STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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S.C. SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Jessica Ann Salvini, Presiding Judge

Appellate Case No.# 2026-001792

Kevin Harbin,..... Petitioner,

V.

State of South Carolina, and South Carolina Department of Corrections,.....Respondents.

PETITION FOR WRIT OF CERTIORARI

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Kevin Harbin

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CERTIFICATE OF COUNSEL

The Petitioner Pro Se, certifies that the Notice and Motion pursuant to Rule 59(e), SCRCP filed in the lower court post conviction relief proceeding was made on June 15 2026, and finally ruled on by the Greenville Court of Common Pleas on July 24,.2026

Date: October 13, 2026
Fairfax, South Carolina

Kevin Harbin
Kevin Harbin

Petitioner, Pro Se

PETITION FOR WRIT OF CERTIORARI

Comes Now, Kevin Harbin, by and through Pro Se, who petitions this Court for issuance of the Writ of Certiorari.

QUESTIONS PRESENTED

1. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, the State's failure to timely file a response within the ninety (90) days allotted by Rule 12, SCRCP, constitutes waiver, and all affirmative defenses, including statute of limitations, successive applications bar, and laches are deemed waived as a matter of law?
2. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, the statute of limitations defense is not jurisdictional and may be waived by the State?
3. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, in the alternative, even if the statute of limitations, successive application bar, and laches defenses were not waived, equitable tolling and the discovery rule for after-discovered evidence applies?
4. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, in the alternative, the successive applications bar does not apply because exceptions exist?
5. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, subject-matter jurisdiction of this Supreme Court and the Circuit Court is distinguishable from waivable affirmative defenses?
6. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, the lower court improperly entertained and granted the State's untimely return, and motions including motion to dismiss, and by sua sponte raising defenses on behalf of the defaulting State who had already waived said defenses, and forfeited all standing to participate in further proceedings?
7. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, remand for evidentiary hearing pursuant to S.C. Code Ann., § 17-27-80, Rule 55(e), SCRCP, and Rule 71.1, SCRCP, is necessary, just and proper?
8. Did the lower court err and commit abuse of discretion by dismissing the application for post-conviction relief, where, the lower court abdicated or failed to perform its duty to require the clerk of court comply with Rule 55(a), SCRCP, when the State was in default, and Petitioner made such default apparent by motion and supporting affidavit?

STATEMENT OF THE CASE

On June 10, 2024, within one-year of learning of the South Carolina Department of Corrections misinterpretation of his sentence and sentence-related statutorily mandated credits, Petitioner filed an application for post-conviction relief.

The State of South Carolina and the South Carolina Department of Corrections, had ninety (90) days in which to respond with a return, motion to dismiss, or to otherwise plead. On September 22, 2024, the ninety (90) day period elapsed without any timely return, motion to dismiss or pleading and those parties entered default.

Petitioner moved for entry of default on October 28, 2025. The clerk of court refused or failed to perform the ministerial duty of entering said default upon the calendar (file book).

Petitioner, subsequently filed motion to compel entry of default on December 10, 2025. The lower court never addressed this motion.

On March 9, 2026, the lower court signed a Conditional Order of Dismissal, before the State entered an appearance by filing its return and motion to dismiss the next day, on March 10, 2026.

After Petitioner's numerous objections, motions and memorandums of law were filed April 9, 2026, which were ignored and never addressed by the lower court, the conditional order became a Final Order of Dismissal on May 22, 2026. Petitioner was never served with nor provided opportunity to object to the proposed orders which were submitted directly to the presiding judge.

On June 15, 2026, Petitioner filed motion pursuant to Rule 59(e), SCRCP. The lower court denied the motion on July 24, 2026. This appeal follows.

STATEMENT OF FACTS

The record before this Court discloses that on February 7, 2024 and at the lastest on March 18, 2024, the Petitioner first became aware of the material facts for the claims and grounds set forth in his PCR application. On that date Petitioner discovered that the SCDC had misinterpreted his sentence and sentence-related credits mandated by statutory provisions, while discussing these matters with a caseworker in the Classification Department of the South Carolina Department of Corrections (SCDC). Moreover, these discoveries included the fact that the sentencing judge failed to specify the application of mandatory statutory sentence-related credits to Petitioner's sentence. The record contains the post-conviction relief application, which alleges the following:

> "S.C.D.C.'s misinterpretation and wrong application on February 7th, 2024, after becoming aware of the provisions in law for the first time, inquiry was made to classification kiosk Reference Number 24-03395801. In there (sic) response I was informed until they are shown the error, applicant's maxout would not change.
>
> On March 18th, 2024, applicant spoke with Chief Classification staff member in person and offered a copy of P.C.R. brief to read and she refues (sic) and responded to my kiosk Request # 24-03441115 until I receive a legal document from the [c]ourt they will not accept copy to review..."

Appendix, P-179, ¶ 11(B), of Application for Post-Conviction Relief. (Emphasis provided)

As a threshold matter, the record before this Court clearly reflects, the SCDC waived, and in fact, invited, the Petitioner to seek judicial remediation through the courts. It consents to suit. These facts are not in dispute.
Appendix, P-179, ¶ 11(B), of Application for Post-Conviction Relief (Emphasis supplied).

On June 10, 2024, less than one-year from the date of discovery of the SCDC's improper interpretation of Petitioner's sentence and sentence-related credits, Petitioner filed the above-referenced application for post-conviction relief. Appendix, P-176 through P-183.

The record further shows, that after the PCR application was filed, the clerk of court for Greenville County Court of Common Pleas served upon the South Carolina Attorney General's Office a copy of same that same day of June 10, 2024. Appendix, P-184.

