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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas-PCR
Jocelyn Newman, Circuit Court Judge

Lower Case № 2023-CP-40-02854

Edward Mack, #261986,..... Appellant,

vs.

State of South Carolina..... Respondent.

NOTICE OF INTENT TO APPEAL

Edward Mack, Appellant above-named, appeals the Honorable Jocelyn Newman's Conditional Order of Dismissal dated October 24, 2023- filed October 26, 2023 and the Order of Dismissal dated August 16, 2024- filed August 21, 2024.

Sept. 16th, 2024

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Edward Mack, #261986, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–40–2854 **CONDITIONAL ORDER OF DISMISSAL**

This matter is before the Court based on a successive application for post-conviction relief (PCR) filed by Edward Mack (Applicant) commenced on May 31, 2023. In response, Respondent, the State of South Carolina, made its return and moves to summarily dismiss this application as untimely, barred by the statute of limitations, successive to Applicant's previous PCR action, barred by the doctrine of *res judicata*, for failing to make a *prima facie* showing of newly discovered evidence pursuant to S.C. Code Ann. § 17-27-20, § 17-27-45, and § 17-27-90, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014).[1]

[1] Respondent's return to the application was due to be filed within ninety days of receipt. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts these returns as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Richland County Clerk of Court. In April 1999, the Richland County Grand Jury indicted Applicant for Murder (99–GS–40–38330), Kidnapping (99–GS–40–38331), Strong Arm Robbery (99–GS–40–38332), and Criminal Conspiracy (99–GS–40–38333). Applicant was represented by I. S. Leevy Johnson, Esquire, and Byron E. Gipson, Esquire. Fifth Circuit Deputy Solicitor Jonathan S. Gasser and Assistant Solicitor David M. Pascoe prosecuted the case.

On October 29, 1999, Applicant proceeded to trial by jury before the Honorable L. Henry McKellar. Applicant was found guilty as indicted. Judge McKellar sentenced Applicant to life for Murder, thirty years for Kidnapping[2], fifteen years for Strong Arm Robbery, and five years for Criminal Conspiracy.

Applicant filed a timely Notice of Appeal. I. S. Leevy Johnson, Esquire, and William T. Toal, Esquire, perfected Applicant's appeal. The South Carolina Court of Appeals affirmed Applicant's convictions and sentences. State v. Mack, Op. No. 2001–UP–538 (Ct. App. Filed December 11, 2002). Applicant filed a Petition for Rehearing on December 19, 2001. The Court of Appeals denied rehearing on January 17, 2002.

Applicant then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court on February 11, 2002. Applicant presented the following issues to the South Carolina Supreme Court on certiorari:

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[2] The trial judge declared the kidnapping sentence was subsumed by the murder charge. (R. p. 1384, 11. 13-14; Tr. p. 1250, ll. 13-14).

I. Did the Court of Appeals err in holding that Edward Mack suffered no prejudice from the failure to sever his case from that of his co-defendant?
II. Did the Court of Appeals err by deciding on procedural grounds not to entertain an argument alleging a breach of the standards of professional conduct by the prosecutors when that conduct resulted in the obtaining of evidence against Edward Mack?
III. Did the Court of Appeal err in holding that a statement concerning a jailhouse snitch that "I have found him in everything I've dealt with him to be honest and truthful" was not a statement regarding a series of specific instances of truthfulness and thus not excludable under Rule of Evidence 608(b).

The State filed a Return to Petition for Writ of Certiorari on April 19, 2002. The South Carolina Supreme Court denied certiorari on May 15, 2002. The Remittitur was returned to the Richland County Clerk of Court on May 20, 2002.

