenville County Courthouse on April 22, 2015. Applicant was represented by R. Mills Ariail, Jr., Esquire, and Ratigan again represented Respondent. In an order issued on October 2, 2015, Judge Miller denied the application for post-conviction relief and denied it with prejudice. Judge Miller's order addressed the following claims presented by Applicant at the evidentiary hearing:

1) Henry improperly handled the hearing pursuant to Franks v. Delaware, 438 U.S. 154 (1978);
2) Henry did not tell Applicant what Henry had discussed with Krystyna Reilly, a

surprise witness for the State;
3) Henry did not tell Applicant that he had hired an identification expert;
4) The appellate attorneys were constitutionally ineffective for:
   a) Not raising the issue of personal jurisdiction; and
   b) Failing to oppose Respondent's motion to recall the remittitur based upon the ground of fraud upon the court;
5) Applicant was subjected to double jeopardy because he had already served the five-year sentence for the possession of a weapon during the commission of a violent crime;
6) The magistrate judge failed to comply with South Carolina Code Section 17-13-141; and
7) Judge Patterson lacked subject matter jurisdiction because Rule 3(c), SCRCrimP, was violated.

Ariail filed a timely notice of appeal. Applicant was represented on appeal by Appellate Defender Laura R. Baer of the South Carolina Commission on Indigent Defense, who moved to be relieved as counsel and filed a petition for a writ of certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), arguing that Judge Miller erred in finding that Franklin-Best was not constitutionally ineffective for not filing a return to Respondent's motion to recall the remittitur because the remittitur was not issued due to some mistake or inadvertence on the part of the Court of Appeals. The Supreme Court transferred the case to the Court of Appeals. Applicant filed a pro se response to the Johnson petition, raising the following issues:

1) Whether Judge Miller's order denying the application for post-conviction relief should be vacated because Judge Miller violated the South Carolina Appellate Court Rules, Judge Miller was biased against Applicant, and Judge Miller's impartiality could reasonably be questioned;
2) Whether the Supreme Court's jurisdiction over Applicant's appeal was obtained by fraud upon the court, misconduct, and malicious prosecution on the part of Respondent;
3) Whether Judge Miller abused his discretion in finding that Applicant failed to prove that Henry was constitutionally ineffective at a pre-trial hearing;
4) Whether Judge Patterson's impartiality could be questioned since Judge Patterson had "personal knowledge of disputed Evidentiary facts", the Thirteenth Circuit Solicitor's Office engaged in judge shopping so as to bring Applicant's case to trial before the biased Judge Patterson;
5) Whether Judge Miller abused his discretion in finding that Applicant failed to meet his burden of proof in proving that he received the constitutionally ineffective assistance of counsel from Henry;
6) Whether Judge Miller erred in finding that Applicant's re-trial did not violate

the double jeopardy clause of the Constitution;
7) Whether the Supreme Court's subject matter jurisdiction over Applicant's direct appeal was obtained through misconduct and a miscarriage of justice on the part of Respondent; and
8) Whether Judge Miller, with bias and prejudice against Applicant, improperly precluded Applicant from arguing that Franklin-Best was constitutionally ineffective.

The Court of Appeals relieved Baer as counsel and denied Applicant's petition for a writ of certiorari. Watkins v. State, S.C. Ct. App. filed October 5, 2017, reh'g denied, Watkins v. State, S.C. Ct. App. filed December 14, 2017. The remittitur was issued on May 3, 2018.

0:18-cv-2945-CMC-PJG

On December 20, 2018, Petitioner filed his second petition for a writ of habeas corpus in the United States District Court for the District of South Carolina. Respondent made a return to the petition and moved for summary judgment. On September 30, 2019, United States Magistrates Judge Paige J. Gossett filed a report and recommendation, identifying the claims raised in Applicant's petition and recommending that Respondent's motion for summary judgment be granted. The claims, as identified by Judge Gossett, were: (1) Applicant's appellate lawyer was constitutionally ineffective for not filing a response in opposition to Respondent's motion to recall the remittitur; (2) Applicant's appellate lawyer was constitutionally ineffective for not arguing that Respondent's petition for a writ of certiorari should have been thrown out because Respondent gave a false basis for moving to recall the remittitur; (3) Henry was constitutionally ineffective for not calling witnesses during a pre-trial hearing to support the defense's motion to suppress the search warrant; and (4) Henry was constitutionally ineffective for not moving to suppress certain exhibits at trial due to an illegal search. On November 18, 2019, over Applicant's objection, Senior United States District Judge Cameron McGowan Currie issued an order adopting the report and recommendation, granting Respondent's motion for summary judgment, dismissing the petition

PCR

CURRENT APPLICATION

In his second and current application for post-conviction relief, which was filed on February 13, 2020, Applicant presents a single claim: that then-Assistant Solicitor Lucas Craig Marchant of the Thirteenth Circuit Solicitor's Office violated the requirements of Brady v. Maryland, 373 U.S. 83 (1963), by failing to turn over to the defense an "[i]ncident dispatch detail report" from the Greenville Police Department. Applicant prays that this Court would vacate his convictions and award him a new trial.

