The State of South Carolina
In the Court of Appeals

Appeal From Lexington County
Court of Common Pleas
J. Cordell Maddex Jr., Circuit Court Judge

CASE NO. 2015-CP-32-02465

State of South Carolina _____ Respondent,
Julius Irick Gilyard Jr. #256932 _____ Appellant,

Notice of Appeal

Julius Irick Gilyard Jr., appeals the PCR Order of the Honorable J. Cordell Maddex Jr. dated March 30, 2018. Appellant received Written Notice of entry of the Order on April 16, 2018.

Sincerely,
Julius Gilyard

Date: April 16, 2018

cc. Office of the Attorney General
Alphonzo Simon Jr.
Post Office Box 11549
Columbia, SC. 29211

Tyger River Correctional Inst.
Unit 6 - Room 30-B
200 Prison Road
Enoree, South Carolina 29335

The State of South Carolina

IN the Court of Appeals

Appeal From Lexington County
Court of Common Pleas
J. Cordell Maddox Jr., Circuit Court Judge

Case No. 2015-CP-32-02465

State of South Carolina _____ Respondent,
Julius Irick Gilyard Jr., #256932 _____ Appellant,

Proof of Service

I certify that I have served the Respondent herein on April 16, 2018 with a Written notice of appeal by depositing a copy of it in the U.S. mail, postage prepaid and addressed to:

Sincerely,
Julius Gilyard

cc. Office of the Attorney General
State of South Carolina
Alphonzo Simon Jr.
Post Office Box 11549
Columbia, South Carolina 29211

Tyger River Correctional Inst.
Unit 6 - Rm 30-B
200 Prison Road
Enoree, South Carolina
29335

Date: April 16, 2018

To: The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Date: April 16, 2018

RE: State of South Carolina, Respondent,
V.
Julius Irick Gilyard Jr., Appellant,
Case No. 2015-CP-32-02465

Dear Ms. Kitchings,

Enclosed For Filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Proof of Service of the notice of appeal on the respondents.

(2) A written explanation as to why the PCR Court's determination that the PCR action is barred as successive and untimely under the statute of limitations was improper.

Sincerely,
Julius Gilyard
Tyger River Correctional Inst.
Unit 6 - Room 30-B
200 Prison Road
Enoree, SC 29335

Julius Gilyard #256932
Tyger River Correctional Institution
Unit 6 Room # 30-B
200 Prison Road
Enoree, South Carolina 29335

Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT 2015-CP-32-02465
Julius Irick Gilyard, Jr., #256932, Applicant, v. State of South Carolina, Respondent.	)	**ORDER OF DISMISSAL**

FILED
2016 APR -6 AM 11:03
LISA M. COKER
CLERK OF COURT
LEXINGTON SC

This matter comes before this Court by way of an application for post-conviction relief filed by Applicant Julius Irick Gilyard Jr. ("Applicant") on July 13, 2015, and the State's Return and Motion to Dismiss served on January 20, 2017.

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted during the January 1998 term of the Lexington County Grand Jury for one count of burglary in the first degree, one count of petit larceny, and one count of assault with intent to commit criminal sexual conduct in the first degree (1998-GS-32-00142, C.I-III). I.S. Leevy Johnson, Esquire represented Applicant. Applicant was tried by a jury before the Honorable Rodney A. Peeples on all three charges on March 15-16, 1999. The jury found Applicant guilty on all counts on March 16, 1999. Judge Peeples sentenced Applicant to thirty-eight years confinement for the first-degree burglary conviction, thirty days confinement for the petit larceny conviction, and twenty-five years confinement for the assault with intent to commit criminal sexual conduct in the first degree conviction, all to be served concurrently.