FIRST PCR ACTION AND SUBSEQUENT APPEAL: 2003–CP–40–2309

Applicant filed his first PCR action on May 8, 2003, alleging the following grounds for relief in the application:

1. Trial counsel failed to adequately prepare for trial of the action through necessary pre-trial investigation;
2. Trial counsel failed to interview known pre-trial witnesses and failed to call these witnesses at trial;
3. Trial counsel failed to take adequate contemporaneous exceptions to matters at trial; thus several issues were not properly preserved for review on direct appeal;
4. Trial counsel failed to request beneficial jury instructions to which I was entitled;
5. Counsel failed to object to burden shifting jury instructions that were subject to objection;
6. Appellate counsel failed to brief meritorious issues which were present which, had they been argued, would have justified reversal of my conviction; and
7. But for both Trial and Appellate Counsel's errors and omissions, there is a reasonable probability the outcome of the proceedings would have been different to my benefit.

The State filed its Return on June 22, 2004.

The Honorable Alison Renee Lee held an evidentiary hearing into the matter on June 21, 2006, at the Richland County Courthouse. Applicant was present at the hearing, and Harry L. DeVoe, Jr., Esquire, represented him. Assistant Attorney General Robert L. Brown represented the State. Applicant testified on his own behalf. Also, he presented testimony from Frederick Mack, Freddy Mack, Steven James, I. S. Leevy Johnson, Esquire, and Byron E. Gipson, Esquire.

On March 31, 2003, Judge Lee filed an Order of Dismissal, in which she denied relief and dismissed the Application with prejudice. The Order of Dismissal addressed Applicant's claims that trial counsel was ineffective because (1) counsel failed to adequately prepare for trial of the action through necessary pre-trial investigation; (2) counsel failed to interview known pre-trial witnesses and failed to call these witnesses at trial; (3) counsel failed to make a contemporaneous objection to the statement which was the subject of the Jackson v. Denno[3] hearing; (4) counsel failed to request beneficial jury instructions to which Mack was entitled and (5) counsel failed to object to burden shifting jury instructions that were subject to objection. The Order also addressed Applicant's claim that appellate counsel failed to brief meritorious issues that were present, which, had they been argued, would have justified the reversal of Applicant's conviction.

Applicant filed a timely Notice of Appeal. Assistant Appellate Defender Elizabeth A. Franklin-Best perfected Applicant's appeal. On September 23, 2008, Applicant filed a Petition for Writ of Certiorari. On October 22, 2008, Applicant filed an Amended Petition for Writ of Certiorari. The following issue was presented:

> Did the PCR judge err when she ruled that Mack received effective assistance of counsel when counsel did not object to the solicitor's devastating Golden Rule violation during closing argument, asking that the jurors, while deliberating, to place their own hands over their noses and mouths, and to imagine the slow and horrible death by

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[3] Jackson v. Denno, 378 U.S. 368 (1964).

suffocation that the Victim experienced?

The State filed a Return to Petition for Writ of Certiorari on March 9, 2009.

The South Carolina Supreme Court filed an Order denying certiorari on November 30, 2009. The Remittitur was returned to the Richland County Clerk of Court on December 16, 2009.

SECOND PCR ACTION AND SUBSEQUENT APPEAL: 2010–CP–40–8604

Applicant filed a *second* PCR application on December 8, 2010, alleging the following grounds for relief in the application:

1. Prosecutorial Misconduct
   a) Prosecution failed to disclose material evidence which was in the care of or subject to the control of the prosecution prior to trial, and favorable to my defense.
   b) Prosecution failed to honor and abide by the discovery requirements of Rule 5.
   c) Prosecution knowingly allowed perjured testimony during trial.
   d) Prosecution's suppression of certain evidence denied me the opportunity to attack witnesses['] credibility.
   e) Prosecution failed to disclose promises made to witnesses in return for their testimony.
   f) Prosecution failed to provide, present key witnesses.
   g) Applicant was unable to [effectively] cross examine various witnesses.
   h) Prosecutor knowingly and deliberately used false evidence during the closing arguments and made improper comments.
   i) But for the prosecutions actions, there is a reasonable probability the outcome of the proceedings would have been different to my benefit.

