STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
Kevin Smith, #164290, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2019–CP–40–04208 **RETURN AND MOTION TO DISMISS** (Appointment of Counsel Not Requested

In response to Kevin Smith's (Applicant) application for post-conviction relief (PCR), commenced on July 30, 2019. Respondent, the State of South Carolina, makes the following return and moves to summarily dismiss this application as untimely, barred by the statute of limitations, successive to Applicant's previous two PCR actions, barred by the doctrine of *res judicata*, barred by the equitable doctrine of *laches*, and for failing to comply with the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014). Respondent respectfully offers the following in support of its Return and Motion to Dismiss:[1]

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant

[1] Respondent's return was due to be filed within sixty days of receipt of Applicant's instant post-conviction relief application. 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, Respondent respectfully asks this Court to accept this return as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the 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.).

to orders of commitment from the Richland County Clerk of Court. Applicant was indicted at the June 1995 term of the Richland County Grand Jury for three (3) counts of taking hostages (95-GS-40-3705; -3708; -4282), one (1) count of assault and battery with intent to kill (ABWIK) (95-GS-40-3706)[2], and one (1) count of assault and battery of a high and aggravated nature (ABHAN) (95-GS-40-3707). Applicant was indicted at the February 1996 term of the Richland County Grand Jury for one count of ABWIK (96-GS-40-11556). Applicant was represented by Duffie Stone, Esquire. Fifth Circuit Assistant Solicitor's Warren B. Giese and K. Luck Campbell prosecuted the case.

On June 7, 1996, Applicant proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Applicant was found guilty of was tried and convicted of three (3) counts of taking hostages, one (1) count of ABWIK, one (1) count of the lesser included offense of ABHAN, and one (1) count of ABHAN as indicted. Judge Dennis sentenced Applicant to fifteen (15) years imprisonment for each count of taking hostages, twenty (20) years for ABWIK, and nine (9) years for each ABHAN, all to be served consecutively.

Applicant appealed his conviction and sentence, which was affirmed on September 7, 2000.

FIRST PCR ACTION: 2001-CP-40-3759

On September 10, 2001, Applicant filed his first application for post-conviction relief alleging he was being held unlawfully for the following reasons:

1. Trial counsel was ineffective for failing to disclose a possible conflict of interest since he was representing the South Carolina Department of Corrections in another case involving allegations of abuse by a correctional officer.
2. Trial counsel was ineffective for failing to request that a sleeping juror be individually voir dired to determine whether she was, in fact, sleeping during the Applicant's trial.

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[2] Applicant was indicted for an additional count of ABWIK which was nolle prossed. (95-GS-40-3704).

3. Trial counsel was ineffective for failing to request a jury charge wherein the jury would have been instructed that they could only find the Applicant guilty of the crimes that were a natural or probable consequence of the acts actually agreed on by the Applicant and his co-defendants.
4. Trial counsel was ineffective for failing to adequately explain the elements of assault and battery with intent to kill.
5. Trial counsel was ineffective for failing to object to the evidence presented at trial.
6. Trial counsel was ineffective for failing to adequately prepare for trial.
7. Trial counsel was ineffective for failing to object to a witness' testimony.
8. Trial counsel was ineffective for failing to object to the introduction of photographs depicting damage to the victim's body.
9. Trial counsel failed to object to the non-disclosure of pretrial of certain exculpatory evidence that would have been beneficial to Appellant.
10. Attorney-Client privilege violated by prison security cameras taping conversation between Applicant and attorney.

Respondent made its return on July 17, 2002. An evidentiary hearing into the matter was convened on December 3, 2003, at the Richland County Courthouse. Applicant was present and represented by Tara Dawn Shurling, Esquire. By Order dated June 18, 2004, the Honorable Alison Renee Lee denied and dismissed the application with prejudice.

Applicant filed a timely notice of appeal to the South Carolina Supreme Court by and through Ms. Shurling on July 14, 2004. The appeal was perfected by the filing of a Johnson[3] petition for writ of certiorari by Robert M. Pachak, Esquire, of the South Carolina Office of Appellate Defense on November 8, 2004. The petition was denied, and Mr. Pachak was relieved by an order dated January 6, 2006, with the Remittitur returned on January 24, 2006.