Applicant filed a timely notice of appeal. His direct appeal was perfected by the filing of a Final Anders[1] Brief of Appellant. Applicant also filed a pro se response to the Anders Brief of Appellant. In an unpublished opinion filed November 1, 2000, the South Carolina Court of Appeals dismissed Applicant's appeal. State v. Gilyard, Op. No. 2000-UP-665 (S.C.Ct.App. filed Nov. 1, 2000). The Remittitur was issued on November 17, 2000.

Applicant subsequently filed his first application for post-conviction relief on October 19, 2001 (2001-CP-32-03154). In that application, he alleged the following grounds for relief in his application:

1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.

The State served its return on July 19, 2002.

An evidentiary hearing in that PCR action was held on August 26, 2003 before the Honorable Marc H. Westbrook. Applicant was present, and he was represented by Stephen R. Soltis, Jr., Esquire. B. Allen Bullard, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf. David P. MacDougal, I.S. Leevy Johnson, Esquire, John C. Sharpe, and Mary Joyce Marshall also testified. Immediately prior to the testimony of Mr. Sharpe, Respondent objected that Applicant did not properly allege in his application his issues relating to Mr. Sharpe and the arrest warrants he signed. Judge Westbrook permitted the testimony but left the record open.

A second evidentiary hearing convened on July 10, 2007, before the Honorable John M. Milling. Applicant was present at the hearing and was represented by Michael Duncan, Esquire. Daniel E. Grigg, of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf. I.S. Leevy Johnson, Esquire, and John C. Sharpe also

[1] Anders v. California, 386 U.S. 738 (1967).

testified. By written order filed October 22, 2007, Judge Milling denied and dismissed the application. Applicant timely filed a motion to alter or amend judgment pursuant to Rule 59(e), SCRCP. Judge Milling filed a Supplemental Order of Dismissal on December 12, 2007.

Applicant filed a timely notice of appeal. His appeal was perfected by the filing of petition for writ of certiorari. By letter Order filed April 7, 2010, the South Carolina Supreme Court denied certiorari. The Remittitur was issued on April 23, 2010.

Applicant subsequently filed a pro se Petition for Habeas Corpus under 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina on May 14, 2010 (C.A. No. 3:10-1167-JFA-JRM). In his Petition, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel, in that;

    a. Petitioner was deprived of effective assistance of counsel in violation of the South Carolina Constitution, and the Sixth and Fourteenth amendments to the United States Constitution, and the laws of South Carolina, and in violation of the dual office holding provision as provided by S.C. Const. Art. XVII, Sec. 1(a).

        i. Evidence was introduced against petitioner at trial resulting from arrest and search warrants issued by City of Cayce Judicial official John C. Sharpe. Defense counsel stated prior to the suppression hearing that both his suppression motions were "weak." However, counsel then attempted to argue that the searches were invalid for reasons as outlined in the written motions. Counsel failed to bring to the court's attention that there was no search warrant affidavit and no probable cause as required by S.C. Code § 17-13-140.

    b. Counsel breached the standard of care, and the Petitioner was deprived of effective assistance of counsel as guaranteed by the South Carolina Constitution, and deprived of due process and equal protection of the law as provided by the United States Constitution and the laws of South Carolina; particularly, S.C. Code of Laws, 14-25-310; 14-25-115; S.C. Code 5-7-250(b); 5-7-260(1); and 5-7-270.

        i. Mary Joyce Marshall, a staff attorney with South Carolina Office of Court Administration testified at the August 23, 2003 PCR hearing and reported that they had no record of Mr. Sharpe's

compliance with continuing education or his appointment as a ministerial recorder...

c. Petitioner was deprived of effective assistance of counsel as guaranteed by the United States Constitution, and the South Carolina Constitution, and further deprived of Article I, Section 14 of the South Carolina Constitution, and the laws of South Carolina, particularly, S.C. Code, Section 17-23-60 where trial counsel failed to object to the prejudicial hearsay testimony that was provided by the victim, and State witness Lt. Darwin Fulwood, and which is barred by S.C. Rules of Evidence 801(c).

d. Petitioner was deprived of effective assistance of counsel as guaranteed by the South Carolina Constitution and deprived of due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, where trial counsel failed to move for a mistrial, or object, when the victim in this case repeatedly remarked that Petitioner should take the stand in violation of the Petitioner's constitutional right not to testify on his own behalf.