The State, having been alloted a period of ninety (90) days, under Rule 12(a), SCRCP, in which to file a responsive pleading, motion to dismiss or otherwise defend in the matter as provided by the South Carolina Rules of Civil Procedure, failed to file such within that time. Ninety (90) days from June 10, 2024 elapsed on September 22, 2024.

The record before this Court further discloses that while the PCR application languished in the lower court, seventeen (17) months, and sixteen (16) plus days transpired amounting to a composite time elapse of five-hundreded and twenty-six (526) days late and out-of-time before the State on March 10, 2026 filed its

return, motion to dismiss, and motion to restrict future filings. Appendix, P-103 through 120.

The record before this Court makes abundantly clear that the South Carolina Department of Corrections never entered an appearance, nor filed any responsive pleading or motion to dismiss at all. Consequently, neither the State of South Carolina, nor the South Carolina Department of Corrections contest, refuted, nor dispute the material allegations set forth in the PCR application.

As a critical threshold factual matter in the questions presented to this Court for adjudication, is that fact that on September 22, 2024, both the State of South Carolina and the South Carolina Department of Corrections entered default. Thus, all affirmative defenses, which might have been asserted or raised by timely responsive pleading or motion, are deemed waived.

The record before this Court reflects that on October 28, 2025, the Petitioner, pursuant to Rule 55(a), SCRCP, filed a subsequent Request for Entry of Default, along with supporting Affidavit of Default, seeking the entry of the default of the Respondents upon the calendar (file book). Appendix, P-172 through P-175. The clerk of the lower court either refused or failed to enter that default, in stark violation of statutes, court rules, and his ministerial duty.

In light of the lower court clerk's refusal or failure to perform the ministerial duty to enter the default of the Respondents upon the calendar, the Petition on December 10, 2025, file a motion to compel such entry, addressed to the Chief Judge for Administrative Purposes, the same judge presiding in the post-conviction relief proceeding. That motion was ignored and never addressed by the lower court. Appendix, P-135 through P-139.

On March 2, 2026, the Petitioner filed with this Court his Petition for Exercise of Original Jurisdiction, Petition for Writ of Mandamus, Summons, Complaint and Affidavit advising this Court of the facts and circumstances above-referenced, seeking to compel the lower court clerk of court to enter the default of the Respondents upon the calendar as required by positive mandate of law. This Court declined to intervene, and issue a Key v. Currie Order on June 12, 2026, permitting the forewarned and foretold improper and unlawful conduct in question to continue un-checked. Appendix, P-014.

Having learned of Petitioner's mandamus related filings, the State on the inexcusably late date of March 10, 2026 and without leave of court, nor motion therefore, filed its return, motion to dismiss and motion to restrict future filings. Appendix, P-104 through P-120 No notice of motion was attached to any of these motions.

In light of both the lower court clerk's refusal, neglect, or failure to perform the ministerial duty or responsibility under Rule 55(a), SCRCP, to enter the default of the Respondents, and the lower court presiding judge's own refusal, neglect, or failure to rule on the the motion to compel entry of default, the

Petitioner on March 25, 2026, filed with this Court a Motion for Protective Order. Appendix, P-55. No ruling was forthcoming.

Petitioner was never served, nor given opportunity to object to neither the proposed Conditional Order of Dismissal, nor the un-conditional order restricting future filings before they were signed by the lower court. No Certificate of Service for these proposed orders is attached, and were submitted directly to the presiding judge, does not even mention having been served upon the Petitioner. Appendix, P-095 Moreover, the State's Certificate of Service related to its return and motions, do not even mention proposed orders being submitted to the presiding judge. Appendix, P-104.

The record before this Court shows that the lower court presiding judge, on **March 9, 2026, the day BEFORE THE STATE EVEN FILED** its untimely pleading and motions, had already signed a Conditional Order of Dismissal and an un-conditional order restricting future filings. Appendix, P-067, P-080.

The record moreover reflects that improper **ex parte communications** were held regarding these matters, and on **March 10, 2026** the State filed proposed Order of Dismissal and Order Restricting Future Filings. Thus, if we anticipate or believe the Respondents take on these facts, the presiding judge's granting of these proposed orders **BEFORE THEY WERE EVEN FILED OR SERVED UPON PETITIONER** is un-remarkable, and normal in the world of temporal phenomena. This spectre and state of affairs cannot be made up, nor imagined. The record speaks for itself.

On April 9, 2026, the Petitioner in response to this litany of legal outrages, fired back a barrage of legal objections and motions attempting to restore some semblance of order, and justice to the lower court proceeding. These motions, objections and memorandums of law, fell on the wilfully blind eyes and wilfully deaf ears of the lower court presiding judge. Those un-addressed pleadings included:

1. Objections/Amended Objections To Conditional Order of Dismissal and Order Restricting Future Filings, and memorandums of law. Appendix, P-046; and
2. Notice and Motion To Hold Proceeding in Abeyance, Appendix, P-039; and
3. Notice and Motion To Strike insufficient, impertinent or immaterial defenses due to default of the Respondents; Appendix, P-042; and
4. Notice and Motion To Remove The State As A Party, Appendix, P-044; and

The lower court issued its Final Order of Dismissal on May 22, 2026, and in no way, shape, or form, addressed any of the Petitioner's pleadings, objections, motions, or memorandums of law. Appendix, P-020 Instead, the order of dismissal merely regurgitated the State's untimely and waived affirmative defenses, including statute of limitations, successive applications bar, and laches Appendix, P-067.