SECOND PCR ACTION: 2014-CP-40-3787

[3] Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

On June 10, 2014, Applicant filed his second application for post-conviction relief he was being held unlawfully for the following reasons:

1. "Convictions are invalid under South Carolina Code Annotated § 17-25-50 1976, thus entitling vacation of sentence; resentencing or Applicants released."

The State made its return and motion to dismiss on September 1, 2015. The court issued a conditional order of dismissal on August 31, 2015. On September 9, 2016, the court issued its final order of dismissal, dismissing Applicant's application with prejudice.

Applicant filed a timely notice of appeal. By filed court order, the South Carolina Supreme Court dismissed Applicant's appeal on May 20, 2016. The Remittitur was returned to the lower court on June 7, 2016.

CURRENT ACTION: 2019-CP-40-04208

On July 30, 2019, Applicant filed a filing captioned "Notice of Motion – Motion for a Vacation and Expungement of Sentence Pursuant to Rule 60(b)(3)(4)(5), S. C. R. Civ. Procedure." Applicant also filed a form captioned "Brief Memorandum in Support of Applicant's Motion for Vacation and Expungement of Sentence Pursuant to Rule 60(b)(3)(4)(5), S. C. R. Civ. Procedure." Within this document, Applicant lays out arguments that his indictments are invalid pursuant to S.C. Code Ann. § 14-9-210, the trial court lacked subject matter jurisdiction, and extrinsic fraud upon the court.

On October 9, 2019, Applicant filed a "Notice of Motion – Motion for a Default Judgment Pursuant to Rule 55(e), South Carolina Rules of Civil Procedures 55(e)." On November 5, 2019, the Honorable Jocelyn Newman issued a Form 4 Order denying Applicant's pursuant to Rule 41(a), SCRCP.

On April 6, 2020, Applicant filed his "2nd Notice of Motion - Motion for a Default Judgment Pursuant to Rule 55(e), South Carolina Rules of Civil Procedures."

On September 25, 2023, Applicant filed his "Notice of Motion – Motion for a Writ of Mandamus Pursuant to Rule 65(f)(1), South Carolina Rules of Civil Procedures."

On February 29, 2024, Applicant filed his third "Plaintiff's Request for Entry of Default Judgment Against the Defendant to be Entered in the Record by the Clerk of Court."

Before this Court are the Richland County Clerk of Court records pertaining to Applicant's convictions and sentences, the records of the 2001 and 2014 PCR actions and appeals, the trial transcript, and the records of this action.

MOTION TO DISMISS

Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact, which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, Respondent requests that this Court issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.[4] See S.C. Code Ann. § 17-27-70(b) (establishing the 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); Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for the appointment of counsel only where there is a question of law or fact which necessitates a hearing). Respondent moves for summary dismissal for the following reasons:

SUMMARY DISMISSAL BASED ON STATUTE OF LIMITATIONS

Respondent submits this application should be summarily dismissed for failure to comply

[4] A proposed Conditional Order of Dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

with the filing procedures of the Uniform Post-Conviction Procedure Act.[5] Specifically, the Act requires as follows:

> (A). An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the Remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.
> (B). When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
> (C). If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held 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 . . .

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[5] S.C. Code Ann. § 17-27-10 to -160.

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 various allegations. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant proceeded to trial on June 7, 1996. Applicant did pursue a direct appeal. The Remittitur was returned to the lower court on September 7, 2000. Pursuant to S.C. Code Ann. § 17-27-45(A), Applicant needed to file his application for post-conviction relief on or before September 8, 2001. Applicant did not file this PCR application until July 30, 2019, *seventeen years, ten months, and twenty-two days* beyond the statute of limitations.

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

SUMMARY DISMISSAL BASED ON SUCCESSIVENESS

The Application should be summarily dismissed because it is successive to Applicant's previous *two* PCR applications. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then 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's current allegations regarding Trial Counsel *were or could have been* raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him.

