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Feb 28 2025
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari from
Charleston County
Honorable Roger M. Young, Circuit Court Judge

Appellate Case No. 2024-000601

TERRELL MCCOY,

PETITIONER,

v.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION
FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Circuit Judge abuse its discretion in ruling Petitioner's Rule 60(b), SCRCP motion was untimely?

2. Did the Circuit Judge abuse its discretion ruling Petitioner's Rule 60(b) is barred by res judicata?

3. Did the Circuit Judge abuse its discretion ruling Petitioner has not made prima facie showing the PCR judge's Order is void, where the PCR Court deprived Petitioner of his procedural due process to an evidentiary hearing on the ineffective assistance of trial counsel claim?

4. Did the Circuit Judge abuse its discretion ruling Petitioner did not make a prima facie showing of newly discovered evidence where trial counsel was ineffective for failure to subpoena witness?

5. Did the Circuit Judge abuse its discretion in ruling Petitioner's Rule 60(b)(5) was not brought in a reasonable time?

6. Did the Circuit Judge make an error of law and facts under 60(b)(1)?

RESPONDENT'S COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the circuit court abuse its discretion in finding Petitioner's Rule 60(b) Motions were untimely when the rule requires such motions to be made within a reasonable time and motions pursuant to (1), (2), and (3) to be made not more than one year after the order was entered; the amended order was entered June 14, 2019; and Petitioner's Rule 60(b) motions were not filed until June 7, 2022, and later?

2. Did the circuit court abuse its discretion in finding Petitioner's arguments related to a 911 call and untested blood evidence were barred by res judicata when those issues were addressed in the PCR court's amended order of dismissal?

3. Did the circuit court abuse its discretion in finding Petitioner did not make a prima facie showing that the amended order was void when the circuit court was complying with a directive from the Supreme Court of South Carolina in issuing the amended order and had jurisdiction to do so?

4. Did the circuit court abuse its discretion in finding Petitioner did not make a prima facie showing of newly discovered evidence when the "newly discovered evidence" was an alibi defense he asserted for the first time more than seventeen years after the murder and thirteen years after his underlying criminal conviction?

5. Did the circuit court abuse its discretion in finding Petitioner's Rule 60(b)(5) motion was not brought within a reasonable time when Petitioner waited nearly three years after the amended order to file the motion, and his argument related to this issue is merely an attempt to circumvent the appellate process?

6. Did the circuit court abuse its discretion in denying Petitioner's Rule 60(b)(1) motion when Petitioner is merely attempting to circumvent the appellate process through the filing of a Rule 60(b) motion?

STATEMENT OF THE CASE

Petitioner is presently confined in the South Carolina Department of Corrections serving a forty-year sentence. In July 2006, the Charleston County Grand Jury indicted Petitioner for murder (2006-GS-10-4987). On February 2-6, 2009, Petitioner proceeded to a jury trial, pro se, before the Honorable Roger M. Young.[1] The jury convicted Petitioner as indicted, and Judge Young sentenced him to fifty years. Proctor filed a motion to reconsider the sentence, and Judge Young reduced the sentence to forty years.

Petitioner filed a timely notice of appeal. Appellate Defender Robert Dudek perfected the appeal and filed a brief arguing the trial court erred in allowing Petitioner to proceed pro se. The Court of appeals affirmed. State v. McCoy, No. 2011-UP-471 (filed Oct. 26, 2011). Petitioner filed a petition for rehearing, which was denied. Petitioner then filed a Petition for Writ of Certiorari in the South Carolina Supreme Court, which was denied. The remittitur was sent March 8, 2013.