Finally, the record before this Court reflects that on June 15, 2026, Petitioner filed motion pursuant to Rule 59(e), SCRCP,

pointing out deficiencies in the lower court's **ex parte born** Final Order of Dismissal. Appendix, P-004.

Under these circumstances, on June 26, 2026, the Petitioner sent a letter to the Chief Justice of this Court, asking it to intervene to prevent a miscarriage of justice. Appendix, P-018. No response was forth coming.

The lower court in an example of extraordinary recalcitrance, and judicial tone-deafness, on July 24, 2026, issued a Final Order Regarding Motion To Reconsider. Appendix, P-001

This petition for writ of certiorai follows.

STANDARD OF REVIEW

This Court's standard of review in post-conviction relief cases, "depends on the specific issue before us." Sellner v. State, 416 S.C. 606, 610, 787 S.E.2d 525, 527 (2016) "We defer to a PCR Court's findings of fact and will uphold them [i]f there is any evidence in the record to support them. Id. Questions of law are reviewed de novo, "and we will reverse the PCR Court's decision when it is controlled by an error of law." Id. (citing Jamison v. State, 410 S.C. 456, 465, 765 S.E.2d 123, 127 (2014))

Further, an "abuse of discretion" may be found by this Court where the appellant shows that the conclusion reached by the lower court was "without reasonable factual support, resulted in prejudice to the right of appellant, and therefore amounted to an error of law."
Dunn v. Dunn, 298 S.C. 499, 381 S.E.2d 734, Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974)

Here, the PCR Court's dismissal was based upon legal determinations which are questions of law, regarding the statute of limitations, successive applications bar, and laches. All are questions of law subject to de novo review. This Court owes no deference to the PCR Court's legal conclusions.

ARGUMENT

The Petitioner contends that based on the foreging facts and circumstances, as shown in the attached Appendix and the record shows that the lower court's dismissal of the post-conviction relief application was reversible error and abuse of discretion occasioned by error of law; and is without any evidentiary support for them in the record.

The entire premises propounded upon by the lower court in its order of dismissal is based entirely upon waived affirmative defenses, due to failure to timely plead them in a responsive pleading or motion to dismiss, and thus are deemed waivers, as a matter of law.

Moreover, it will be shown that the lower court order of dismissal is the product of ex parte communications between the lower court presiding judge and the State of State of South Carolina, whose motions bore no notice of motion, and whose proposed Conditional Order of Dismissal was not served upon Petitioner, while being submitted directly to the lower court presiding judge, who, before the State even filed its motion to dismiss or return, had already signed the Conditional Order of Dismissal the day before the State filed its proposed orders and motions. No evidence in the record supports the PCR Court's findings of fact and conclusions of law, thus no deference to them is possible.

It is physically and temporally impossible for the lower court to have been placed on notice of the State's pleadings, motions, and proposed orders, in advance of them being filed, but for improper and abusive ex parte communications.

Finally, a party in default, as here, is not permitted to

participate in further proceedings, has lost all standing to appear, and may not seek affirmative relief from the court, as was done in the instant case.

I. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION, WHERE THE STATE'S FAILURE TO TIMELY FILE A RESPONSE WITHIN NINETY (90) DAYS ALLOTED BY RULE 12, SCRCP, CONSTITUTES WAIVER, AND ALL AFFIRMATIVE DEFENSES, INCLUDING STATUTE OF LIMITATIONS, SUCCESSIVE APPLICATIONS BAR, AND LACHES ARE DEEMED WAIVED AS A MATTR OF LAW.

Under the Uniform Post-Conviction Relief Procedure Act, (UPCRA), the State, the respondent here, shall file its return or motion to dismiss in a timely manner. S.C. Code Ann. § 17-27-70(a)(2003)

Rule 12(a), SCRCP, governs PCR actions and required:

> "A defendant shall serve his answer ... unless the Court directs otherwise ... and provided further that the State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within .... 90 days, if it arises out of a trial."

(Emphasis provided)

When the State fails to comply with South Carolina Rules of Civil Procedure, it waives its own defenses.

The consequences of waiver are well-established. Under South Carolina Law, "[t]he failure to plead an affirmative defense is deemed a waiver of the right to assert it." (Emphasis supplied) Whitehead v. State, 352 S.C. 215, 222, 574 S.E.2d 200, 204 (2002)

This Court has expressly held that:

> "laches is an affirmative defense that must be pleaded, and the State waives it if not timely asserted."

Id. 221-222, 574 S.E.2d at 204 (Laches is an affirmative defense that must be pleaded. Rule 8(d), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it.")

The same principle applies equally to the statute of limitations defenses and successive applications bar. Adams v. State, 355 S.C. 125, 130, 584 S.E.2d 125, 128 (2003)(holding that the State may waive procedural defenses by failing to timely assert them.)

Here, the undisputed and un-refuted facts on record, plainly show that the State had ninety (90) days to respond. Instead, over five-hundred and twenty-six (526) days elapsed on March 10, 2026. Appendix, P-184; P-103 through P-120.

The State did not file any timely return, motion to dismiss, nor any other timely pleading. Further, the State filed no motion seeking leave to file an out-of-time return or motion to dismiss. Nor did the lower court grant any such extensions.

It was abuse of discretion, and error of law for the lower court to grant to the State relief it did not itself seek.

Moreover, it was error of law, and abuse of discretion for the lower court, in the face of the default of the Respondents,

to sua sponte raise affirmative defenses, the Respondents themselves waived at the close of September 22, 2024 when the ninety (90) days to respond elapsed, as a matter of law.