Therefore, the Application should be summarily dismissed as successive to Applicant's previous PCR applications.

SUMMARY DISMISSAL BASED ON THE DOCTRINE OF RES JUDICATA

Additionally, this application 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 (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 first and second PCR actions. 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 court's rulings should be respected, and the application should be summarily dismissed as barred by the doctrine of *res judicata.*

SUMMARY DISMISSAL BASED ON THE EQUITABLE DOCTRINE OF LACHES

The application should also be dismissed as barred by the equitable doctrine of *laches.* To ensure the finality of litigation, our courts require reasonable diligence in pursuing collateral relief. McElrath v. State, 276 S.C. 282, 283, 277 S.E.2d 890 (1981). Requiring reasonable diligence "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." Id. (quoting Honeycutt v. Ward, 612 F.2d 36, 42 (2nd Cir. 1979)). Where an applicant for post-conviction relief fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of laches, which is defined as "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." Bray v. State, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)). "Whether a claim is barred by laches is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute *laches*." Id.

Applicant seeks post-conviction relief nearly two decades after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an applicant from seeking collateral review of his conviction, significantly where the delay affects

the availability of evidence to review the applicant's claims. McElrath, 276 S.C. at 283, 277 S.E.2d at 890. Applicant has offered no justification for the delay. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. See, e.g., Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy "would undoubtedly be futile considering the passage of over ten years' time" when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, this application should be summarily dismissed as barred by the equitable doctrine of *laches*.

SUMMARY DISMISSAL BASED ON RULE 60(B), SCRCP

Rule 60(b), SCRCP, provides an avenue for relief from judgment based on the following:

> (b) 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.

Rule 60(b), SCRCP.

As a threshold matter, Respondent submits that this matter should be dismissed pursuant to Rule 12(b)(6), SCRCP, as it is a frivolous filing. Furthermore, Respondent submits that

Applicant's motion must be denied because of Applicant's failure to timely file his motion. South Carolina Rules of Civil Procedure Rule 60(b)(5) states: "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." The order upon which the current motion is made was executed on June 7, 1996, by Judge Dennis. Respondent submits that Applicant's motion was not filed within a reasonable time as mandated by Rule 60(b), SCRCP, nor was it filed within one year of entry of judgment. Applicant's motion was filed ***twenty-three years, one month, and twenty-three days beyond*** the entry of the order that is the subject of this motion. Therefore, Applicant's motion under 60(b)(3)(5) is untimely and should be denied and dismissed.

Applicant also lists Rule 60(b)(4), SCRCP, in that the judgment is void. Rule 60(b)(4), SCRCP, is not subject to the same time limits as Rule 60(b)(3)(5), SCRCP. However, Respondent submits Applicant has failed to meet his burden of presenting evidence that proves the facts essential to entitle him to relief.

The movant in a Rule 60(b), SCRCP, motion has the burden of presenting evidence, usually provided by affidavits, proving the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991). Applicant alleges that he should be relieved from this judgment because his indictments are invalid pursuant to S.C. Code Ann. § 14-9-210, the trial court lacked subject matter jurisdiction, and extrinsic fraud upon the court. However, Applicant fails to offer any evidence providing the facts essential to entitle him to relief. Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991).

In addition, Applicant cannot use Rule 60(b) to re-litigate issues that have already been adjudicated in prior civil actions. All of Applicant's allegations either have been or could have been addressed in his prior PCR actions challenging his conviction. All arguments were raised to

the PCR judge and ruled on in the order dismissing Applicant's PCR application. See Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993) (holding a final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action). The doctrine of *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).

Therefore, because Applicant's allegations were already ruled upon when Judge Cole denied Applicant's 60(b) motion that was filed in the original PCR action, this subsequent 60(b) motion should be dismissed.

SUMMARY DISMISSAL BASED ON SUBJECT MATTER JURISDICTION

Applicant contends that the trial court lacked subject matter jurisdiction over his case and he is entitled to relief under Rule 60, SCRCP. Specifically, Applicant maintains that the trial court lacked subject matter jurisdiction because his indictments were null and void, that the State did not follow S.C. Code Ann. §14-9-210, and the grand jury was illegally empaneled.