The State made a Return and Motion to Dismiss on May 12, 2011, requesting that the application be summarily dismissed because it was barred by the statute of limitations and successive to the 2003 application.

Pursuant to this request, and after reviewing the original pleadings in this case and the relevant records attached thereto, the Honorable James R. Barber, III, issued a Conditional Order of Dismissal filed on July 6, 2011, provisionally denying and dismissing the application for the

reasons argued in the Return and Motion to Dismiss, but giving Applicant twenty days from the date of service of the Order to show why the dismissal should not become final.

Applicant responded to the Conditional Order of Dismissal by submitting two *pro se* documents. The first document, dated August 7, 2011, was captioned "Reply and Objection to the Conditional Order of Dismissal." In it, Mack raised the following objections to the State's Conditional Order of Dismissal:

1. "S.C. Code Ann. § 17-27-45(c) allows the filing of a post-conviction relief application within one year of the date of actual discovery of facts not previously presented and heard or one year after the date when the facts could have been ascertained by the exercise of reasonable diligence. Petitioner's claim for post-conviction relief was timely under § 17-27-45(c) where it was filed within one year of the actual ["]discovery." In support of this contention, Mack set forth the following specifics:
   a) "On June 26, 2010. Mack made the first of several discoveries involving evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.
   b) Pursuant to a Freedom of Information Act request, the South Carolina Law Enforcement Division provided Mack with 171 pages of documents of testings, collectings, analysis, etc., on June 26, 2010. Included in these documents Mack discovered the evidence which supports the material facts raised in this application and his actual innocence."
   c) "On August 25, 2010, Mack received unconfirmed information concerning several state witnesses who testified at the trial."
   d) "On September 10, 2010 the United States Postal Service [provided] Mack with evidence confirming the information of one [of] the State's key witness' testimony as impossible and totally false."
2. "The grounds for relief asserted in this application were not presented in the original application due to circumstances beyond his control." In support of this contention, Mack set forth the following specifics:
   a) "During trial, the prosecution failed to present, to the court, [exculpatory] evidence .... These representations, misleading representations caused Mack, judge, and jury to assume that

evidence existed which did not and evidence which did not exist, did."

b) "These circumstances obstructed Mack from obtaining knowledge of this evidence, therefore impeding Mack's ability to raise the asserted grounds for relief in his original application."

Applicant also filed a letter to Respondent dated March 20, 2012, requesting documents from SLED, the Richland County Solicitor's Office, the South Carolina Department of Corrections, and other agencies pursuant to the Freedom of Information Act.

On June 20, 2012, Judge Barber filed a Final Order dismissing the application with prejudice. Judge Barber found that Mack's "newly-discovered evidence claim to be without merit." Judge Barber further found that Applicant failed to set forth with any specificity what the alleged newly-discovered pieces of evidence were, and failed to present any supporting documentation to the Court to make a showing that he is in actual possession of the items alleged. Further, Applicant failed to set forth with any specificity how these items might have affected the outcome of his trial, or why they could not have been discovered prior to his trial.

On July 6, 2012, Applicant served a Motion to Alter or Amend the Judgment pursuant to Rule 59(e), SCRCP, on Respondent that was filed in the Richland County Clerk of Court's Office on July 10, 2012. On July 19, 2012, Judge Barber issued an Order denying Applicant's 59(e) motion as untimely.

Applicant timely filed a notice of appeal on July 17, 2012. On September 6, 2012, the South Carolina Supreme Court filed an Order summarily dismissing his appeal because it found that "[i]n the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), petitioner has failed to show that there is an arguable basis for asserting that the

determination by the lower court was improper."[4] The Remittitur was returned to the Richland County Clerk of Court on October 1, 2012.