The respondent in that action filed its Return and Motion for Summary Judgment on October 28, 2010. On June 16, 2011, the Honorable Joseph R. McCrorey, United States Magistrate Judge, issued a Report and Recommendation recommending the respondent's motion for summary judgment be granted. Gilyard v. Reynolds, 3:10-1167-JFA-JRM, 2011 WL 4544076 (D.S.C. 2011). On September 30, 2011, the Honorable Joseph F. Anderson, Jr., United States District Judge, accepted the Report and Recommendation, granted the respondent's motion for summary judgment, and denied Applicant's federal habeas petition. Gilyard v. Reynolds, 3:10-1167-JFA-JRM, 2011 WL 4544054 (D.S.C. 2011). Applicant filed a notice of appeal with the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals dismissed Applicant's appeal on February 3, 2012. Gilyard v. Reynolds, 464 Fed.Appx. 143 (4th Cir. 2012).

Applicant subsequently filed this second application for post-conviction relief on July 13, 2015. The State served its Return and Motion to Dismiss on January 18, 2017. With the Return and Motion to Dismiss, the State also submitted a proposed Conditional Order of Dismissal. In

response to the proposed Conditional Order of Dismissal, Applicant sent the Honorable William P. Keesley, Circuit Court Judge, correspondence outlining his objections to the Conditional Order of Dismissal. Judge Keesley filed the correspondence with the Clerk of Court for Lexington County on March 13, 2017.

II. CURRENT APPLICATION

In his second and current post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Conviction and sentence obtained in violation of the 4th Amendment to the U.S. Constitution"
    a. "[T]he Arrest and Search Warrants that were issued [. . .] were issued by an Official who was not authorized to issue Warrants[.]"

2. "Conviction and sentence obtained in violation of S.C. State Law, particularly, S.C. Code: 14-25-310; 14-25-320; (repealed) S.C. Code: 14-25-115; also, S.C. Code: 5-7-250(b), 5-7-260(1), 5-7-270, and violative of Due Process and Equal Protection of the Law as guaranteed by the S.C. Constitution, and the U.S. Constitution"

    a. "[. . .] There are also no competent public records reflecting that John Sharpe was ever sworn into office, by whom, what his term was as set by City Council, or that he was certified by the municipal Judge as having been instructed in the proper method of issuing warrants as required by S.C. Code: 14-25-115. [. . .]"

    b. The State did not introduce "competent evidence" to prove witness John Sharpe was a "ministerial recorder" for the City of Cayce. Therefore, Applicant was deprived of due process and equal protection of the laws.

3. "Conviction and Sentence obtained due to ineffective assistance of counsel as guaranteed by the S.C. and U.S. Constitution"

    a. "[. . .] Applicant contends that Counsel should have investigated the authority, the lawfulness, and the Constitutionality of the ministerial recorder's appointment, and the fact that there is no search warrant affidavit for the search of Applicant's vehicles. [. . .]"

4. "Prosecutorial misconduct; Fraud upon the Court, etc., violation of Procedural Due Process, violation of Due Process and Equal Protection of the Law, as guaranteed by the S.C. Constitution, and the U.S. Constitution"

a. "[. . .] This Applicant contends that this constituted prosecutorial misconduct, and constitutes fraud upon the court where the conclusions made by the Attorney General in the prepared Order of Dismissal are not supported by any facts contained in the PCR record, and further fails to address any of the information that the PCR Judge instructed the Attorney General to obtain from the City of Cayce. [. . .]"

5. "Ineffective assistance of Post-Conviction Relief Counsel as provided by S.C. state law, and violative of Due Process and Equal Protection of the law as guaranteed by the S.C. Constitution and the U.S. Constitution"

   a. "Applicant contends that both PCR attorneys (Steven Soltis and W. Michael Duncan) were ineffective during Applicant's first PCR stage where both [l]awyers failed to perfect Applicant's claims and to amend Applicant's application to reflect a 4th Amendment violation."

   b. "Both attorneys also failed to conduct any meaningful investigation into Applicant's claim that John Sharpe was not lawfully appointed as the ministerial recorder for the City of Cayce, S.C., or that the Office of Ministerial Recorder was properly established by an ordinance."

   c. "After getting the Order denying Applicant PCR relief, PCR attorney W. Michael Duncan, failed to file a Rule 59(e) motion, [. . .] where the State failed to notify PCR counsel of its intent, where the Order failed to provide any facts in the record to support such a finding, and where there was no transcript of that [. . .] hearing (July 10, 2007) ever made thereafter for the PCR Court to review and make a decision based on the facts that were presented on the record, and the evidence that was requested by the Court, and where the State could not provide such evidence."

6. "That there exist[s] evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence in the interest of justice."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A hearing on the State's Motion to Dismiss was heard by this Court at the Lexington County Courthouse on December 12, 2017. Applicant was present and acted pro se. The State was represented by Assistant Attorney General Alphonso Simon Jr.

At the motion hearing, Applicant presented arguments regarding why his application should not be dismissed. Applicant asserted he was not attempting to file a successive post-conviction relief action. He contended that it was the Attorney General's Office's fault that he

was denied relief upon the first application. Applicant noted that his prior post-conviction relief action had a continued hearing. He had presented a claim that a judicial officer was signing warrants, and no one presented the warrant in his case to a judge. When the prior post-conviction relief action was before Judge Milling, Applicant presented Judge Milling with the information regarding the fact the warrants (arrest and search) were signed by a ministerial recorder, and not a judge. Applicant further contended that Judge Milling told the attorney from the Attorney General's Office to find the ordinance that created the ministerial recorder position, or the minutes from the City of Cayce Council meeting where the ministerial recorder position was created. Applicant noted that the Attorney General's Office indicated later that no ordinance was in place, and there were no minutes from a City of Cayce Council meeting. Applicant asserted there was also an issue with the ministerial recorder being a dual office holder.

Applicant contended he thought some error had been made when he received the order of dismissal in his first post-conviction relief action. He also stated that he asked PCR counsel in that action to bring the issue to the PCR Court's attention. At the motion hearing, Applicant also claimed he was never served with a search warrant.

In support of his arguments, Applicant referred this Court to page 525, line 9 of the appendix from the appeal in his prior post-conviction relief action. In this portion of the transcript from the second evidentiary hearing in that action, Judge Milling stated:

> I quite frankly feel like if this is a situation where the search warrant was void because there was no ability to search, then we're looking at something much more critical than we are if we're looking at whether or not there was evidence that he actually had the training.

Before this Court are the Application, the State's Return and Motion to Dismiss, the Lexington County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final orders of Applicant's previous PCR and federal habeas

actions, and the records of this current PCR action. This Court has also taken into consideration the arguments presented by Applicant at the hearing on the motion to dismiss, along with the page referenced by Applicant from the appendix in the prior PCR appeal. After reviewing these documents and considering Applicant's arguments, this Court grants the State's motion to dismiss, and this Application for Post-Conviction Relief is denied for the following reasons:

A. This Action is Barred by the Statute of Limitations.

This Court finds the application must be summarily dismissed 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:

> 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, 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."

Applicant was convicted on March 16, 1999, and the remittitur from his direct appeal issued on November 17, 2000. Thus, a timely application for post-conviction relief should have been filed no later than November 17, 2001. The current application was not filed until July 13,

2015 – more than fourteen years after the one-year statutory filing period expired. Therefore, this Court summarily dismisses this application as barred by the statute of limitations.