Here, it was abuse of discretion and error of law, as the lower court improperly resurrected from the dead the State's waived affirmative defenses, which the Respondents' themselves did not avail themselves of when given an opportunity to assert said defenses. Whitehead v. State, 352 S.C. at 222, 574 S.E.2d at 204 ("The State has waived its right to raise the affirmative defense of laches in this case.")

This Court has consistently held that the statute of limitations defense under S.C. Code Ann., § 17-27-45 **"are not jurisdictional and may be waived by the State."** Gary v. State, 347 S.C. 627, 629, 557 S.E.2d 662, 663 (2001); Wilson v. State, 348 S.C. 215, 219, 559 S.E.2d 581, 583 (2002)(**"[T]he one-year statute of limitations is not jurisdictional and may be waived.**")

In Wilson, this Court reversed the PCR Court's dismissal based on statute of limitations, and remanded for an evidentiary hearing. Id. at 219, 559 S.E.2d at 583.

Finally, there is no evidence in the record to even suggest much less support that an affirmative defense of any kind was timely asserted or raised, which the lower court could base its order of dismissal. Accordingly, the record is devoid any "any evidence" to support the lower court findings of fact and conclusions of law. A waived defense is no defense at all. The lower court's findings to the contrary constitute an error of law, and no deference is owed to such legal determinations against the weight of the evidence in the record before this Court which directly militates against and totally contradicts the lower court's findings and conclusions on the precise issues before the Court in this appeal.

II. THE LOWER COURT ERRED AND ABUSED ITS DISCRETION IN DISMISSING THE PCR APPLICATION, WHERE THE STATUTE OF LIMITATIONS IS NOT JURISDICTIONAL AND MAY BE WAIVED BY THE STATE.

This Court has repeatedly held that the PCR statute of limitations is not jurisdictional and is subject to waiver by the State. In Wilson v. State, 348 S.C. 215, 219, 559 S.E.2d 581, 583 (2002), this Court held:

> "the one-year statute of limitations is not jurisdictional and may be waived."

(Emphasis supplied)

In Wilson, this Court reversed the PCR court's dismissal based upon the statute of limitations, and remanded for an evidentiary hearing. Id. at 629-30, 557 S.E.2d at 664-65.

Talley v. State, 371 S.C. 535, 640 S.E.2d 878 (2007) further illustrated that the statute of limitations defense is **not an absolute bar**. Id. at 540-41, 640 S.E.2d at 881.

Here, because the State failed to timely raise the statute

of limitations, successive application, and laches defenses, they are all waived. The lower court erred and abused its discretion, and committed an error of law, by failing "to respect and apply the law" relevant to the **doctrine of waivers** to the precise legal questions of law before it to be adjudicated.

The lower court committed abuse of discretion, an error of law by ignoring, and further by not addressing the Petitioner's numerous objections, motions, pleadings and arguments in its orders of dismissal.

Finally, there is **no evidence** in the record to even suggest any viable statute of limitations, successive application, or laches defense has been **timely asserted** in a responsive pleading, or motion. Thus, no deference is owed to the lower court's findings of fact, if any, and conclusions of law, in the absence of any evidence to the contrary.

III. IN THE ALTERNATIVE, EVEN IF THE STATUTE OF LIMITATIONS, SUCCESSIVE APPLICATION BAR, OR LACHES DEFENSES WERE NOT WAIVED, EQUITABLE TOLLING AND THE DISCOVERY RULE FOR AFTER-DISCOVERED EVIDENCE APPLIES.

If this Court should somehow determine that the State did not waive all affirmative defenses, by failing to timely assert them, Petitioner is entitled to equitable tolling.

"**Equitable tolling is a doctrine to stop the running of the statute of limitations** and is reserved for extraordinary circumstances." Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 629 (Ct.App. 2008)

The Court of Appeals in Pelzer identified circumstances warranting equitable tolling:

1. extraordinary circumstances preventing the plaintiff from filing despite his or her diligence;
2. the plaintff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendants misconduct into allowing the filing deadline to pass; and
3. the plaintiff despite all due diligence, is unable to obtain vital information, bearing on the existence of his or her claim.

Id. 521, 662 S.E.2d at 620-21 (quoting 51 Am. Jur.2d Limitations of Actions, § 174 (2007)).

This Court also recognized that the ongoing mental incompetence may warrant equitable tolling of the PCR statute of limitations. Ferguson v. State, 382 S.C. 615, 620, 677 S.E.2d 600, 603 (2009)

Here, Petitioner's circumstances, having recently found out **on February 7, 2024** from the SCDC's Classification department, that they were improperly interpreting his sentence and sentence-related credits, and learning that the sentencing court had failed to specify to the SCDC that mandatory statutory

sentence-related credits applied, warrants equitable tolling of the statute of limitations. Appendix, P-176, P-179, ¶ 11 (B)

The State has in in no way contested, nor refuted the material allegations set forth in the well-pleaded allegations of the PCR application, nor in the requests for admission attached to the record before this court. Appendix, P-169

Furthermore, the Appendix, makes abundantly clear that the State, by operation of law of Rule 36(a), SCRCP, admitted to these material factual allegations, and as a direct result of the application of this rule, those factual allegations are deemed to be "conclusively established.". Id. Here, Petitioner's requests for admission militate against the State detrimetally as party admissions. The Petitioner's actual discovery of the material facts giving rise to his claim occurred on February 7, 2024, and at the latest on March 18, 2024, thus his filing of the PCR application on June 10, 2024 was clearly within one-year of the date of actual discovery.