FIRST FEDERAL HABEAS ACTION: 9:10-CV-00763-TLW- BM

Applicant filed a *pro se* Writ of Habeas Corpus on March 25, 2010. Applicant filed a motion to withdraw his federal habeas without prejudice on July 23, 2010. On July 27, 2010, the Magistrate Judge issued the Report and Recommendation recommending the motion be granted without prejudice. Applicant did not file any objections to the Report and Recommendation. On January 12, 2011, the Honorable Terry L. Wooten filed an Order granting Applicant's motion to withdraw without prejudice. Judgment was entered in that action on January 12, 2011.

SECOND FEDERAL HABEAS ACTION: 5:13-1021-MGL-KDW

Applicant filed a second *pro se* Writ of Habeas Corpus on April 30, 2013. On September 20, 2013, the State filed its Return and Memo Supporting Summary Judgment Motion. On September 25, 2013, the State filed it Amended Motion for Summary Judgment. On October 25, 2013, Applicant filed a Motion to Support Grounds with Specific Allegations and multiple attachments. On November 20, 2013, Applicant filed a Response to Amended Summary Judgment and Return. On February 18, 2014, Applicant filed a *Ex Parte* Motion for Subpoena and Limited Discovery from a Non Party. On March 7, 2014, the State filed its Response to *Ex Parte* Motion for Subpoena and Limited Discovery from a Non Party.

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[4] Rule 243, SCACR, provides that "[i]f the lower court has determined that the post-conviction relief action is barred as successive or being untimely under the statute of limitations, the petitioner must, at the time the notice of appeal is filed, provide an explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. If the petitioner fails to make a sufficient showing, the notice of appeal may be dismissed."

On March 13, 2014, the Honorable Kaymani D. West, United States Magistrate Judge, issued a Report and Recommendation. On April 3, 2014, Applicant filed his Objections to Report and Recommendation. On May 19, 2014, Applicant filed his Motion to Supplement/Amend Objections to Report and Recommendation. On June 10, 2014, the Honorable Mary G. Lewis, United States District Judge, issued an Order adopting the Report and Recommendation granting the State's Motion for Summary Judgment. On June 30, 2014, Applicant filed a Motion for Reconsideration. On February 20, 2015, the State filed its Response in Opposition to Petitioner's Motion for Reconsideration.

On May 4, 2015, Applicant filed a Notice of Appeal. On July 28, 2015, the Fourth Circuit Court of Appeals dismissed Applicant's appeal by unpublished *per curiam* opinion. Mack v. Larry Carledge, Unpub. Op. No. 15-6694 (Filed July 28, 2015). The Mandate was entered on August 19, 2015.

CURRENT ACTION BEFORE THIS COURT

On May 31, 2023, Applicant *untimely* filed his *third* application for PCR in which he alleges the following:

1. Newly Discovered Evidence
   a. "After my conviction was, affirmed and I lost the initial post conviction relief. I retained the services of a private investigator to look at the evidence in my case. The private investigator was able to obtain phone records I had not previously seen. The phone records show that I was making a call from my landline phone at a time that made it impossible for me to have been at the Fatz Cafe at the time of the robbery and murder. I believe this new information would have resulted in a different verdict had it been presented to the jury in mv trial. The private investigator issued his report to me on June 1. 2022. which is when I learned of the results of his investigation His report further found other discrepencies in the phone records which were used in mv trial."

Applicant seeks relief from the Court in the form of a new trial.

Before this Court are the Richland County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's trial transcript; Applicant's records from his direct appeal; Applicant's records from his two federal habeas actions; Applicant's records from his first and second PCR actions; Applicant's records from his first and second PCR appeal actions; and the records of the current PCR action.[5].