On September 23, 2020, Applicant filed an amendment to his application. He repeated in it the claim that he had presented already about (1) the alleged Brady violation, and raised a claim that (2) then-Assistant Attorney General William M. Blitch, Jr., of the South Carolina Attorney General's Office committed fraud upon the South Carolina Court of Appeals in Respondent's motion to recall the remittitur. Applicant prays in his amendment that the Court would reinstate the Court of Appeals' opinion in his (second) direct appeal or grant him a new trial.

Before this Court are the records of the Greenville County Clerk of Court regarding Applicant's convictions; the records from Applicant's direct appeal (the second one only), including the record on appeal, the parties' briefs before the Court of Appeals, the Court of Appeals' opinion, the petition for rehearing and any return thereto, the Court of Appeals' order denying the petition for rehearing, the June 2, 2011, remittitur, Respondent's motion to recall the remittitur, the Court of Appeals' order recalling the remittitur, Respondent's petition for a writ of certiorari in the Supreme Court and Applicant's return thereto, the order granting the petition for a writ of certiorari, the parties' briefs before the Supreme Court, the Supreme Court's dispositive opinion, and the remittitur; the records from Applicant's first application for post-conviction relief appeal, including the Johnson petition and appendix, Applicant's pro se Johnson response, the

order transferring the case to the Court of Appeals, the Court of Appeals' order denying the petition for a writ of certiorari, Applicant's multiple petitions for rehearing and the Court of Appeals' orders denying the same, and the remittitur; the records from Applicant's second petition for a writ of habeas corpus in federal court, including Applicant's petition, Respondent's return to the petition and motion for summary judgment, the report and recommendation, Applicant's objection to the report and recommendation, and the order granting Respondent's motion for summary judgment; Applicant's records from the South Carolina Department of Corrections; and all filings in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to S.C. Code Ann. § 17-27-70(c), this Court may summarily dispose of an application if there is no genuine issue of material fact in the "pleadings, depositions and admissions and agreements of fact" and the movant is entitled to judgment as a matter of law. The summary dismissal of an application for post-conviction relief without a hearing is appropriate only when it is apparent on the fact of the application that a hearing is not needed for the development of a factual record and the applicant is not entitled to relief. Mose v. State, 420 S.C. 500, 505, 803 S.E.2d 718, 720 (2017) (citing Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2005)). This Court, in considering the motion for summary dismissal without the holding of an evidentiary hearing, must assume the facts presented by Applicant as true and view then in the light most favorable to Applicant. Robertson v. State, 418 S.C. 505, 519, 795 S.E.2d 29, 36 (2016) (citing McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013)).

First, this present application for post-conviction relief shall be dismissed due to Applicant's failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. The Act requires as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of offense or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996) (per curiam). The remittitur in Applicant's (second) direct appeal was issued on December 20, 2013. The application was, therefore, due on or before December 21, 2014. This application was not filed until February 13, 2020, more than five years after the statutory filling period expired. The application, therefore, shall be dismissed summarily for Applicant's failure to file within the time mandated by Act.

The Act does allow a person to institute a post-conviction relief 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 an applicant contends there is evidence of a material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). This exception to the statute of limitations does not apply in this case. Applicant writes on the handwritten page attached to his application—which is numbered in the bottom, right corner that it is page three—that he "received this favorable Evidence on April 27, 2015"[2] in response to his Freedom of Information Act request to the Greenville Police Department. Applicant also alleges in his application that that particular document had not been turned over to him or to Henry by Marchant in the earlier discovery disclosures. Even if Applicant's allegations that he received the document from the Greenville

[2] Applicant repeats this date in the amendment to his application.

Police Department on April 27, 2015, and that the document was not included in the State's discovery disclosure(s) to him or Henry before trial are true, that fact would not allow the discovery rule exception to save the application from the procedural bar of the statute of limitations. For the discovery rule exception to apply, Applicant would have had to file his application on or before April 28, 2016, which is one year after the date on which Applicant allegedly discovered the evidence of the (alleged) Brady violation. S.C. Code Ann. §17-27-45(C).[3] Instead, Applicant filed this application on February 13, 2020, more than three years after that date.

