STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE SIXTH JUDICIAL CIRCUIT
COUNTY OF CHESTER)	CASE NUMBER: 2017-CP-12-0278
James R. McClurkin,)	
)	
Petitioner,)	
)	
v.)	
)	
The State of South Carolina)	
)	
Respondent.)	
)	

PETITIONER'S NOTICE OF APPEAL

Now comes Petitioner James R. McClurkin, and files his notice of appeal of the Order entered by Judge Brian M. Gibbons, Chief Administrative Judge, Sixth Judicial Circuit, Dismissing Petition for Writ of Habeas Corpus signed January 18, 2018. The Order is attached as Ex. A to this Notice of Appeal.

Petitioner's attorney received this Order on January 22, 2018.

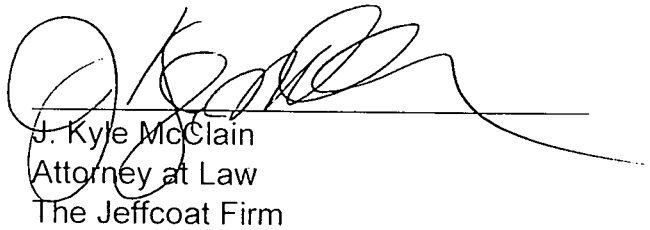
The Court's order dismissing the writ sought finds that the subject matter is within the original jurisdiction of the South Carolina Supreme Court. If so, this notice of appeal may not be required. However, in an abundance of caution, counsel for Petitioner is respectfully filing this notice of appeal to ensure the protection of Petitioner's legal rights, particularly in a case where procedural faults (or claimed faults) have often thwarted the course of full review.

As well, Petitioner plans to file a petition seeking a writ of habeas corpus asserting that the South Carolina Supreme Court has original jurisdiction to hear that petition.

This notice of appeal is being served upon all parties of record.

(SIGNATURE PAGE TO FOLLOW)

Respectfully Submitted:



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ATTORNEY FOR THE PETITIONER

January 30, 2018
Lexington, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE FOURTH JUDICIAL CIRCUIT
COUNTY OF CHESTER	)	
	)	
JAMES R. McCLURKIN,	)	2017-CP-12-0278
	)	
Petitioner,	)	
	)	**ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS**
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

This matter comes before the Court pursuant to the state circuit court Petition for Writ of Habeas Corpus, dated May 31, 2017 and an Amended Petition for a Writ of Habeas Corpus dated June 1, 2017 challenging James R. McClurkin's November 1977 conviction for murder and life sentence on Indictment 77-GS-12-118. The Petitions were filed by Dayne Phillips and Michael Jeffcoat of the South Carolina Bar on Mr. McClurkin's behalf.

This Court scheduled a status conference for October 13, 2017 at the Chester County Courthouse for this action along with a similar state habeas corpus action by Mr. McClurkin's co-defendant Ray Charles Degraffenreid in State of South Carolina v. Ray Charles Degraffenreid, 2017-CP-12-00292. Prior to the hearing, Petitioner McClurkin's counsel filed a "Trial Brief of Petitioner" dated October 13, 2017. This Court also made inquiry of the Solicitor's Office on whether the Attorney General's Office was notified and participating inasmuch as that Office was recently involved in Mr. McClurkin's prior post-conviction relief proceedings and the resulting January 28, 2015 Order by this Court filed January 30, 2015 in McClurkin v. State, 2013-CP-12-0112, restricting future filings pursuant to In Re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

On October 13, 2017, prior to the on-the-record hearing, the Court was advised by the State, through the Attorney General's Office, in chambers that it was the State's position that there was a jurisdictional defect in the proceeding because the writ of habeas corpus for challenging convictions only lies in either the original jurisdiction of the Supreme Court pursuant to caselaw and the Uniform Post-Conviction Relief Act. The Court advised the parties to make their arguments concerning the Court's authority to proceed in the matter and how to proceed if the Court had the authority to do so on-the-record in open court .

The Petitioner was present and represented by counsel Phillips and Jeffcoat in the October 13, 2017 proceeding. The Court also granted the petition to appear *pro hac vice* for J. Kyle McClain of the Texas Bar on Petitioner McClurkin's behalf. Co-defendant Degraffenreid was also present and represented by his court-appointed counsel Joshua Snow Kendrick and Christopher S. Leonard. On behalf of the Respondent State of South Carolina, Solicitor Randy Newman of the Sixth Judicial Circuit was present along with Deputy Attorney General Donald Zelenka.

Arguments were presented by Mr. Phillips and Mr. McClain of Petitioner McClurkin's behalf. Mr. Kendrick argued on behalf of Petitioner Degraffenreid. Deputy Attorney General Zelenka argued on behalf of the State. At the conclusion of the arguments, the Court temporarily recessed to consider the matter and review case law that had been provided.

The Court then announced that the petitions for writ of habeas corpus should be dismissed *without prejudice*. The basis for the ruling was that the Court of Common Pleas lacked subject matter jurisdiction over a petition for writ of habeas corpus since it rests solely in the original jurisdiction of the South Carolina Supreme Court in this setting. This written Order follows.

I. PROCEDURAL HISTORY OF MR. McCLURKIN

The records before this Court reflect that the Petitioner is presently on parole from orders of commitment of the Clerk of Court for Chester County. The Petitioner was indicted for Murder (1977-GS-12-0118) involving the death of Claude Killian at the May 1977 term. Arthur Lee Gaston, Esquire, represented him. The records reflect there was an initial trial before the Honorable Julius Baggett which resulted in a mistrial on May 13, 1977 after the jury was unable to agree on a verdict.

McClurkin was found guilty following a joint trial with Ray Charles Degraffenreid. On November 5, 1977, he was sentenced by the Honorable Joseph R. Moss to life imprisonment.[1]

The South Carolina Supreme Court issued an Order dismissing the direct appeal on January 24, 1979.

1980-CP-12-0053 – First PCR Action

McClurkin filed an initial PCR application on March 18, 1980 (1980-CP-12-0053). An evidentiary hearing was held on February 9, 1981. McClurkin was present and represented by counsel, Tyre D. Lee. The State was represented by William K. Moore of the Attorney General's office. The Honorable Donald A. Fanning denied and dismissed the application on March 18, 1981. No appeal was filed. [2]

1988-CP-12-0048 – PCR Action

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[1] Though not listed in his present filing, McClurkin was sentenced on October 11, 1973, in Chester County to an aggregate term of twenty-five (25) years for armed robbery and larceny, robbery and larceny, and housebreaking and larceny. He was also sentenced to five (5) years imprisonment on November 7, 1973, in Fairfield County for housebreaking and larceny. In some prior filings, these convictions were challenged alongside the murder charge presently being challenged.

[2] This state PCR action is not noted in the Petitioner's current petition for writ of habeas corpus summary of the proceedings.

McClurkin filed a second PCR application on March 4, 1988 (1988-CP-12-0048). He set forth the following allegations:

1. "Violation of the Brady Rule (Motion), not given all statements, investigative and otherwise, which may have aided the applicants case."

2. "Adverse publicity."

3. "Ineffective assistance of counsel."

4. "Unconstitutional oppression to induce a confession."

5. "Defective arrest warrant."

6. "Misconduct by the solicitor's office."

7. "Denial of a fair and impartial trial."

A Conditional Order of Dismissal was dated October 25, 1988, finding the application successive and barred by the one-year statute of limitations by the Honorable John Hamilton Smith, A Final Order of Dismissal with prejudice was signed by the Honorable Don S. Rushing on March 17, 1989.

MOTION FOR NEW TRIAL BEFORE JUDGE RUSHING

McClurkin and Degraffenreid filed a joint motion for new trial in the Court of General Sessions in 1993. This motion was based on 1992 and 1993 recantations by a trial witness Melvin Smokey Harris. An evidentiary hearing was held on November 22, 1993 before Judge Rushing. McClurkin and Degraffenreid were present at the hearing and were represented by retained counsel Dennis Bolt. Testimony was received from Mr. Harris concerning his recantation of his earlier trial testimony and the statements he gave in the interim on May 28, 1993 and October 11, 1992. The motion was denied by written order of the Honorable Don S.

Rushing on January 6, 1994. This Court has before it the written order of Judge Rushing which it has reviewed.

Appeal

In a document dated February 4, 1994, McClurkin filed an out-of-time Notice of Appeal from his denial of the motion for new trial in the South Carolina Supreme Court. This was followed by a document captioned "Motion Seeking Promission [sic] to File a Belated Appeal" and dated March 9, 1994. The South Carolina Supreme Court denied the "Motion for a Belated Appeal" in a letter order dated May 6, 1994.

2:01-cv-00836-DCN – Federal Habeas Corpus Action

McClurkin subsequently filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of South Carolina (2:01-cv-00836-DCN). Respondent filed its Return and Motion for Summary Judgment on May 9, 2001. On June 28, 2001, the Honorable Robert S. Carr, United States Magistrate Judge, entered his Report and Recommendation. By Order filed July 13, 2001, The Honorable David C. Norton, United States District Judge, adopted the Magistrate's Report and Recommendation and dismissed Applicant's petition for being untimely.

An appeal to the Fourth Circuit Court of Appeals was dismissed on October 30, 2001. McClurkin v. Condon, No. 01-7454 (4TH Cir. Oct. 30, 2001)(unpublished).

2003 Circuit Court Habeas Corpus and PCR Action - 2003-CP-12-0240

McClurkin filed a *pro se* "Petition for Writ of Habeas Corpus" on June 18, 2003 (2003-CP-12-0240). At a hearing on February 23, 2004, Applicant asked the court to construe his filing as a PCR and took issue with prior attorneys' failing to file appeals in his criminal case and prior PCR cases. The Petitioner was represented by Joan Winters. The Respondent was represented by

Assistant Attorney General Douglas Leadbitter. An evidentiary hearing was held on February 23, 2004. At the hearing, the State made a motion to dismiss. In an order dated February 24, 2004, the Honorable Kenneth Goode denied and dismissed the application with prejudice, finding that even if the matter was construed as a PCR, the matter would be successive and barred by the one-year statute of limitations.

Appeal of Denial of State PCR Action.

A Petition for Writ of Certiorari pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988) was filed on Applicant's behalf, and Applicant filed a *pro se* Petition. In the appeal, his appointed counsel Joseph Savitz raised the following assertion as an arguable ground:

> The judge erred bv construing McClurkin's petition for writ of habeas corpus as a post conviction relief application, thereby denying McClurkin an evidentiary hearing on the grounds that such an application was successive and barred by the statute of limitations.

Johnson Petition, filed November 15, 2004. McClurkin made a *pro se* response. The South Carolina Supreme Court in an order dated December 14, 2005 denied the Johnson petition for writ of certiorari and granting his petition to be relieved as counsel. The remittitur was issued on December 30, 2005.

2013-CP-12-0112 – PCR Action

McClurkin made another application for post-conviction relief filed March 4, 2013. In that application for post-conviction relief he alleged that he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR counsel in failing to file an appeal from the denial of my 1980 PCR.

The Respondent made its Return and Motion to Dismiss on or about December 11, 2013, requesting that the Application be summarily dismissed. Pursuant to this request, and after

reviewing the pleadings in this matter and all of the records attached thereto, the Honorable J. Ernest Kinard, Jr., issued a Conditional Order of Dismissal filed December 27, 2013, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.

In a document captioned "Applicant Opposition to State's Conditional Order of Dismissal" and dated March 31, 2014, McClurkin argued the following:

- Application is not successive or barred by the statute of limitations because it raises an Austin claim.

In a document captioned "Motion to Have all Pre-Trial Motions Rule On. Based on Rule 16(A)(7) of Rules of Civil Procedure" and filed November 6, 2014, McClurkin asked the Circuit Court to rule on the following motions filed by him:

1. Motion for Summary Judgment, filed June 24, 2013.
2. Motion for Appointment of Counsel, filed October 10, 2013.
3. Motion for "Inlargement" of Time, filed on January 23, 2014.

In an order filed January 30, 2015, this Court held as follows:

> This Court has reviewed Applicant's motions and finds Applicant is neither entitled to summary judgment, nor is he entitled to appointment of counsel. This Court finds the Motion for "Inlargement" of Time is moot, given Respondent consented to a sixty (60) day extension of time for Applicant to respond to the Conditional Order of Dismissal. Accordingly, the motions are denied. Furthermore, this Court has reviewed Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. This Court finds Applicant has failed to provide a sufficient reason for his failure to comply with the statute of limitations in this matter. This Court also finds the Applicant has had a full opportunity to litigate the claims he raises in this matter in his previous post-conviction relief matters. Applicant could have raised the current Austin claims in his previous PCR applications. By failing to bring them up in his prior Applications, Applicant

has waived any Austin claims. Accordingly, this Court finds this Application is denied and dismissed with prejudice.

McClurkin v. State, 2013-CP-12-0112, Final Order of Dismissal, dated January 12, 2015, filed January 30, 2015 (Gibbons, Chief Administrative Judge).

MAXTON ORDER

On January 14, 2015, the State, through Assistant Attorney General J. Croom Hunter made a motion to restrict future filings, asserting the repetitive and frivolous nature of the prior filings. On January 27, 2015, McClurkin made a response to the request. On January 30, 2015, this Court entered an "Order Restricting Future Filings," dated January 28, 2015.

On February 12, 2015, McClurkin mailed a *pro se* pleading styled "INTENT TO APPEAL RESTRICTION ORDER."

PAROLE

On October 11, 2016, Petitioner McClurkin was released on parole. He is currently on parole supervision.

II. CURRENT PETITION FOR HABEAS CORPUS

In this Petition for Writ of Habeas Corpus, Petitioner essentially raised the following issues for relief:

a. Melvin Harris, now deceased, had confessed and recanted his testimony against Petitioner and confessed as the sole murderer of Claude Killian. Petition, p. 8-9.

b. "Sheriff Underwood of Chester County re-opened an investigation and Petitioner asserts has revealed additional facts consistent with Harris' confession and recantation, rather than Petitioner's guilt.

i. Sheriff Underwood found an arrest warrant for Harris that was subsequently dismissed.

ii. Sheriff Underwood "noticed that there was physical evidence from the crime scene found behind the laundromat, showing the murderer fled on foot." Harris' story that Petitioner and Degraffenreid left in a car is not supported by the evidence." Petition, p. 8-9.

c. "Sheriff Underwood has publically stated that based on his investigation of this murder, he believes Petitioner is innocent." Petition, p. 9.

d. He contends that he has shown "a denial of fundamental fairness shocking to the universal sense of justice."

The Petitioner attached to his petition an October 11, 2016 Rock Hill Herald article as Exhibit A concerning the Petitioner's parole hearing and release on parole.[3]

The Petitioner filed an Amended Petition for Writ of Habeas Corpus in Chester County on June 1, 2017. The Amended Petition is virtually the same as the original Petition. In both, he

[3] "[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment." Md. Highways Contractors Ass'n, Inc. v. Md., 933 F.2d 1246, 1251 (4th Cir. 1991). The admissibility of the newspaper article presents two levels of possible hearsay—the quoted statements and the article itself. The Fourth Circuit has repeatedly held that newspaper articles are inadmissible hearsay when presented for the truth of their contents. See Greene v. Scott, 637 Fed.Appx. 749 (4th Cir. Feb. 11, 2016) (unpublished) (recognizing that the mayor's statement as a party-opponent was not hearsay, but "the conveyance of that statement in the newspaper article [was] hearsay"); Gantt v. Whitaker, 57 Fed.Appx. 141, 150 (4th Cir. 2003) (unpublished) (affirming the district court's striking of a newspaper article submitted by the plaintiff in response to the law enforcement defendants' motion for summary judgment that contained statements allegedly made by one of the law enforcement defendants about the plaintiff's arrest).

requests that Court hold an evidentiary hearing on his claim of actual innocence and then grant his petition for habeas corpus relief by vacating his sentence for murder.

On October 13, 2017, prior to the status conference, Petitioner, through counsel filed a "Trial Brief of Petitioner." In this memorandum, Petitioner contended his incarceration was unjust because he alleged:

a. "No physical evidence whatsoever tying him to the scene of the crime;

b. False confession coerced from his co-defendant (Degraffenreid).

c. False testimony by the real killer (Melvin Harris) who later admitted he not only lied at the trial about Petitioner's involvement, but admitted he (Melvin Harris) was the real killer."

Trial Brief of Petitioner, p. 2.

ARGUMENTS BEFORE THIS COURT

Prior to its ruling on whether the Court had jurisdiction, the Court allowed the parties to make oral arguments before the Court. Counsel for McClurkin, Dayne Phillips requested that this Court had the power to issue a writ of habeas corpus under Article I, §18. He asserted that they had shown "in this setting a denial of fundamental fairness shocking to the universal sense of justice." He stated that they needed a full and meaningful hearing because the criminal justice system had utterly failed him. He contended that they were seeking the relief of either an order of exoneration and innocence or a remand for a new trial. He asserted that this is within the circuit court's discretion. Counsel noted that if it was this Court's position that jurisdiction rested in the South Carolina Supreme Court rather than the Circuit Court, they would honor it and file in the Supreme Court. *Pro hac vice* counsel McClain of the Texas Bar argued about the breadth of the "Great Writ" and the duty to seek justice represented

in the Courtroom. He urged that this court had the discretion to grant the writ and take jurisdiction of the case. Although referring to the 1996 Anti-terrorism and Effective Death Penalty Act concerning federal habeas corpus, he briefly summarized on McClurkin's unsuccessful prior proceedings and n prior representation. He concluded with the assertion that the Court should respect the impact of Sheriff Underwood's belief of his client's innocence as sufficient to award the writ.

Counsel for Degraffenreid Josh Kendrick argued a similar basis for his pleading. He urged that the Court should accept jurisdiction. He further asserted in his argument and pleadings that they had met the elements for a petition for habeas corpus and noted that Degraffenreid's confession had been held by a federal magistrate to be involuntary and that Judge Baggett had reached the same position in the first aborted trial. He disagreed with Judge Rushing's factual rejection of the Harris recantation.

Counsel for the State Deputy Attorney General Don Zelenka urged the Court to dismiss the petition as not being properly before the Circuit Court by a petition for writ of habeas corpus. He asserted at this stage the petition must be first presented to the South Carolina Supreme Court. The State asserted that the South Carolina Supreme Court had conclusively spoken of its own jurisdiction to the exclusion of circuit court jurisdiction in Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998) which held "that a matter which is cognizable under the [Uniform Post-conviction Relief] Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts, citing Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998). The State urged that all of the Petitioners factual assertions could or were presented in prior PCR or new trial actions and therefore could not be raised in the circuit court, but must be presented before the South Carolina Supreme Court in an petition for writ of

habeas corpus in its original jurisdiction and seek to determine whether each is able to show "a violation, which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (*emphasis in original*) (internal citation omitted). See McWee v. State, 357 S.C. 403, 404, 593 S.E.2d 456, 456 (2004) (seeking a petition in the original jurisdiction of the Supreme Court unsuccessful). The State urged in contrast to the argument raised by the petitioner that the current Chester County Sheriff's purported belief in each petitioner's innocence was insufficient alone to create entitlement without more in light of the Supreme Court (or this Court's ability if referred to it) to consider in full the trial record, the post-conviction history of matters being presented and the deference due Judge Rushing's January 6, 1994 order after a full hearing with represented counsel where Judge Rushing rejected the recantation testimony of Melvin Harris. Judge Rushing concluded that Harris lacked credibility in his recent recantations and was contradicted by other witnesses based upon his review of the record at trial. Since Mr. Harris is now deceased, the State urged that this conclusion of credibility and his conclusion based upon his review of the trial record.[4]

The State further noted that the impact of the exclusion of Degraffenreid's confession in the first trial was not based upon an involuntary conclusion by Judge Baggett , but that Judge Baggett believed it could not be introduced in a joint trial. In the trial before Judge Moss, it was admitted after a Jackson v Denno hearing. The State stated that the voluntariness of Degraffenreid's statement was upheld by the Fourth Circuit in Degraffenreid v. McKellar, 883 F.2d 68 (4th Cir. Aug. 9, 1989)(unpublished), rehearing and rehearing en banc denied Oct. 2,

[4] In Judge Rushing's order of January 6, 1994, he concluded: "upon reviewing each version and the record of the 1977 trial, I find the only version that is in part corroborated by other evidence is that testimony given by Mr. Harris in the 1977 trial."

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1989. The State further noted that the instructions given the jury did not allow the confession to be considered against the co-defendant. (Tr. 670).

The State stated that before this Court or any circuit judge needed consider the merits of the habeas corpus petition, it had to first be presented to the South Carolina Supreme Court in a petition for writ of habeas corpus in the original jurisdiction of the Court Supreme Court. The State contended that if the Supreme Court deems it appropriate or necessary, it could refer to an appropriate judge to act as a referee for the Court in its original jurisdiction. Since that has not been done in either case, the State urged that the matter be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds after review of the relevant precedent and n the history of the proceedings involving each of the Petitioners that the respective petitions for a writ of habeas corpus in the Circuit Court of Chester County must be dismissed without prejudice. This Court makes no findings or conclusions as to the merits of the claims raised as it lacks authority to do so. Rather, its review of the procedural history reveals the strength of the State's argument that the Court cannot address the grounds. Since 1998, it has been consistently held that "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a PCR application." Keeler v. Mauney, 330 S.C. 568, 571, 500 S.E.2d 123, 124 (Ct. App. 1998). "Furthermore, if a person is procedurally barred, his only means of obtaining state habeas corpus relief is to file a petition in the original jurisdiction of the Supreme Court." Id. The soundness of this conclusion should be clear. The Uniform Post-conviction Relief Act provided the statutory remedy for the circuit court's to address issues related to South Carolina convictions. As the Supreme Court stated:

> Section 17-27-20(b) states that the Act "comprehends and takes the place of all other common law, statutory or other remedies heretofore available for

> challenging the validity of the conviction or sentence," and provides the Act "shall be used exclusively in place of them." We acknowledge we have stated that habeas corpus is available once the petitioner has exhausted all post-conviction remedies. Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994); Pennington v. State, 312 S.C. 436, 441 S.E.2d 315 (1994); Slack v. State, 311 S.C. 415, 429 S.E.2d 801 (1993). In Tyler v. State, 247 S.C. 34, 145 S.E.2d 434 (1965), however, this Court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself. Because we believe the rule in Tyler is the appropriate rule, we now hold that a matter which is cognizable under the Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts.4 See Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998).

Simpson v. State, 329 S.C. 43, 46, 495 S.E.2d 429, 431 (1998).

Contrary to the request of the Petitioners this Court does not have the discretion to ignore the precedent of the South Carolina Supreme Court and its proper interpretation of the exclusive effect of the Uniform Post-Conviction Relief Act. To accept the Petitioners' argument make meaningless the PCR Acts provisions concerning statute of limitations or successiveness. The Supreme Court's precedent in this area is clear and merely changing the title of a pleading from a "post-conviction relief application" to a "petition for a writ of habeas corpus" in a pleading in the South Carolina circuit does not create a new remedy that was expressly foreclosed by the PCR Act. This Court does not have the requested discretion to do otherwise where it is conceded that the particular grounds are those which could have been raised in a post-conviction relief application or were actually raised before a circuit court judge in a motion for a new trial based upon after discovered evidence in 1994.[5]

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[5] The following general rules are interwoven with the PCR Act and its procedural concepts of successiveness and the statute of limitations. "Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." S.C. Prop. & Cas. Ins. Guaranty Ass'n v. Wal–Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). In Wal–Mart Stores, Inc., the Supreme Court adopted the general rule set forth in the Restatement (Second) of Judgments § 27 (1982). Id. "Section 27 provides that when an issue of fact or law is actually litigated and determined by a valid and final

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judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Id. (emphasis added).Stated another way, "[t]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct.App.2009).

The doctrine of collateral estoppel is also known as "issue preclusion." In re Crews, 389 S.C. 322, 698 S.E.2d 785 (2010); Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008); Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 481 S.E.2d 706 (1997). Issue preclusion bars the relitigation of only the particular issues that were actually litigated and decided in the prior suit. Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997). As a result, the doctrine of collateral estoppel is inapplicable when the argument turns on an assertion that the other party should have litigated a particular issue in the prior action. See id. at 216, 493 S.E.2d at 835.

The doctrine of res judicata is a distinguishable concept. Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 190 n. 1 (Ct.App.1984). Res judicata encompasses both issue preclusion and claim preclusion. Crestwood Golf Club, Inc., 328 S.C. at 216, 493 S.E.2d at 834. However, res judicata is more commonly referred to simply as claim preclusion. Garris v. Governing Bd. of S.C. Reinsurance Facility, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). Claim preclusion bars plaintiffs from pursuing a later suit where the claim (1) was litigated or (2) could have been litigated. Crestwood Golf Club, Inc., 328 S.C. at 216, 493 S.E.2d at 835.

The Court has reaffirmed the following statement of the doctrine:

> 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. 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."

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (alteration in original) (citations omitted), cited with approval in Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011).

Res judicata may be applied if (1) the identities of the parties are the same as in the prior litigation, (2) the subject matter is the same as in the prior litigation, and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250–51, 452 S.E.2d 832, 833 (1994). The doctrine of res judicata is not an "ironclad bar," however, to a later lawsuit. Judy, 393 S.C. at 167, 712 S.E.2d at 412; Garris, 333 S.C. at 449, 511 S.E.2d at 57; Clark v. Aiken Cnty. Gov't, 366 S.C. 102, 109, 620 S.E.2d 99, 102 (Ct.App.2005). Catawba Indian Nation v. State, 407 S.C. 526, 536–38, 756 S.E.2d 900, 906–07 (2014).

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This Court agrees with Respondent that the claims made in the Petition for Writ of Habeas Corpus could have been previously raised in their initial post-conviction relief applications. As the procedural history reflects, if these same claims had been brought in 2017 under the Uniform Post-conviction Relief Act, each would have been barred as untimely under the §17-27-45 one-year statute of limitations or the successive petition bar under the Court's mandates in 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." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may

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"Under the law-of-the-case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal, but expressly rejected by the appellate court." Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009) (citing 5 C.J.S. Appeal & Error § 991 (2007)). In other words, "[t]he doctrine of the law of the case prohibits issues [that] have been decided in a prior appeal from being relitigated in the trial court in the same case." Ross v. Med. Univ. of S.C., 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997); see In re Grossinger's Assocs., 184 B.R. 429, 434 (Bankr.S.D.N.Y.1995) ("Closely related to the doctrines of claim and issue preclusion is the doctrine of law of the case, which holds that a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation." (quotation marks omitted)). While the doctrine has been referenced as discretionary, it is recognized that principles "of authority ... do inhere in the 'mandate rule' that binds a lower court on remand to the law of the case established on appeal." 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure § 4478 (2d ed.2002).

"The rule of the law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186, 198, 70 S.Ct. 537, 94 L.Ed. 750 (1950). "Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. These rules do not involve preclusion by final judgment; instead, they regulate judicial affairs before final judgment." In re Grossinger's Assocs., 184 B.R. at 434. See Flexon v. PHC-Jasper, Inc., 413 S.C. 561, 573, 776 S.E.2d 397, 404 (Ct. App. 2015). It thus serves the same objective as the 'newly discovered' requirement in Rule 60(b)(2)." (citation and quotation marks omitted)); id. ("In this case, [the appellant] is seeking to reopen factual issues finally laid to rest by the Ninth Circuit in 1982 on the basis of evidence it could have discovered with due diligence at least by the time of trial of this case in 1977. The district court was fully justified in rejecting this attempt." (emphasis added)).

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not raise those grounds in successive applications. Id. The Petitioners are not claiming that they are entitled to a successive state PCR application. In fact, they are solely claiming entitlement as a habeas corpus petition in the circuit court.

Petitioner cannot file a petition in the circuit court, but must instead file in the original jurisdiction of the Supreme Court. Therefore, these particular claims related to sufficiency of the evidence, reconsideration of a recantation of a deceased witness, and an interpretation about the state's evidence, and counsel's ineffectiveness cannot be raised in a Petition of Habeas Corpus in the Circuit Courts of South Carolina. Accordingly, the Petition should be summarily dismissed.

The Petitioners have raised before this Court arguments based upon the federal habeas corpus act, 28 U.S.C. § 2254 and also known as the 1996 Anti-terrorism and Effective Death Penalty Act as suggesting there is some discretion in a state circuit court to address his claims of fundamental fairness. His argument is misplaced before this circuit court. Under Art. 5, § 5 of the South Carolina Constitution, the South Carolina Supreme Court retains the ability to entertain writs of habeas corpus in their original jurisdiction and grant relief in those unusual instances where "there has been a violation which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." Butler v. State, 302 S.C. 466, 397 S.E.2d 87 (1990); see also Simmons v. State, 322 S.C. 49, 471 S.E.2d 455 (1993); Key v. Currie, 305 S.C. 115, 406 S.E.2d 356 (1991) (Supreme Court will exercise its original jurisdiction where there is an extraordinary reason such as a question of significant public interest or an emergency).[6]

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[6] This Court would note that its decision to dismiss the petitions in this manner is not a matter of first impression in South Carolina. Courts which have consistently found that no remedy exists in the circuit courts for similar challenges under a "habeas corpus" petition. See

IT IS THEREFORE ORDERED that the Petition for Writ of Habeas Corpus is hereby denied and dismissed without prejudice to the filing of an action in the original jurisdiction of the South Carolina Supreme Court. It is for that Court, not the Circuit Court, to determine whether the Petitioner has made or ultimately proven "there has been a violation which, *in the setting*, constitutes a denial of fundamental fairness shocking to the universal sense of justice."

AND IT IS SO ORDERED this 16 day of January 2018.

BRIAN M. GIBBONS
Chief Administrative Judge
Sixth Judicial Circuit

Clerk, South Carolina

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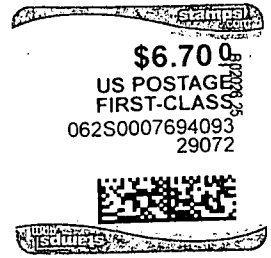
Ellerbe v. State, No. 2004-UP-644, 2004 WL 6339721, at *1 (S.C. Ct. App. Dec. 21, 2004); Barron v. State, No. 2010-UP-239, 2010 WL 11506693, at *1 (S.C. Ct. App. Apr. 14, 2010); Ford v. State, No. 2010-UP-276, 2010 WL 10079934, at *1 (S.C. Ct. App. May 19, 2010); Fishburne v. State, No. 2009-UP-549, 2009 WL 9530299, at *1 (S.C. Ct. App. Nov. 23, 2009); Harrell v. State, No. 2009-UP-101, 2009 WL 9527551, at *1 (S.C. Ct. App. Feb. 26, 2009); Johnson v. State, No. 2008-UP-547, 2008 WL 9846485, at *1 (S.C. Ct. App. Oct. 9, 2008).



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