The statute of limitations period begins to run when a party knows or should know, through exercise of due diligence, that a cause of action might exist. Poly-Med, Inc. v. Novus Scientific Pte. Ltd., 437 S.C. 343, 878 S.E.2d 896 (2022) Here, the SCDC invited the Petitioner to seek judicial relief, on February 7, 2024, and further for the first time informed the Petitioner of its erroneous interpretation and application of sentence-related credits, and of the sentencing court's failure to specific the application of mandatory statutory sentence-related credits. Petitioner exercise all due diligence in filing an actual grievance within a short time of these material fact discoveries. Appendix, P-176 and P-179, ¶ 11(B) referecing conversations with SCDC Classification officials, and kiosk messages pertaining to his formal grievances on the precise issue, Post-Conviction Relief Application. Under the "discovery rule", Petitioner clearly could not have known these facts until revealed by the very circumstances and information provided to him on February 7, 2024 and at the latest March 18, 2024, occuring on those dates. Thus, equitable tolling clearly applies, and is a component of the discovery rule itself.

S. C. Code Ann., § 17-27-45(C), specifically incorporates the discovery rule:

> "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 .... within one year after the date of actual discovery of the facts by the applicant...**"

Id. (emphasis provided) see also Coates v. State, 352 S.C. 500, 575 S.E.2d 557 (2003)

This is so, even if this Court finds that the statute of limitations defense was not waived.

IV. DID THE LOWER COURT ERR AND COMMIT ABUSE OF DISCRETION BY DISMISSING THE APPLICATION FOR POST-CONVICTION RELIEF, WHERE, IN THE ALTERNATIVE, THE SUCCESSIVE APPLICATON BAR DOES NOT APPLY BECAUSE EXCEPTIONS EXIST?

Even if this Court finds the State did not waive the successive applications defense, Petitioner is entitled to relief because exceptions to the successive applications bar apply.

"Successive PCR applications and appeals are generally disfavored." Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) However, South Carolina law "forbids a successive PCR application unless an applicant can point to "sufficient reason" why the new ground for relief asserted was not raised or not raised properly. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991)

Here, the record before the Court clearly shows that the material factual allegations in the PCR application, and the requests for admissions are deemed admitted as a matter of law.

Due to the State's failure to timely file a responsive pleading or motion to dismiss, and by operation of Rule 36(a), SCRCP, and Rule 8(d), SCRCP, the Respondents have admitted these material factual allegations. See Appendix, P-176, and specifically P-179, ¶ 11(B) of the Post-Conviction Relief Application.

Moreover, during the lower court proceeding, the State did not refute the Petitioner's arguments, objections, memorandums of law, nor any of the motions or pleadings filed by the Petitioner. They are uncontested, un-refuted, nor challenged. Thus, the allegations and contentions in those filings are conclusively established. No evidentiary hearing was convened below.

"When considering the State's motion for summary dismissal of an application, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant."
Leamon v. State, 363 S.C. 432, 434-435, 611 S.E.2d 494, 495 (2005) (emphasis provided)

The doctrine of "estoppel by silence" fully applies here, including the fact that Petitioner's February 7, 2024 discovery of the material facts pertaining to the SCDC's erroneous interpretations and the sentencing court's failure to specify the application of mandatory statutory sentencing-credits. Rushing v. McKinney, 370 S C. 280, 293, 633 S.E.2d 917, 924 (Ct.App. 2006) Because those facts were not discovered and could not have been discovered, even by exercise of reasonable or due diligence, this constitutes "sufficient reason" why the new grounds raised in the June 10, 2024 successive PCR application had not been previously been raised. The PCR application was duly filed within six (6) months of learning the material facts constituting a cause of action. Additionally, the Appendix clearly reflects the SCDC invited the Petitioner to seek resort to the courts. Appendix, P-176, and specifically, P-179, ¶ 11(B). The one-year statute of limitations clearly had not expired.

Even if this Court somehow finds the statute of limitations had already expired, the facts, and admissions on the record before this Court constitute "after-discovered evidence", and do not require equitable tolling be applied at all.

Under the discovery rule, the Petitioner's PCR filing on June 10, 2024, meets within the exceptions to successive PCR applications recognized by this Court in Aice v. State, supra.,

at 450, 409 S.E.2d at 394.

S.C. Code Ann., § 17-27-90 provides in pertinent part the following:

> "[a]ll grounds for relief available to the applicant . . . must be raised in his application,"

Unless this Court finds "there is sufficient reason" why they were not previously raised.

South Carolina courts recognize "rare procedural circumstances" in which successive application may be entertained, "such as if the court dismisses the first PCR." Odom, 337 S.C. at 361, 523 S.E.2d at 755. See also Tilley v. State, 334 S.C. 24, 30, 511 S.E.2d 368, 371 (1999)

Here, the Petitioner, clearly could not file a PCR application based upon facts and circumstances only recently learned from the SCDC Classification Department, which he did not discover before February 7, 2024 and at the lastest on March 18, 2024.

In Coats v. State, this Court unanimously found in favor of the appellant, where well after his sentence had become final, he learned from the South Carolina Department of Corrections, that his lawyer's parole advice was erroneous. There, the appellant, like Petitioner here, filed an internal grievance within the South Carolina Department of Corrections. This Court unanimously held that, the PCR application was filed within the statutory limitations period.

252 S.C. 500, 504, 575 S.E.2d 557,559 (2003)

There this Court held:

> "Petitioner's counsel argued that petitioner did not discover his claim until he was informed by the Department of Corrections that he was parole ineligible. . . Petitioner filed his PCR application immediately upon learning his parole ineligible status. . . . Petitioner filed his PCR application raising that claim within one year after the date of discovery of the fact that he was parole ineligible. Accordingly, we reverse the PCR court and remand this matter for an evidentiary hearing on the merits."

Id. 252 S.C. 500, 504, 575 S.E.2d 557,559 (2003)

Thus, Petitioner performed reason or due diligence in response to his recent communications with SCDC officials regarding his sentence and sentence-related credits. Applying that reasonable due diligence, within six (6) months, he filed a successive PCR application on June 10, 2024, well within the one-year statute of limitations period.

To the extent the lower court found differently, it amounts to an abuse of discretion, primarily because the lower court did not convene an evidentiary hearing to delve into and resolve the genuine material fact issues related to the statute of limitations, successive applications bar, nor laches untimely defenses.

Alternatively, because the State is bound by its own judicial admissions, and facts conclusively established by operation of law, the lower court committed reversible error in dismissing the application without convening an evidentiary hearing. Petitioner has shown an exception to the successive applications bar exists, and has been met.

V. DID THE LOWER COURT WERE AND COMMIT ABUSE OF DISCRETION BY DISMISSING THE APPLICATION FOR POST CONVICTION RELIEF, WHERE SUBJECT-MATTER JURISDICTION IS DISTINGUISHABLE FROM WAIVEABLE AFFIRMATIVE DEFENSES ?

This Court has held that "lack of subject matter jurisdiction may not be waived, even by consent of the parties." Brown v. State, 343 S.C. 342, 348, 540 S.E.2d 846, 849 (2001)

However, the defenses at issue in this appeal -- statute of limitations, successive applications bar, and laches -- are not jurisdictional. They are affirmative defenses that must be timely pleaded, and are waivable. Wilson v. State, 348 S.C. 219, 559 S.E.2d at 583 ("The one-year statute of limitations is not jurisdictional and may be waived."); Whitehead v. State, 352 .C. at 222, 574 S.E.2d at 204 (laches is an affirmative defense subject to waiver.) Successive applications bar has been treated the same. Robertson v. State, 418 S.C. 505, 795 S.E.2d 29 (2016); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Rule 8(c), SCRCP, mandates that statutory avoidance (like § 17-27-90 successive bar) are affirmative defenses.

Here, the PCR court had subject-matter jurisdiction generally. S.C. Code Ann. § 17-27-20 (2001) (Conferring jurisdiction on courts to grant PCR relief.) The State's waiver of affirmative defenses does not implicate neither the lower court s nor this Court's jurisdiction to hear this appeal. The lower court's dismissal was based entirely upon waived defenses; and was therefore a legal determination based upon reversible error of law. That does not deprive this Court of appellate jurisdiction.

VI. DID THE LOWER COURT ERR AND COMMIT ABUSE OF DISCRETION BY DISMISSING THE POST CONVICTION RELIEF APPLICATION, WHERE, THE LOWER COURT IMPROPERLY ENTERTAINED AND GRANTED THE STATE'S UNTIMELY RETURN AND MOTIONS, INCLUDING MOTION TO DISMISS, AND BY SUA SPONTE RAISING DEFENSES ON BEHALF OF THE DEFAULTING STATE WHO HAD ALREADY WAIVED SAID DEFENSES, AND FORFEITED ALL STANDING TO PARTICIPATE IN FURTHER LITIGATION ?

The lower court committed reversible error and committed abuse of discretion by entertaining the defaulting State's return and motions, including the motion to dismiss, where the State had already entered default, and waived all affirmative defenses by failing to timely assert them in a responsive pleading or motion.

A party in default occupies a unique position in litigation. Rule 5(a), SCRCP, expressly provides that: "[n]o service need be made on parties in default for failure to appeal..." and emphasizes that parties in default are not entitled to service of most papers.

This rule reflects the fundamental principle that a defaulting party has forfeited its right to participate in the ordinary course of litigation.

The United States Supreme Court minces no words in holding that:

> "The defaulting party is simply out of court and can take no further part in the case."

Frow v. De La Vega, 82 U.S. (12 Wall.) 552, 554, 21 L.Ed. 60 (1872), 1872 WL 15275.

This holding has continued to be recognized as law, good and true, in its force and effect. The United States Court for the District of South Carolina recently held that:

> "The defaulting party has merely lost his standing in court. He will not be entitled to service of notices in the case, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing."

McDaniels v. South Carolina Department of Corrections, Civ. Act. No.#: 1:09-1732-TLW-SVH, citing Frew v. De La Vega, supra., 2010 WL 3782134 (Emphasis supplied)

The defenses of statute of limitations, successive application bar, and laches are all affirmative defenses. A party can waive any affirmative defense. McClendon v. S.C. Dept. Pub. Transp., 313 S.C. 525, 526, 443 S.E.2d 539, 540 (1994)('Waiver of the statute of limitations may be shown by words or conduct. Thus, waiver may result from express agreement... or from failure to claim the defense... or any inaction manifestly inconsistent with an intention to insist on the statute." Mende v. Conway Hospital, Inc., 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991)

A court cannot, as here, accept untimely defenses from a party who has waived them. Whitehead v. State, 352 S.C. at 222, 574 S E 2d at 204. (Failure to timely plead affirmative defenses constitutes waiver); Adams v. State, 355 S.C. at 130, 584 S.E.2d at 128.