As an initial matter, Applicant's allegations regarding jurisdiction are without merit. "Circuit courts obviously have subject matter jurisdiction to try criminal matters." State v. Gentry, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). Further, a circuit court has subject matter jurisdiction to convict a defendant of an offense if there is an indictment that sufficiently states the offense, the defendant waives presentment, or the offense is a lesser-included offense of the crime charged in the indictment." State v. Wilkes, 353 S.C. 462, 464-465, 578 S.E.2d 717, 719 (2003) (citing Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)).

In this case, despite Applicant's allegations against the indictments, the record reflects the Richland County Grand Jury validly indicted Applicant. These indictments contain all the necessary elements of the offenses and further cite the applicable statute. Further, "[a]n indictment

is merely a notice document." State v. Baker, 390 S.C. 56, 62, 700 S.E.2d 440, 442 (Ct. App. 2010) (citing State v. Gentry, 363 S.C. 93, 102-103, 610 S.E.2d 494, 500 (2005). A presumption of regularity attaches to all proceedings in the courts of this State, and it is incumbent upon one who challenges a proceeding to prove his claims. See, e.g., Tate v. State, 345 S.C. 577, 549 S.E.2d 601 (2001); Pringle v. State, 287 S.C. 409, 339 S.E.2d 127 (1986). Here, Applicant cannot show any irregularity because the indictments in question are sufficient on their face.

Moreover, "an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood. " Id. at 63, 700 S.E.2d at 443 (citing State v. Tumbleston, 376 S.C. 90, 98, 654 S.E.2d 849, 853 (Ct. App. 2007.) Significantly, in order to challenge the sufficiency of an indictment, an objection must be made before the jury is sworn in. S.C. Code Ann. §17-19-90 (2003).

Next, an Applicant may challenge the subject matter jurisdiction of the trial court, and such a claim is one that may be raised at any time. See Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001), overruled in part by State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter jurisdiction to try criminal matters." Gentry, 363 S.C. 93; See also S.C. Const. Art. V, § 7. Applicant must present evidence that his case is of some class over which the circuit court does not have the authority to preside. Applicant's conviction involved a criminal charge in General Sessions Court. Thus, the circuit court had subject matter jurisdiction.

Additionally, A grand jury may meet at any time ordered by a circuit judge. See S.C. Code Ann. §§ 14-5-910 to -940 (allowing for terms of court not provided for by law). Accordingly, a grand jury is not unlawfully impaneled simply because it does not meet in a term of court as

provided for in S.C. Code Ann. §§ 14-5-620 to -820. See State v. Jeffcoat, 26 S.C. 114, 1 S.E. 440, 441 (1887) ("[M]erely changing the time for holding the court did not make the grand jury illegal.").

Furthermore, a presumption of regularity is attached to proceedings in the Court of General Sessions. Pringle v. State, *supra*. Absent evidence to the contrary, the court must presume that a properly returned indictment is valid. State v. James, 321 S.C. 75, 472 S.E.2d 38, 40 (Ct. App. 1996) (citing Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)); State v. Thompson, 305 S.C. 496, 409 S.E.2d 420 (Ct. App. 1991). Applicant's indictments are valid on their face because they state all the necessary elements of the crime, the date of the offense, and the name of the accused. Id. at 75, 472 S.E.2d at 40.

Respondent submits Applicant has failed to present any evidence that the convictions he challenges in this application are in a class over which the circuit court does not have the authority to provide, that his indictments were valid, and there was no illegal empanelment of the Grand Jury. Therefore, the Respondent requests that this allegation be summarily dismissed.

SUMMARY DISMISSAL BASED ON 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 his

initial 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."). Because Applicant has not made a *prima facie* showing of extrinsic fraud, the Court should deny this motion without a hearing.