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

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

[1] Petitioner initially proceeded to a jury trial on July 15, 2008, but that trial ended in a mistrial due to a hung jury. Lorelle Proctor, Esquire, represented Petitioner at that time. Petitioner moved to relieve Proctor and proceed pro se. Following a hearing, the Honorable R. Markley Dennis granted Petitioner's motion but ordered Proctor to remain as standby counsel. However. Judge Dennis ordered that Proctor's representation ended on January 27, 2009, and advised Petitioner he would not be permitted to raise an ineffective assistance of counsel claim against Proctor for conduct occurring after that date. (Att. 5, Tr. of Jan. 2009 hearing, pg. 21).

application with prejudice. Petitioner filed a motion to reconsider, which was denied. Petitioner filed a Petition for a Writ of Certiorari, and the Supreme Court of South Carolina granted certiorari. On February 1, 2019, the Court remanded the order to the circuit court, instructing the court to address each allegation raised by Petitioner.

On June 14, 2019, Judge Jefferson issued an amended order denying relief and dismissing Petitioner's PCR claims with prejudice. ***Pertinent to the current action, Judge Jefferson found Petitioner did not prove any allegation related to a 911 tape he believed the State purposefully destroyed or untested blood evidence.*** (Att. 19, PCR Or. Of Dismissal, pg. 15-20).[2] Petitioner filed a petition for a writ of certiorari, which was denied on May 18, 2022. The remittitur was sent October 20, 2022.[3]

Pro se Rule 60(b) Motions

On June 7, 2022, Petitioner filed a motion pursuant to Rule 60(b), raising various allegations of fraud and misconduct, including:[4]

1. Police engaged in misconduct by purposely destroying exculpatory evidence;

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[2] The enumeration of the pages in the Appendix is random and incomprehensible; thus, Respondent will cite to each document by its Attachment Number (as listed in the Index) and the internal page number of that document. Respondent notes the order denying the Rule 60(b) motions in the Appendix contains Petitioner's handwritten notes, which are improper for inclusion in the Appendix. Cf. Rule 210(c), SCACR ("The record shall not, however, include matter which was not presented to the lower court or tribunal."). Respondent respectfully asks the Court to strike Petitioner's notes and not consider them in its consideration of this petition.

[3] On February 15, 2023, Petitioner filed a petition for habeas in the Federal District Court (C/A No. 9:23-00089-MGL). On January 29, 2024, the district court issued an order granting Respondent's motion for summary judgment and dismissing Petitioner's amended petition with prejudice. Petitioner filed a motion to reconsider, which was denied. Petitioner has now filed a Rule 60(b)(1) motion in the federal court seeking to set aside the order dismissing his action.

[4] These allegations are set forth as Petitioner raised them; however, Respondent has corrected minor grammatical errors and removed some of the individual names.

2. Fraud upon the court is proven by a December 2015 affidavit from Kriston D. Neely, where she admits the City of North Charleston destroyed a 911 recording and CAD report pertaining to Petitioner's criminal trial on June 25, 2006, and March 25, 2009, in compliance with its retention policy; and

3. The Supreme Court of South Carolina found the PCR court's first order of dismissal did not address all grounds raised.

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

I. "PCR Judge Deadra Jefferson knowingly committed fraud upon the court, and misconduct along with [the assistant attorney general]. Both officers of the Court were made aware on December 14, 2014, that the State committed misconduct; Fraud/and or nondisclosure (2) Intentional nondisclosure of material facts (3) fraud upon the Court (4) spoilation of evidence."

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

III. "[Former Assistant Attorney Generals] are fully aware that the State failed to produce documents during Petitioner's trial held in 2009. Applicant has appealed, and filed a [PCR] application in April 4, 2013."

IV. "[The Assistant Attorney General] filed fraudulent documents with the court preventing Petitioner from fully presenting his case and being heard. This constitutes fraud."

V. The solicitors presented perjured testimony during Petitioner's trial. Judge Young "explained that perjury needed to be handled after Petitioner's trial once he received the trial transcript."

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

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

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

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

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

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

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

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

1. A party may seek to set aside a final judgment for fraud upon the court independent of Rule 60(b)(3) grounds for relief for fraud;

2. Petitioner is not seeking a successive PCR; rather, he is moving pursuant to Rule 60(b)(3) based upon fraud upon the Court;

3. "PCR judge committed fraud upon the Court by stating in its order Applicant did not present trial counsel [at the hearing] to testify eliminating the Court's ability to make an independent factual determination as to what advice, if any, trial counsel provided regarding the consequences of his proceeding pro se."