FINDINGS OF FACT AND CONCLUSIONS OF LAWS

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application as there is no genuine issue of material fact which would necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); Welch v. MacDougall, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

SUMMARY DISMISSAL BASED ON STATUTE OF LIMITATIONS

Respondent moved to summarily dismiss the application because it fails to comply with the filing procedures of the Uniform Post-Conviction Procedure Act.[6] Specifically, the Act requires as follows:

> (A). An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of

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[5] Due to the age of these cases, the records may not be complete.
[6] S.C. Code Ann. § 17-27-10 to -160.

conviction or within one year after the sending of the Remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

(B). When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C). If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of the statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

In the present case, Applicant is alleging he is entitled to post-conviction relief based on newly discovered evidence. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant had a jury trial on October 29, 1999. Applicant did

pursue a direct appeal and the Remittitur was returned on May 20, 2002. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before May 21, 2003. Applicant did not file this PCR application until June 5, 2023, nearly *twenty years and ten days* beyond the statute of limitations.

Accordingly, this application is *untimely* pursuant to S.C. Code Ann. § 17-27-45 and shall be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

SUMMARY DISMISSAL BASED ON SUCCESSIVENESS

Respondent moved to summarily dismiss the application because it is successive to the previous application(s) for post-conviction relief. 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). Importantly, S.C. Code Ann. § 17-27-90 provides:

> 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.

Pursuant to S.C. Code Ann. § 17-27-90, successive PCR actions are barred unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In Aice, the South Carolina Supreme Court held that PCR rules "contemplate an adjudication on the

merits of the original petition, one bite at the apple as it were." Id. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, "[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice." Id. at 451, 409 S.E.2d at 394.

Expressly, 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. Notably, 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).

Here, Applicant's current allegations, other than newly-discovered evidence, *were or could have been* raised in Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. See Graham v. State, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) ("Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than 'one bite at the apple as it were.' A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application."). This Court finds Applicant is unable to show that these claims could not have been raised in his initial application, as his claims were known and easily could have and should have been raised in his initial post-conviction relief action or the second PCR action.

Accordingly, Applicant has failed to meet the burden imposed upon him, and the Court

shall summarily dismiss the application as successive to Applicant's previous PCR application(s).

SUMMARY DISMISSAL BASED ON THE DOCTRINE OF RES JUDICATA

Additionally, Respondent moved to summarily dismiss this application as barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits of a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate any and all his allegations in his prior *two* PCR actions and failed to do so. The prior PCR Courts issued final judgments on the merits of the same or similar issues Applicant raises in this successive action. The finality of the previous Courts' rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter.

Accordingly, this Court shall summarily dismiss the application as barred by the doctrine of *res judicata*.

SUMMARY DISMISSAL BASED ON NEWLY DISCOVERED EVIDENCE

Lastly, this Court finds Applicant's assertion that he is being held in custody unlawfully as

a result of newly discovered evidence, such that he should be entitled to PCR, is without merit.

The Uniform Post-Conviction Procedure Act states that 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, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). Otherwise, a PCR must be filed within one year of sentencing or, if a direct appeal is filed, within one year of the remittitur. S.C. Code Ann. § 17-27-45(A).

In his current application, Applicant claims that he discovered on June 2, 2022, from a private investigator that someone was making a call from the landline at his home at the time of the armed robbery and murder of Victim. Applicant further avers that the private investigator's report found other discrepancies in the phone records used at trial. Applicant's assertion of newly discovered evidence is an obvious attempt to thwart the untimeliness and successive nature of this new application for PCR. A party requesting a new trial based on newly 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.

Clark v. State, 315 S.C. 385, 387–88, 434 S.E.2d 266, 267 (1993); see Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (setting forth the five factors to be analyzed when

considering a newly-discovered evidence claim) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979))). However, the granting of a new trial based on after-discovered evidence is disfavored. State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct. App. 2011); see also State v. David, 14 S.C. 428, 432 (1881) ("There can be no doubt that motions of this sort should be received with the utmost caution, because, as it is said by a learned judge, there are but few cases tried in which something new may not be hunted up . . .").

Initially—and critically—the document Applicant contends he only discovered on June 2, 2022, is not before this Court. Applicant bears the burden of proof, which he has not provided. Furthermore, Applicant has not provided how the purportedly newly discovered evidence meets the Hayden factors. This Court finds the article Applicant contends is newly discovered evidence likely fails the Hayden factors numbers one, three, four, and five.