Here, based on the forward facing TRUTH, and the fact of the defaulting State's unconditional waiver of all affirmative defenses, the lower court's findings of fact and conclusions of law, are rendered mere products of judicial activism, and sua sponte raising of defenses on behalf of the State. It is beyond improper. It is far beyond unjust, and far beyond impartial judicial reasoning.

Moreover, as here, the court cannot sua sponte resurrect from the dead, defenses which the State itself, due to its default, and untimely filings, has irrevocably waived. This Court owes no deference to such draconian and tainted adjudicatory malfeasance. Such findings and conclusions rendered by the lower court clearly are without any evidence in the record before this court to support them.

VII. DID THE LOWER COURT ERR AND COMMIT ABUSE OF DISCRETION BY DISMISSING THE POST CONVICTION RELIEF APPLICATION, WHERE, REMAND FOR EVIDENTIARY HEARING PURSUANT TO S.C. CODE ANN. § 17-27-80, Rule 55(B), SCRCP, and RULE 71.1, SCRCP, IS NECESSARY, JUST AND PROPER ?

S.C. Code Ann, § 17-27-80, provides in pertinent part the following:

> "The application shall be heard in and before any judge, of a court of competent jurisdiction in the county in which the conviction took place."

Id (emphasis provided.)

The Respondent does not dispute that the lower court has general jurisdiction of post-conviction relief proceedings. The statute is couched in explicitly mandatory language,

incorporating the use of the word "shall".

The lower court dismissed the PCR application, and ignored Petitioner's motions, including motion to strike insufficient defenses, and motion to remove the defaulting State as a party. The lower court further refused to compel its clerk of court to comply with Rule 55(a), SCRCP, mandating the clerk of court enter the default of the State upon the calendar (file book). Appendix, P-172 through P-175. Petitioner's motion to compel entry of default was ignored by the lower court. Appendix, P-135 through P-139. The lower court abdicated virtually every letter spread upon the Judicial Canons, and issued orders **born in ex parte communications.**, which were never served upon Petitioner as required by South Carolina Rules of Civil Procedure. All these actions and instances of stark malfeasance in office were foretold and forewarned by Petitioner's Petition for Writ of Mandamus to this very Court Appendix, P-014; P-055; P-123. This Court declined to exercise its original jurisdiction citing Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) The damage so foretold and forewarned has now been fully consummated. Appendix, P-014. The lower court entertained every whim of the State, and ignored every petition, grievance, objection, and motion submitted by the **ONLY PARTY WITH LEGAL STANDING TO BE IN COURT.** This violates statutory law, § 17-27-80, S.C. Code Ann.; it violates Rule 71.1, SCRCP; and it violates Rule 55 (a),SCRCP, and judicial canons, and art. I, § 3 of the South Carolina Constitution's Due Process Clause right to be heard at a meaningful time, in a meaningful manner. It constitutes error of law, abuse of discretion, and reversible error. This requires remand for an evidentiary hearing on the merits of Petitioner's PCR claims, with the State removed as a party, and its default entered upon the record nunc pro tunc, as is just and proper.

VIII. DID THE LOWER COURT ERR AND COMMIT ABUSE OF DISCRETION BY DISMISSING THE APPLICATION FOR POST-CONVICTION RELIEF, WHERE, THE LOWER COURT ABDICATED OR FAILED TO PERFORM ITS DUTY TO REQUIRE THE CLERK OF COURT TO COMPLY WITH RULE 55(a), SCRCP, WHEN THE STATE WAS IN DEFAULT, AND PETITIONER MADE SUCH DEFAULT APPARENT BY MOTION AND SUPPORTING AFFIDAVIT ?

The record before this Court reflects that on June 10, 2024, the Petitioner filed an application for post-conviction relief. Appendix, P-176 through P-183. The clerk of court served a copy of the application upon the South Carolina Attorney General's Office that same day. Appendix, P-184.

The State having been alloted, under Rule 12(a), SCRCP, in which to file a responsive pleading or motion to dismiss or otherwise defend as provided by the South Carolina Rules of Civil Procedure, failed to file such within that time. Ninety (90) days from the date of filing of the PCR application elapsed on September 22, 2024. (emphasis provided)

Moreover, the record before this court discloses that while the PCR application languished in the lower court, seventeen (17) months, and sixteen (16) plus days transpired amounting to a

composite time elapse of five-hundred and twenty-six (526) days late and out-of-time before the State on March 10, 2026 filed its return, motion to dismiss and supplemental motion to restrict future filings. This was done without seeking leave of court to do so, and no order issued from the lower court granting such leave.

The South Carolina Department of Corrections (SCDC), never entered an appearance at all. Thus, both the State of South Carolina and the SCDC are in default.

The record discloses that on October 28, 2025, Petitioner pursuant to Rule 55(a), SCRCP, filed Request for Entry of Default, and supporting affidavit of default. Appendix, P-172 through P-175. The clerk of court either refused or failed to perform this ministerial duty, in violation of statutes, court rules, and his oath of office.

In light of this refusal or neglect of duty by the clerk of court, Petitioner on December 10, 2025, filed motion to compel such entry submitted to the Chief Judge for Administrative Purposes, the same judge presiding in the post-conviction relief proceeding. Appendix, P-135 through P-139. That motion was ignored and never addressed by the lower court.

The Petitioner, on March 2, 2025, filed then with this very Court petition for exercise of its original jurisdiction, along with petition for writ of mandamus, summons, complaint and affidavit seeking to compel the performance of ministerial duty imposed by positive mandate of law, .i.e. compliance with Rule 55(a), SCRCP. Petitioner further, on March 25, 2026, filed a motion for protective order. Appendix, P-55. No order was forthcoming This Court declined to intervene, and issued a Key v. Currie, opinion on June 12, 2026, permitting the forewarned and foretold improper and illegal conduct in question to continue un-checked. Appendix, P-014.