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

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

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

7. The solicitors committed fraud upon the court; the Ninth Circuit Solicitor's Office was served with Rule 5 & 6, SCRimP, motions requesting all evidence be provided to Petitioner's defense pursuant to Brady. Petitioner presented material evidence that a 911 tape did exist during March 25, 2006. See Kriston D. Neely Affidavits as exhibits in this record. During Petitioner's second trial, the solicitor told the judge that the solicitor's office did not subpoena the 911 tape from North Charleston Police

Department. See trial transcript page 634 line 6-25. This constitutes fraud upon the court."

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

On November 11, 2022, Petitioner filed a Rule 60(b)(5) motion alleging

1. The South Carolina Supreme Court granted, vacated, and reversed the PCR judge order on February 2, 2019. The prior judgment upon which it is based has been reversed or otherwise vacated, due to the facts that the judge did not make specific findings of fact and conclusions of law on each issue presented during Petitioner's PCR hearing.

2. The PCR judge issued an amended order in which Petitioner timely filed a Rule 59(e) motion objecting to the sufficiency of the order. Petitioner established his entitlement to relief by a preponderance of the evidence. During the PCR hearing, Petitioner presented affidavits by Kriston D. Neely that attest that the State committed misconduct by failing to disclose material evidence, which Petitioner could have used in his defense to impeach witness.

3. Petitioner complained during trial that his attorney had made specific request for the evidence. Attorney Lorelle Proctor explained to the trial that she specifically requested the material evidence.

4. The State committed misconduct under 60(b)(3), when the solicitors stated they did not subpoena the 911 tape.

5. The evidence was exculpatory. Petitioner testified during the PCR hearing that the 911 tape was material evidence that contradicted witness testimony. This witness, Cerenda Snowden, gave multiple statements to police and admitted to lying to police.

6. Judge Young said he would allow Petitioner to play the 911 tape to the jury, but the State indicated the 911 tape did not exist.

7. Petitioner presented an affidavit by Kriston D. Neely attesting the 911 tape did exist but was later destroyed. Petitioner was unable to obtain an adverse jury instruction because of

misconduct by State, in which the judge believed the evidence did not exist.

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

9. The South Carolina Supreme court vacated the PCR court's order and mandated that the judge issue an amended order that complied with the law. The Supreme Court also mandated that the PCR court issue an order within 30 days of the Supreme Court's order, dated February 2, 2019. The PCR court failed to issue an order in a timely manner. The order was issued in June of 2019. Petitioner filed a notice of appeal and a Rule 59(e) motion to preserve his rights.

10. Petitioner is entitled to relief under Rule 60(B)(5), SCRCP, because the prior judgment was vacated by the state Supreme Court.

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

On May 18, 2023, Petitioner filed an affidavit asserting he acted with due diligence in discovering the 911 tape was destroyed and detailing the steps he took to obtain the tape. Petitioner again averred the destruction of this evidence prevented him from fully defending his case.

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

1. The solicitors committed fraud by concealing a 911 tape that was destroyed before Petitioner's trial. The 911 tape could have been used in Petitioner's defense to show he did not commit the crime and to rebut the State's theory. The fraud continued through court appointed public defender who coerced Petitioner to waive his right to counsel and committed perjury by informing the Court that Petitioner filed a motion to withdraw counsel. There is no record to support Lorelle Proctor's arguments.

2. The fraud upon the court continues throughout Petitioner's PCR hearing, where the Assistant Attorney General was made aware of the State's misconduct. Instead of moving for a new trial, the State drafted a fraudulent order for the PCR judge to sign. This order constitutes fraud upon the court because it prevents Petitioner from presenting his defense.

3. The PCR judge's order is more evidence of fraud upon the court committed by officers of the court. The order prevented Petitioner from presenting his case.