First, the record before this Court provides the phone records were highly contested at trial and in Applicant's first PCR action in 2003, and Applicant federal *habeas* in 2013. Thus, this Court is unable to ascertain how Applicant asserts this evidence is newly-discovered. Next, Applicant avers this evidence would change the result if a new trial were given. This Court disagrees and agrees with Respondent that just because an alleged phone call was made from a landline at Applicant's residence when the armed robbery and murder of Victim occurred—does not mean it was Applicant making the phone call. The record shows Applicant lived with his wife and at least one other person in the house. Also, this Court finds that with due diligence, Applicant could have gotten those records before trial. Lastly, this Court finds this evidence is not material to Applicant's guilt or innocence and would merely be cumulative to testimony at trial. See, e.g., United States v. Connolly, 504 F.3d 206, 212 (1st Cir. 2007) ("Every element of this test . . . is essential, and a failure to establish any one element will defeat the motion.").

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a *prima facie* showing of newly discovered evidence. Because his claims do not meet the high threshold of newly discovered evidence, they are barred by the one-year statute of limitations set forth in S.C. Code Ann. § 17-27-45(A).

Accordingly, Applicant is not entitled to an evidentiary hearing, and this matter 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 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).

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." Teague v. Lane, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to

contemplate the future prospect of 'becoming a constructive citizen.'" United States v. Fugit, 703 F.3d 248, 252 (4th Cir. 2012) (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring)). In his concurring and dissenting opinion in Mackey v. United States, 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). 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.

|CONCLUSION PAGE FOLLOWS|

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific factual or legal reasons 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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
PCR Division – 5th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Richland 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 24th **day of** October**, 2023.**

THE HONORABLE JOCELYN NEWMAN
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Edward Mack, #261986, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–40–02854 **FINAL ORDER OF DISMISSAL**

This matter comes before this Court by way of a successive post-conviction relief (PCR) action commenced by Edward Mack (Applicant) on May 31, 2023. Respondent made its Return and Motion to Dismiss requesting this action be summarily dismissed because it was untimely, barred by the statute of limitations, successive to Applicant's previous application, barred by the doctrine of *res judicata*, for failing to make a *prima facie* showing of newly discovered evidence pursuant to S.C. Code Ann. § 17-27-20, § 17-27-45, and § 17-27-90, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014).

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed on October 26, 2023, provisionally denying and dismissing this action while giving counsel for Applicant twenty days from the date of service of said order in which to show why the Conditional Order of Dismissal should not become final. ~~Attached to this Final Order and incorporated herein by reference is an affidavit of service dated December 5, 2023, indicating the State served the above-mentioned Conditional Order of Dismissal on Applicant.~~

On December 5, 2023, C. Rauch Wise, Esquire, filed a Return to Conditional Order of Dismissal on behalf of Applicant. On February 20, 2024, Respondent filed its Return to

Applicant's Return to Conditional Order of Dismissal.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal and Respondent's responses to Applicant's responses in their entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court finds Applicant has failed in his burden to establish there is a genuine issue of material fact such that he should be granted an evidentiary hearing on his PCR application. S.C. Code Ann. § 17-27-70(c); Leamon v. State, 363 S.C. 432, 434, 61 1 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). This Court reasserts its findings in the Conditional Order of Dismissal that the current PCR application must be dismissed because it is untimely, barred by the statute of limitations, successive to Applicant's previous application, barred by the doctrine of *res judicata*, for failing to make a *prima facie* showing of newly discovered evidence pursuant to S.C. Code Ann. § 17-27-20, § 17-27-45, and § 17-27-90, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 et seq. (2014).

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a showing based on the information set forth in his application and his responses, and, therefore, he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises Applicant he must file and serve a notice of appeal within thirty days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 16th day of August, 2024.

JOCELYN NEWMAN
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina.