STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) FOR THE TWELFTH JUDICIAL CIRCUIT

Timothy L. Johnson, #370487,) CASE NO. 2024–CP–21–00870

Applicant,

v.) **CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

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DORIS POULOS O'HARA
CCCP & GS
FLORENCE COUNTY, SC
FILED

This matter comes before this Court by way of a successive application for post-conviction relief filed by Applicant Timothy L. Johnson on April 10, 2024. In response, Respondent, the State of South Carolina, moved for the matter to be summarily dismissed as 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). After a review of all records before this Court, the current application, and Respondent's motion to dismiss, this Court provisionally dismisses this action based on the following:

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for the State Grand Jury. On October 22, 2015, the State Grand Jury indicted Applicant for one count of trafficking in heroin greater than 28 grams, seven counts of distribution of heroin, one count of possession with intent to distribute heroin, and one count of trafficking heroin greater than 28 grams (conspiracy) (2015-GS-47-0021, -0022) as part of a multi-count, multi-defendant

indictments stemming from an investigation into a heroin trafficking ring. Brendan P. Barth, Esquire (Plea Counsel), represented Applicant. Assistant Attorney General David Fernandez of the South Carolina Attorney General's Office prosecuted the case.

On August 1, 2016, Applicant entered into a written plea agreement, in which he agreed to "fully and truthfully cooperate with the Office of the Attorney General of South Carolina, and any local, state and federal law enforcement agents in their investigation of importation, possession, and distribution of controlled substances and related unlawful activities," in exchange for a negotiated sentence range of an aggregate eighteen to twenty-two years imprisonment. As part of this plea agreement, Applicant expressly waived his right to both a direct appeal and post-conviction relief action. ("The Defendant, Timothy Leverne Johnson, agrees that as a part of the consideration for this plea he will not appeal his plea of guilty or any sentence he receives in General Sessions Court in South Carolina. The Defendant, Timothy Leverne Johnson, acknowledges that he understands that he has a right of direct appeal of his guilty plea or sentence and that he knowingly, voluntarily and expressly waives this right of direct appeal. Additionally, the Defendant, Timothy Leverne Johnson, understands that he has a right to file a post-conviction relief (PCR) action in this case but agrees to knowingly and voluntarily waive any post-conviction relief action except for claims that directly attack the effectiveness of advice to agree to this waiver.") Applicant initialed each page of this written plea agreement and signed this plea agreement.

The following day (August 2, 2016), Applicant appeared in the Florence County Court of General Sessions before the Honorable Roger E. Henderson, circuit court judge, and pursuant to the signed plea agreement, pled guilty to seven counts of distribution of heroin and one count of possession with intent to distribute heroin as indicted, and to the lesser-included offenses of

trafficking in heroin (4-14 grams) and trafficking in heroin (4-14 grams) (conspiracy). Judge Henderson accepted Applicant's plea and deferred sentencing.

On November 14, 2016, Applicant again appeared before Judge Henderson for a sentencing proceeding. At this hearing, Judge Henderson sentenced Applicant to an aggregate nineteen years imprisonment. Applicant did not file a notice of appeal.

FIRST PCR ACTION AND APPEAL: 2017-CP-21-0952

On April 13, 2017, Applicant filed a *pro se* application for post-conviction relief (2017-CP-21-0952), alleging the following ground for relief:

1. Ineffective assistance of counsel: "Trial counsel failed to conduct factual and legal investigation"
2. "State Grand Jury unconstitutional assembled, evidence inadmissible: Grand Jury lacked probable cause to indict and violate fair cross section"
3. "Conviction obtained in violation of constitutional rights: rights were violated when no warrants were served for arrest-detention."

On October 6, 2017, Respondent served its return to the application and made a partial motion to dismiss, seeking summary dismissal of all claims beyond whether counsel was ineffective for advising him to enter the written plea agreement waiving his rights to challenge his conviction through post-conviction relief pursuant to the written plea agreement.

On January 25, 2018, Applicant, through counsel, amended his application to include the following additional allegations:

1. Counsel was ineffective for failing to properly advise Applicant regarding entry into a plea agreement that would constitute a waiver of Applicant's appellate and post-conviction relief rights.
2. Counsel was ineffective for failure to meet with Applicant in a sufficient amount for Applicant to understand the nature of the allegations against him, any potential defenses he may have had, and the State's burden of proof with respect to his charges, thus rendering Applicant's plea involuntarily entered into. Counsel was ineffective for misleading and misinforming Applicant that

all other defendants alleged in the indictment had agreed to cooperate against Applicant and that Applicant was the final remaining defendant, thus rendering Applicant's plea involuntarily entered into.

3. Counsel was ineffective for failure to investigate the facts and circumstances of alleged video and photographic evidence.

An evidentiary hearing was convened on February 2, 2018, at the Florence County Courthouse before the Honorable Michael G. Nettles, circuit court judge. Applicant was present at the hearing and represented by Jonathan D. Waller, Esquire. Senior Assistant Deputy Attorney General Megan Harrigan Jameson from the South Carolina Attorney General's Office appeared on behalf of the State. Testimony was taken from Applicant and Plea Counsel.

Judge Nettles denied the application from the bench. A written order of dismissal was filed on March 20, 2018, finding Plea Counsel's credible testimony established he properly advised Applicant of the terms of the plea agreement, including the waiver of post-conviction relief on all ground other than whether counsel was ineffective in advising him to enter into the plea agreement. Judge Nettles' written ruling made specific findings that Plea Counsel's testimony on the issues before the court were credible and dispositive while Applicant's testimony was not credible.

Applicant appealed the denial of post-conviction relief and was represented by Appellate Defender Victor R. Seeger of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who raised the following issue on appeal, "[w]hether trial counsel provided ineffective assistance of counsel when he failed to fully explain the consequences of the appellate review and post-conviction relief waiver in Petitioner's guilty plea, such that Petitioner's post-conviction relief waiver was not knowingly, voluntarily, or intelligently made?" Following receipt of Respondent's return, the matter was transferred to the South Carolina Court of Appeals pursuant to Rule 243(l), SCACR. The Court of Appeals subsequently denied the petition for certiorari on October 15, 2020. The Remittitur was returned on November 5, 2020.

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SECOND PCR ACTION: 2020-CP-21-02925

Applicant filed his *second* application for post-conviction relief on December 17, 2020, and alleged he was being held in custody unlawfully based on: "structural error, usurp autonomy." As requested relief, Applicant asked for his plea to be vacated. The State made its Return and Motion to Dismiss on February 4, 2021. Applicant made his Objection to State's Motion to Dismiss on February 19, 2021. The Honorable D. Craig Brown filed the Conditional Order of Dismissal on February 19, 2021. Applicant made another Objection to State's Motion to Dismiss on February 24, 2021. Applicant made a Motion for a New Trial on March 15, 2021. The Final Order of Dismissal was filed on April 9, 2021.

Applicant did not appeal.

CURRENT ACTION BEFORE THE COURT

In his successive application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on:

1. Newly Discovered Evidence
    a. Arrest warrants were based on false evidence, and new affidavits exonerate Applicant.[1]
2. Involuntary Guilty Plea
    a. Waiver of rights are invalid without informing Applicant of terms.

Applicant requests relief in the form of his conviction being vacated.

Attached to Respondent's Return and before this Court are the records of the State Grand Jury Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's first post-conviction relief action and subsequent appeal, second post-conviction relief action, and the records of the current PCR action.

[1] Notably, there were no "new affidavits" attached to Applicant's PCR application.

<u>FINDINGS OF FACT AND CONCLUSIONS OF LAW</u>

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 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. <u>See</u> S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); <u>Leamon v. State</u>, 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); <u>Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court</u>, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

SUMMARY DISMISSAL BASED ON NEWLY DISCOVERED EVIDENCE

Respondent moved this Court to summarily dismiss the application because Applicant's assertion that he is being held in custody unlawfully due to 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 he has new affidavits that exonerate him. However, Applicant has provided no such affidavits. 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 . . .").

Applicant has provided nothing to the Court to substantiate his claim of newly discovered evidence.

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). This Court finds Applicant has failed to make a *prima facie* showing of newly discovered evidence. Because his claims do not meet the

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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). Thus, Applicant is not entitled to an evidentiary hearing, and this matter shall be summarily dismissed.

Summary Dismissal Based on Successiveness

Respondent moved to summarily dismiss the application because it is successive to Applicant's prior post-conviction relief application. This Court agrees this action should be summarily dismissed as successive.

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been 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 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.

Section 17-27-90 is clear—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 or actions challenging this conviction. 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 the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. Applicant bears the

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burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

The South Carolina Supreme Court held the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." Aice, 305 S.C. 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 395. Here, Applicant has failed to show that a successive application is appropriate or why he could not have raised these claims, except for newly discovered evidence, in his prior post-conviction relief action. Accordingly, this Court finds this application should be dismissed as successive to Applicant's prior post-conviction relief action and intends to dismiss it on this ground unless Applicant can provide sufficient reasons why the successive action should be allowed to proceed forward.

SUMMARY DISMISSAL BASED ON THE STATUTE OF LIMITATIONS

Respondent also moved to summarily dismiss this application for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. 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

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> 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 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 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 allegations of newly discovered evidence and involuntary guilty plea. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Therefore, the application shall be summarily dismissed as barred by the statute of limitations. Accordingly, this application is untimely pursuant to § 17-27-45 and this Court finds it shall be dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act unless Applicant can provide a sufficient reason why he should be allowed to proceed forward on this untimely action.

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,

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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, other than newly discovered evidence, in his prior two PCR actions. The prior PCR Courts issued final judgments on the merits of the same or similar issues Applicant raised in this successive action. The finality of the previous court's rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata.*

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

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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]

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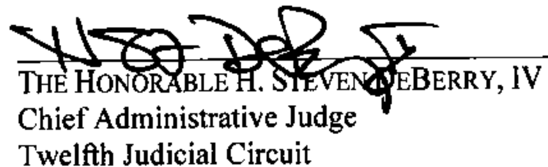
CONCLUSION

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

Office of the Attorney General
PCR Division – 12th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Florence 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 24 day of June, 2021.



THE HONORABLE H. STEVEN DEBERRY, IV
Chief Administrative Judge
Twelfth Judicial Circuit

Florence, South Carolina

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