4. The proposed order submitted by the Assistant Attorney General prevents Petitioner from presenting his defense where evidence was proved to have been intentionally destroyed by the State. This misconduct is evidence of fraud upon the court under Rule 60(b)(3).

5. Kris Neely's affidavit is sufficient evidence the police destroyed material evidence in Petitioner's criminal case. This is evidence of fraud upon the court.

6. State witness Cerenda Snowden gave false statements to police and committed perjury during Petitioner's first and second trial.

7. North Charleston Police Officer Angela Bunker committed perjury when she testified about the collection of DNA blood evidence.

8. The PCR judge did not allow Petitioner to call counsel Lorelle Proctor as a witness, denying Petitioner his one bite of the apple. This denial is more evidence of fraud upon the court.

9. The solicitor admitted he did not subpoena the 911 tape. This is evidence of misconduct and fraud upon the court.

10. The trial court denied Petitioner's motion for a charge on spoilation of evidence.

On June 12, 2023, Petitioner filed a Reply to Respondent's Return, wherein he reiterated many of his prior arguments and asserted Respondent's return was another example of fraud upon the Court. On June 22, 2023, Petitioner field a Motion to Strike Respondent's Return, again asserting Respondent's return was an attempt to defraud the court. Petitioner alleged:

1. Respondent's return is not supported by facts.

2. Kris Neely's affidavit was introduced at the PCR hearing, where she admitted the 911 tape was destroyed.

3. State witness Cerenda Snowden was not credible, gave different accounts to law enforcement, and committed perjury.

4. The solicitor admitted he did not subpoena the 911 tape, which is evidence of fraud upon the court.

5. The return does not address the fact the South Carolina Supreme Court vacated the PCR court's first order.

6. "The PCR judge's order does not comply with the law due to the existing facts that the State prevented Applicant from presenting his defense at trial and during civil proceeding (PCR). This constitute extrinsic fraud."

7. "The failure to collect DNA evidence, so that the evidence could have been sent to SLED for testing prevented Applicant form presenting his defense."

8. "The facts that Angela Burke committed perjury constitutes fraud."

On June 29, 2023, Petitioner filed a motion for a new trial based on newly-discovered evidence pursuant to Rule 60(b)(2). In that motion, he alleged new evidence in the form of an April 27, 2023, affidavit filed by his brother alleging Petitioner was with him in Georgia when this murder was committed in 2006.

On July 28, 2023, Respondent filed an amended return addressing all of Petitioner's Rule 60(b) motions. On August 2, 2023, the Honorable Roger M. Young, Sr., issued an Order Denying Petitioner's Rule 60(b) Motions and his Motion to Strike Respondent's Return. Pertinently, the Court found (1) the motions were untimely; (2) the allegations related to a 911 call and untested blood evidence were barred by res judicata; (3) Petitioner did not make a prima facie showing of extrinsic fraud; (4) Rule 60(b) is not a substitute for an appeal; (5) Petitioner did not make a prima

facie showing that the Amended PCR Order was void; and (6) Petitioner did not make a prima facie showing of newly discovered evidence. Petitioner filed a motion to reconsider, which was denied.

Standard of Review

The standard of review for PCR depends on the specific issue before the appellate court. Smalls v. State, 422 S.C. 174, 810 S.E.2d 836, 839 (2018). When reviewing factual findings, the appellate courts defer to the PCR court's findings and will uphold them if any probative evidence in the record supports them. Buckson v. State, 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018); Smalls, 422 S.C. at 180-81, 810 S.E.2d at 839-40. Further, appellate courts "defer to the PCR court's credibility findings as to witnesses who testified before the PCR court." Thompson v. State, 423 S.C. 235, 247, 814 S.E.2d 487, 493 (2018). Pure questions of law are reviewed *de novo* without deference to the PCR court. Id. Appellate courts will reverse the decision of the PCR court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012). ***When reviewing procedural issues arising under the PCR Act or the South Carolina Rules of Civil Procedure, appellate courts apply an abuse of discretion standard.*** Mangal v. State, 421 S.C. 85, 92, 805 S.E.2d 568, 571 (2017) (emphasis added). "An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support." Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013).