SUMMARY DISMISSAL BASED ON APPLICANT'S MOTION FOR WRIT OF MANDAMUS

Respondent moves this Court to deny and dismiss the "Notice of Motion - Motion for a Writ of Mandamus Pursuant to Rule 65(f)(1) South Carolina Rules of Civil Procedure." Applicant's motion must be denied because mandamus is not appropriate.

"Mandamus is the highest judicial writ and is issued only when there is a specific right to be enforced, a positive duty to be performed, and no other specific remedy." Ex Parte Littlefield, 343 S.C. 212, 5222, 40 S.E.2d 81, 86 (2000). "The primary purpose of a writ of mandamus is to enforce an established right and a corresponding imperative duty created or imposed by law." Id. at 223, 40 S.E.2d at 86. The writ of mandamus lies solely within the discretion of the court of which it is requested. In the Interest of Lyde, 284 S.C. 419, 421, 327 S.E.2d 70, 71 (1985). Moreover, mandamus is unavailable where the legal right is doubtful. Id.

An Applicant seeking a writ of mandamus to require the performance of an act "must show (1) a duty of respondent to perform the act, (2) the ministerial nature of the act, (3) the Applicant's specific legal right for which discharge of the duty is necessary, and (4) a lack of any other legal remedy." Porter v. Jedziniak, 334 S.C. 16, 18, 512 S.E.2d 497, 498 (1999). Respondent submits that Applicant has failed to show the required elements necessary to consider the issuance of a Writ of Mandamus. Applicant requests the "Richland County Court of Common Pleas Judge of

the Fifth Judicial Circuit South Carolina for a Writ of Mandamus Granting a Judgment of Default Against the Defendants for the Vacation of the Plaintiff's Sentence and Expungement From the Record." Respondent submits this is not an appropriate mandamus remedy.

Because the PCR Act explicitly applies to constitutional challenges to convictions and sentences, relief in the form of a declaratory judgment is not available. See S.C. Code Ann. § 17-27-20 (A)(1), (B); Singleton v. State, 313 S.C. 75, 85–86, 437 S.E.2d 53, 59 (1993) (discussing § 17-27-20(B) and the appropriate relief in PCR cases); Gilstrap v. State, 252 S.C. 625, 628, 168 S.E.2d 88, 89 (1969) (stating that even under the assumption that all the allegations were true, the relief to be granted on PCR is remand for a new trial); Smith v. State, 413 S.C. 194, 195, 775 S.E.2d 696, 696 (2015) ("We now clarify the proper remedy is a new trial."). The PCR Act has taken the place of all other remedies formerly available for challenging the validity of a conviction or sentence, including actions for declaratory judgment. S.C. Code Ann. §17-27- 20(B). Recently, in Carpenter v. S.C. Dep't of Corr., the Court of Appeals rejected Carpenter's attempt to circumvent post-conviction procedures by raising claims that "fit squarely into a category available for redress under the PCR Act" in the form of a petition for habeas corpus or a declaratory judgment action. 431 S.C. 512, 521, 848 S.E.2d 346, 350 (Ct. App. 2020); see also Williams v. Ozmint, 380 S.C. 473, 671 S.E.2d 600 (2008) (stating that PCR is intended to address constitutional violations related to the criminal conviction (citing S.C. Code Ann. § 17-27-20(A) (2007))).

Further, Applicant has failed to show a "lack of other legal remedy" as required by Porter. PCR takes the place of all other remedies for challenging the validity of a conviction or sentence. S.C. Code Ann. §17-27-20(B) ("Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of

them."). Applicant has had an opportunity to raise his allegations in previous collateral actions. Accordingly, the Motion for Writ of Mandamus should be denied and summarily dismissed pursuant to Rule 12(b)(6), SCRCP, because it fails to state facts sufficient to constitute a cause of action or to support the requested relief.

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

WHEREFORE, having made its Return to Applicant's PCR action, Respondent requests the matter be summarily dismissed.

Respectfully submitted,

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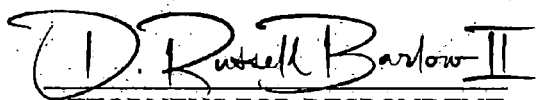
By: 

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