Applicant includes with his amendment a letter purporting to be a cover letter for a FOIA disclosure from the Attorney General's Office to Respondent of Blitch's mail log. The letter is dated January 6, 2012, which is presumably the date on which the letter was mailed to Applicant. Even if one charitably presumes that it took up to a month for Applicant to receive the letter, Applicant would have had to assert any claim he would have had arising from his receipt of the letter and its enclosures no later than February 7, 2013. Applicant filed this application on February 13, 2020, more than seven years later than that date. This Court shall dismiss the application as untimely because it was not filed in accordance with the time requirements Uniform Post-Conviction Procedure Act.

Second, this application for post-conviction relief shall be dismissed because it is impermissibly successive. 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 raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold

[3] Notably, Applicant included in his first application a claim that Marchant committed a Brady violation, but Applicant presented no testimony or other evidence as to the claim at his evidentiary hearing before Judge Miller on April 22, 2015. Judge Miller's October 2, 2015, order denying the application for post-conviction relief included a finding that Applicant had abandoned the claim.

v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" that new grounds were not raised or were not properly raised in a previous application. 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. If the applicant could have raised the 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).

Applicant has failed to show that his Brady claim could not have been raised in his first application. In fact, Applicant did raise a Brady claim in his first application, but abandoned it at his April 22, 2015, evidentiary hearing before Judge Miller. Applicant writes in his application that he learned of the existence of the dispatch report when he received a FOIA disclosure from the Greenville Police Department on April 27, 2015, which was only five days after the evidentiary hearing. Even if that is true, the fact that Applicant included the claim in his first application for post-conviction relief, which was filed on January 31 2014, demonstrates that Applicant was aware that the State's disclosure—or non-disclosure—of evidence was an issue worth pleading. Applicant raised a Brady issue in his first application and has failed to give a sufficient reason that he could not have moved forward on that claim at his evidentiary hearing rather than abandoning

PNC

it.

Applicant has failed to show that he could not have raised the claim of fraud upon the court in his first application. Indeed, Applicant's own allegations and the attachments to his filings in this matter indicate that he was in the possession of Blitch's mail log years before he filed his first application for post-conviction relief. Applicant makes this claim a standalone claim now, but he presented a slightly different version of the same claim during his first PCR action. Applicant's exhibit admitted during his evidentiary hearing before Judge Miller was the cover letter for Respondent's FOIA disclosure to Applicant; that letter was dated January 6, 2012. When testifying at that evidentiary hearing about Blitch's actions during Applicant's (second) direct appeal, Applicant said:

> And you see here, [the South Carolina Court of Appeals] issued the order [recalling the remittitur] based upon what [Blitch] said here. That showed that he was not being truthful. That's fraud upon the Court. That's a misconduct of an adverse party which could have gotten a writ of certiorari thrown out and they would have never heard – it would never have been reviewed by the Supreme Court.

App. 831-32.[4] This proves that Applicant could have raised a standalone claim of fraud upon the court in his previous application. This Court shall dismiss the application as impermissibly successive.

Third, this Court shall dismiss the application because the claim raised is barred by the doctrine of res judicata. Res judicata prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (S.C. 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 (S.C. Ct. App. 1993). Res judicata also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State,

[4] Citations styled this way in this order are citing the appendix filed in the appeal resulting from Judge Miller's order denying the application for post-conviction relief.

275 S.C. 615, 274 S.E.2d 415 (1981) (approving of PCR court's finding that claims raised or that could have been raised in a prior federal habeas corpus proceeding were barred by res judicata). As previously noted, Applicant raised a Brady issue in his first application but abandoned it during the course of that action. The doctrine of res judicata precludes Applicant from raising the claim again. During his first PCR action, Applicant argued that his appellate lawyers should have argued that Respondent's motion to recall the remittitur constituted fraud upon the court, and Judge Miller found that Applicant could not prove prejudice from that claim because "the timeline of when the State received the Court of Appeals' denial of [the State's] petition for rehearing was presented to the Supreme Court and that Court chose to grant the State's motion." App. 852. Baer filed a Johnson petition, which argued that Judge Miller's finding was in error, and Applicant argued in his pro se Johnson response that Respondent's motion to recall the remittitur constituted fraud upon the court, but the Court of Appeals rejected those arguments and affirmed. The doctrine of res judicata precludes Applicant from reviving this argument, or some form of that argument, now.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application for post-conviction relief with prejudice unless Applicant provides specific reasons, factual or legal, that 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 provide reasons that this order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Taylor Zane Smith, Esquire
PCR Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville 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 15th day of June, 2021.

Perry H. Gravely
Chief Judge for Administrative Purposes
Thirteenth Judicial Circuit

Greenville, South Carolina

Copy mailed to
Attorney General and applicant
on 6/25/2021.