ARGUMENT

1. The circuit court did not abuse its discretion in finding Petitioner's Rule 60(b) Motion was untimely when the rule requires such motions to be made within a reasonable time and motions pursuant to (1), (2), and (3) to be made not more than one year after the order is entered; the amended order was entered June 14, 2019; and Petitioner's Rule 60(b) motions were not filed until June 7, 2022, and later.

Petitioner first contends the circuit court abused its discretion by incorrectly calculating the time limit Petitioner had to file his Rule 60(b) motions. He contends his appeal of the amended order acted as an automatic stay of the order, making his motions timely. (Pet. 6-7). However, based on the plain language of the rule, the circuit court did not abuse its discretion in finding these motions—the first of which was filed nearly three years after the amended order—were untimely. Further, Petitioner has not cited any case showing the time for filing a Rule 60(b) motion is stayed during the pendency of an appeal, and the rule itself contemplates a remand for the consideration of a Rule 60(b) motion filed during the pendency of an appeal. Thus, the circuit court did not abuse its discretion in finding these motions untimely.

"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." Rule 60(b), SCRCP. "During the pendency of an appeal, leave to make the motion must be obtained from the appellate court." Id.

The circuit court did not abuse its discretion in finding these motions were not timely. Notably, the motions made pursuant to sections (1), (2), and (3) were barred by the plain language of the Rule itself. See Coleman v. Dunlap, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992) ("The rule clearly states that ***a motion under 60(b)(1)–(3) must be made*** within a reasonable time ***no later than one year from the original judgment.***" (emphasis added)); id. ("The petitioners are correct in stating that ***one year is the absolute time limit.***" (emphasis added)). Here, the amended order

was filed on June 14, 2019, and Petitioner did not file his first Rule 60(b) motion until June 7, 2022—nearly three years later, and two years beyond the one-year limit prescribed by the rule.

Likewise, the circuit court did not abuse its discretion in finding the motions made pursuant to Rule 60(b)(4) and (5) were not filed within a reasonable time. Although the amended order was filed June 14, 2019, Petitioner waited until November 11, 2022, to file a motion under Rule 60(b)(5), and until May 22, 2023, to file a motion under Rule 60(b)(4). The circuit court did not abuse its discretion in finding these motions were not made within a reasonable time.

Petitioner's assertion that his appeal of the amended order tolled the time for filing the motion lacks support. Although the notice of appeal divested the circuit court of jurisdiction, the rule itself contemplates a remand for purposes of consideration of a Rule 60 motion during the pendency of an appeal. See Rule 60(b) ("During the pendency of an appeal, leave to make the motion must be obtained from the appellate court."). Petitioner has not cited to any caselaw to support his contention that the appeal tolled the time for filing the motion. In the absence of law to support this argument, the circuit court judge did not abuse its discretion in finding the motions were untimely—especially in light of the plain language of the rule setting a timeframe on the filing of the motion. See Ware v. Ware, 404 S.C. 1, 10, 743 S.E.2d 817, 822 (2013) ("An abuse of discretion occurs when the order of the court is controlled by an error of law or where the order is based on factual findings that are without evidentiary support."); cf. Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985) ("A motion made under [Rule 60(a), SCRCP,] does not toll the running of the time for appeal.").

2. The circuit court did not abuse its discretion in finding Petitioner's arguments related to a 911 call and untested blood evidence were barred by res judicata when (a) these issues were addressed in the PCR court's amended order of dismissal, (b) Petitioner did not set forth a prima facie showing of *extrinsic* fraud, and (c) Petitioner is improperly using a Rule 60 motion to attack a general sessions conviction.

Petitioner argues the circuit court abused its discretion in finding his claims related to a 911 call and untested blood evidence were barred by res judicata. Specifically, he asserts res judicata does not apply because he made a prima facie showing of extrinsic fraud, which he contends is an exception to res judicata. He contends the following constitute extrinsic fraud: (1) the solicitor asserted all evidence was disclosed and no evidence was suppressed; (2) the solicitor suppressed a 911 call and the identity of the 911 caller, which would have impeached witness Ceranda Snowden; (3) the solicitor concealed the 911 call by objecting to the CAD report; (4) the solicitor presented perjured testimony through witnesses Angela Bunker and Ceranda Snowden; (5) the solicitor admitted he did not subpoena material evidence (the 911 call) from the North Charleston Police Department despite counsel's request for such information; and (7) trial counsel did not subpoena a witness Petitioner wanted at trial, which constituted misrepresentation.

Petitioner also argues the PCR court erred in (1) not allowing him to call trial counsel as a witness at the PCR hearing; (2) not allowing him to raise extrinsic fraud or misrepresentation; (3) ruling he did not prove prosecutorial misconduct without a hearing; (4) issuing an order that did not comply with the Rules; and (5) failing to make credibility findings. Finally, he asserts he acted promptly in filing these motions.

However, the circuit court properly found Petitioner's allegations related to untested blood and the 911 call were barred by res judicata, and Petitioner did not make a prima facie showing of extrinsic fraud. Further, Petitioner's allegations related to the PCR court's order should have been raised on appeal and are not proper for a Rule 60(b) motion. Finally, this Court should not fall for

Petitioner's attempt to use a Rule 60 motion to attack an underlying general sessions conviction.

a. The circuit court properly found Petitioner's allegations related to untested blood and the 911 call were barred by res judiciata.

The circuit court properly found Petitioner's claims related to a 911 call and untested blood evidence are barred by res judicata. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Under the doctrine of res judicata, [a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Id. (internal quotation marks omitted) (alteration in original). "To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id.

Petitioner's claims related to a 911 call and untested blood evidence were addressed by the PCR court in its Amended Order of Dismissal. Regarding the 911 call, the PCR Court found "[t]he trial record is abundantly clear that the Solicitor's office did not ever have the 911 tape in its possession"; Petitioner—who proceeded pro se at trial—never sought to enter the CAD report into evidence at trial; Petitioner did not prove a Brady violation; and appellate counsel was not ineffective for not raising the preserved issue related to the 911 call. (Att. 19, pg. 15-17, 19-20). Likewise, the PCR court addressed the issue of the untested blood evidence and found it did not constitute a Brady violation. (Att. 19, pg. 17-20). These issues have been previously litigated as part of this same proceeding with the same parties, and the circuit court properly found they are barred by the doctrine of res judicata.

b. The circuit court properly found Petitioner did not make a prima facie showing of extrinsic fraud.

Petitioner's allegations of extrinsic fraud relate to conduct that occurred *at the trial itself.* These allegations thus amount to intrinsic—not extrinsic—fraud. Thus, the circuit court properly denied this claim.

"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. (internal quotation marks omitted). "Intrinsic fraud, on the other hand, is fraud presented and considered in the trial. Id. at 431-32, 529 S.E.2d at 718. "For example, perjury is intrinsic fraud and will not support an action to set aside the judgment." Id. at 432, 529 S.E.2d at 718. "In addition, the failure to disclose to an adversary or court matters which would defeat one's own claim is intrinsic fraud." Chewning v. Ford Motor Co., 354 S.C. 72, 81, 579 S.E.2d 605, 610 (2003). "Relief is granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments." Id. at 82, 579 S.E.2d at 610.

Petitioner's allegations of fraud related to the 911 call was raised at trial and litigated in the PCR action. Far from an "intentional scheme to defraud the court," Chewning, 354 S.C. at 82, 579 S.E.2d at 610, the solicitor here candidly told the trial court he did not subpoena the 911 call and it had been destroyed. (Att. 6, Trial Tr., 631-36). Thus, this is not a prima facie showing of extrinsic fraud.

Likewise, Petitioner's allegations of perjury are not allegations of extrinsic fraud.[5] See id.

[5] Although the subornation of perjury by an attorney can form the basis of extrinsic fraud, Petitioner's allegations of suborned perjury here relate only to his general sessions trial—not the

("[P]erjury is ***intrinsic*** fraud and will not support an action to set aside the judgment." (emphasis added)). Finally, Petitioner's allegations of ineffective assistance of counsel and PCR court error are not allegations of extrinsic fraud. Rather, as discussed below, the remedy for perceived errors in an order is through an appeal. Because Petitioner did not make a prima facie showing of extrinsic fraud, the circuit court properly denied his motions to set aside the judgment based on fraud.

c. Petitioner is improperly using a civil court motion to attack his general sessions conviction.

Petitioner is improperly using a Rule 60(b) civil court motion to attack his general sessions conviction. Critically, most of his allegations of fraud relate to the general sessions trial. Rule 60 is a rule of *civil procedure* that does not apply in general sessions. Although Petitioner can use Rule 60 to challenge the PCR proceeding, he cannot use Rule 60 to challenge the general sessions conviction. The general sessions conviction was properly challenged through Petitioner's collateral PCR action, and the issues related to the untested blood and the 911 call have been litigated through that procedure. To the extent Petitioner complains about alleged errors in the PCR order, the remedy for that is an appeal—which Petitioner has had. Petitioner had his full bite of the apple, and this Court should deny his attempt to relitigate this issue and devour a second apple through the filing of a Rule 60(b) motion.

3. The circuit court did not abuse its discretion in finding Petitioner did not make a prima facie showing that the amended order was void when the circuit court was complying with a directive from the Supreme Court of South Carolina in issuing the amended order and had jurisdiction to do so.

Petitioner asserts the circuit court abused its discretion in ruling Petition did not make a prima facie showing that the amended order was void. He asserts, "A void ordered [sic] is one

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PCR hearing itself. As set forth below, Rule 60 is a *civil* rule and is not an appropriate mechanism for attacking a general sessions conviction. Petitioner has had an opportunity through this PCR action to raise allegations of prosecutorial misconduct—which he has already done.

rendered in the absence of proper due process, or judgment from Courts which lacked jurisdiction or personal jurisdiction." (Pet. 15). Petitioner contends—for the first time—that the amended order is void because the PCR court denied his procedural due process right to a hearing on ineffective assistance of trial counsel and adverse misconduct claims. However, the PCR court properly found Petition did not make a prima facie showing that the amended order was void.

"The definition of void under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." Universal Benefits, Inc. v. McKinney, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). "A judgment is not rendered void by irregularities which do not involve jurisdiction." Id. at 183, 561 S.E.2d at 661.

Here, the circuit court properly found the amended order was not void because the PCR court was complying with a directive from the South Carolina Supreme Court in issuing the amended order. Petitioner's reliance on an alleged procedural due process violation to support his contention that the order is void was not presented to the circuit court in Petitioner's numerous Rule 60(b) motions or in any of his *four* motions to reconsider the order denying his Rule 60(b) motions. Thus, that argument is not preserved.

Further, Petitioner's reliance on an alleged procedural due process violation to argue the order is void is misplaced here where he does not allege a lack of personal or subject matter jurisdiction. See id. ("A judgment is not rendered void by irregularities which do not involve jurisdiction."). To the extent anything in Petitioner's argument can be construed as asserting the PCR court lacked jurisdiction to issue the amended order, the PCR court had subject matter jurisdiction over this action pursuant to section 17-27-30 of the South Carolina Code. Finally, Petitioner himself filed this PCR action, and any contention that the PCR court lacked personal

jurisdiction over him would be patently without merit. The PCR court thus did not abuse its discretion in dismissing this motion.

4. The circuit court did not abuse its discretion in finding Petitioner did not make a prima facie showing of newly-discovered evidence when his "newly discovered evidence" was an alibi defense he asserted for the first time more seventeen years after the murder, and more than thirteen years after his criminal conviction.