The State's and the SCDC's default in this matter is not in dispute, nor questioned; and that default is not merely a procedural technicality; it triggers a mandatory statutory and procedural framework that entitles Petitioner to entry of default, and eventual judgment.

(A) ENTRY OF DEFAULT IS A MINISTERIAL DUTY:

Rule 55(a), SCRCP, provides:

> "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by AFFIDAVIT or otherwise, the clerk [s]hall enter his default."

Id (Emphasis provided)

This imposes a ministerial duty upon the clerk of court -- not a discretionary act -- once the factual predicate of default is established.

This very Court has repeatedly held that entry of default under Rule 55(a) SCRCP, is a ministerial act that the clerk must perform upon proper showing In Gaskins v. Firemen s Insur. Co.

of Newark, New Jersey, 206 S.C 213, 333 S E 2d 498 (1945), this Court explained that Rule 55(a) "makes mandatory the entry of default by the clerk when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defense as provided by the rules and that fact is made to appear by affidavit or otherwise " Id.

Petitioner's motion and supporting affidavit clearly complies with the requirements of Rule 55(a). Appendix, P-172 through P-175 .

This Court has emphasized that the clerk of court has no discretion to refuse to enter a default when the facts required by the rule are shown to exist. This principle was reaffirmed in Stark Truss Co , Inc. v. Superior Court, 360 S C. 503, 602 S.E 2d 99 (2004)

> "the clerks duty to enter default is mandatory once the requirements of Rule 55(a) are satisfied "

see also: Thynes v Lloyd, 294 S C 152, 154, 363 S.E.2d 122, 123 (1987)

(B) CIRCUIT COURT JUDGES HAVE A DUTY TO SUPERVISE CLERKS OF COURT:

The lower court had a duty to supervise the clerk of court and ensure compliance with the rules While the entry of default is a ministerial function of the clerk the circuit court retains supervisory authority over the clerk's performance of these duties Canon 3(b)(c)(2), Rule 501, SCACR Code of Judicial Conduct.

This supervisory authority extends to the power to direct the clerk of court to perform a mandatory duty when the clerk fails or refuses to do so.

Where, as here the clerk failed to enter a properly requested default under Rule 55(a), SCRCP, it is the judge's [d]uty to compel compliance.

This duty arises from the judge's role as the presiding officer of the court and the Constitutional obligation to ensure that judicial proceedings are conducted in accordance with the law, not contrary to it, as the lower court has demonstrated here thus far The lower court's failure to reign in his clerk of court, and to adequately supervise subordinate staff members, amounts to abuse of discretion. The failure to exercise lawful discretion, constitutes equally abuse of discretion . State v Smith 276 S C 494, 280 S E 2d 200 (1981) Jamison v. Ford Motor Co , 376 S C 506, 657 S.E 2d 775 (Ct pp. 2007)

Consequently, for these reasons, the Petitioner respectfully requests this Court:

1. Direct the clerk of the lower court to enter the default of the State of South Carolina and the SCDC upon the calendar (file book) nunc pro tunc establishing default as of September 22 2024 when ninety (90) days elapsed from date of service of the PCR application or alternatively on October 28 2025, when the motion for entry of default was filed and
2. Declare the Respondents are in default, not entitled to participate in further proceedings, nor seek affirmative relief beyond September 22, 2024 or alternatively beyond

October 28 2025; and
3. Reverse the lower court's granting of the State s out of-time motion to dismiss and motion to restrict future filings; and reversing the dismissal of the PCR application; and
4. Strike from the record the State s belated return motion to dismiss and motion to restrict future filings as a party in default may not seek affirmative relief nor appear in the case in any way; and
5. Order the lower court to convene an evidentiary hearing on the merits of Petitioner s PCR application pursuant to Rule 55(c), SCRCP allowing Petitioner to present evidence satisfactory to the court on the well-pleaded allegations of the PCR application, conclusively established by judicial admissions on the record as a matter of law; and
6. Remove the State as a party in default.

CONCLUSION

WHEREFORE, having set forth the preceding matters, this Court should render a decision making the following findings of fact and conclusions of law, and which:

1. **Directs the clerk of the lower court to enter the default of the State of South Carolina and the SCDC upon the calendar (file book) nunc pro tunc establishing default as of September 22, 2024 when ninety (90) days elapsed from date of service of the PCR application, or alternatively, on October 28, 2025, when the motion for entry of default was filed; and**
2. **Declares the Respondents are in default, not entitled to participate in further proceedings, nor seek affirmative relief beyond September 22, 2024, or alternatively, beyond October 28, 2025; and**
3. **Reverses the lower court's granting of the State s out-of-time motion to dismiss and motion to restrict future filings; and reversing the dismissal of the PCR application; and**
4. **Strikes from the record the State's belated return, motion to dismiss, and motion to restrict future filings, as a party in default may not seek affirmative relief, nor appear in the case in any way; and**
5. **Orders the lower court to immediately convene an evidentiary hearing on the merits of Petitioner's PCR application pursuant to Rule 55(c), SCRCP allowing Petitioner to present evidence satisfactory to the court on the well-pleaded allegations of the PCR application conclusively established by judicial admissions on the record, as a matter of law.**
6. **Removes the State as a party in default; and**
7. **Orders such other relief as is just and proper**

Respectfully Submitted,

Date: October 13, 2026
Fairfax, South Carolina

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