Petitioner contends the circuit court erred in finding he did not make a prima facie showing of newly-discovered evidence. Specifically, he contends Terrance Prizzie's affidavit, dated April 25, 2023, constitutes newly-discovered evidence of an alibi. This argument patently lacks merit.

> A party requesting a new trial based on after-discovered evidence must show that the evidence: (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) *Could not by the exercise of due diligence have been discovered before the trial*; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (emphasis added).

Here, ***Petitioner asserts for the first time more than seventeen years after the murder that he was with his brother in Georgia at the time of the murder***. Petitioner's late, last-ditch attempt at an alibi does not meet the high threshold for newly-discovered evidence. No one was in a better position than Petitioner himself to know where he was in March 2006. The PCR court properly found this evidence could have been discovered with due diligence before trial and thus did not constitute newly-discovered evidence.

5. The circuit court did not abuse its discretion in ruling Petitioner's Rule 60(b)(5) motion was not brought within a reasonable time when this motion was filed more than three years after the PCR court entered its amended order, and Petitioner is merely attempting to circumvent the appellate process through the filing of this motion.

Petitioner contends the circuit court abused its discretion in ruling his Rule 60(b)(5), SCRCP, motion was not brought within a reasonable time. In support of this argument, Petitioner

argues (1) the amended order does not comply with the Supreme Courts' remand mandate and (2) the PCR court erred in finding his trial attorney was constitutionally effective. He asserts these errors create "a defect in the integrity of the post conviction relief proceeding which require the judgment to be set aside." (Pet. 19-20). However, the circuit court did not abuse its discretion.

A motion pursuant to Rule 60(b) "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." Rule 60(b), SCRCP. "Subsection (5) is notably not limited by the one year provision, but only that of a reasonable time." Evans v. Gunter, 294 S.C. 525, 528, 366 S.E.2d 44, 46 (Ct. App. 1988) (emphasis added). Here, the amended order was entered on June 14, 2019, and Petitioner waited until November 11, 2022, to file a Rule 60(b)(5) motion. The circuit court did not abuse its discretion in finding this motion was untimely when it was filed over three years after the amended order. In his petition, Petitioner focuses on mistakes he believes the PCR court made it its amended order. However, as set forth more fully below, the appropriate venue for addressing his perceived errors in the PCR court order was through the appellate process—not through the filing of a circuit court motion. Petitioner has not set forth a compelling argument showing the circuit court abused its discretion in finding his Rule 60(b)(5) motion was not filed within a reasonable time.

6. The circuit court abuse its discretion in denying Petitioner's Rule 60(b)(1) motion when Petitioner is merely attempting to circumvent the appellate process through the filing of a Rule 60(b) motion.

Petitioner argues the circuit court abused its discretion in denying his Rule 60(b)(1) motion because the amended PCR order contained mistakes. He contends (1) the amended order "does not remedy the February 1, 2019 order, and is error of law and fact"; (2) the PCR court unreasonably decided counsel was constitutionally effective without holding a hearing; and (3) "the facts regarding whether trial counsel articulate a strategic reason for failure to obtain evidence during

the three years of representation is not before this Court, nor strategic reason for failure to subpoena Jenie Fowler and Terence Prizzie." (Pet. 21). However, the PCR court properly found the avenue for challenging the amended order was through an appeal (which Petitioner has already had).

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

Petitioner's arguments here center on his perceived errors with the PCR court's amended order. However, these are all allegations of PCR court error that he could have pursued on appeal. Petitioner appealed of the denial of his PCR application, but the Court of Appeals denied certiorari. This Court should not fall for Petitioner's attempt to circumvent the decision of the Court of Appeals by filing a Rule 60(b) motion. Likewise, to the extent Petitioner is now raising allegations of PCR court error that he did not raise in his appeal, Petitioner cannot do so using a Rule 60(b) motion. Thus, the PCR court properly denied Petitioner's Rule 60(b)(1) motion.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for a Writ of Certiorari.

Respectfully Submitted,

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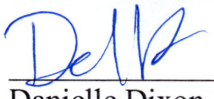

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This 28th day of February, 2025.