B. This Action is Barred by the Doctrine of Laches.

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

Applicant seeks post-conviction relief more than sixteen years after his conviction. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant's claims. McElrath, 276 S.C. at 283, 277 S.E.2d at 890. This Court finds the Applicant's arguments at the hearing on the motion

to dismiss fails to justify the delay in the filing of this action. Because of the delay, witness memories and physical evidence will have naturally faded and degraded. See, e.g., Bray, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that laches barred belated review of denial of PCR seven years after PCR hearing was held); State v. Serrette, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy "would undoubtedly be futile considering the passage of over ten years' time" when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, the Court shall summarily dismiss this application as barred by the equitable doctrine of laches.

C. This Action is Barred because It Is Successive to His Prior PCR Action.

This Court also finds the application must be summarily dismissed because it is successive to Applicant's previous PCR application. 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.

S.C. Code Ann. § 17-27-90.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were

not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." Id. at 450, 409 S.E.2d at 394. If 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 burden of showing the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. Thus, the Court shall summarily dismiss the application as successive to Applicant's previous PCR application.

D. This Action Is Barred by the Doctrine of Res Judicata.

The application is similarly barred by the doctrine of res judicata. Res judicata prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in 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).

The Applicant had a full opportunity to litigate all his allegations in his prior actions. Mr. John Sharpe's role in Applicant's prosecution and his status as the ministerial recorder for the

City of Cayce was raised to and ruled upon by the Court in Applicant's first PCR action, and dismissed by written order dated October 18, 2007, and filed October 22, 2007. The finality of the previous Court ruling must be respected and, thus, the Court shall summarily dismiss the application as barred by the doctrine of res judicata.

E. Applicant Fails to State a Claim Upon Which Post-Conviction Relief Can Be Granted in Asserting Claims of Ineffective Assistance of PCR Counsel.

Applicant alleges he is entitled to relief on grounds that his prior PCR counsel, Michael Duncan, Esquire, was ineffective. The Court finds this allegation must be dismissed because ineffective assistance of PCR counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." Id.; Aice, 305 S.C. at 452, 409 S.E.2d at 394; see also Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his first PCR action and timely appealed therefrom. Applicant further utilized to exhaustion the federal habeas corpus procedures, including an attempt to appeal to the United States Fourth Circuit Court of Appeals. It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Therefore, Applicant's allegations of ineffective assistance of PCR counsel do not fall within any exception to the rule barring such claims, and the allegations should be summarily dismissed.

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court shall dismiss the applicant's fifth allegation as not cognizable under the Uniform Post-Conviction Procedure Act.

F. Applicant's Claims Do Not Present Newly Discovered Evidence.

Lastly, the Court finds Applicant's assertion that his allegations constitute "facts not previously presented and heard," such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a post-conviction relief 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 material fact not previously presented, the post-conviction relief 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). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had;
> (2) Has been discovered since the trial;
> (3) Could not by the exercise of due diligence have been discovered before the trial;

(4) Is material to the issue of guilt or innocence; and,
(5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979).

Applicant has failed to allege facts sufficient to support his claim of newly discovered evidence. As made clear at the hearing on the motion to dismiss, Applicant's allegations involve "facts" that were, or could have been, discovered before his trial. Furthermore, each of Applicant's allegations have been raised *at least* once in his prior actions in state and federal courts. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that 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). Applicant has failed to make such a prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the Court shall summarily dismiss this matter with prejudice.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Respondent's Motion to Dismiss should be granted. Applicant failed to timely file for post-conviction relief and the application must be summarily dismissed. This application is also barred by the doctrine of laches. It is successive to a prior filed post-conviction relief action. The application is also barred by the doctrine of res judicata. Applicant fails to state a claim upon which post-conviction relief can be granted in his assertions that prior PCR counsel was ineffective. Also, Applicant does not present a viable claim based upon newly discovered evidence. Therefore, this Court grants respondent's motion to dismiss this PCR application with prejudice.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Since the application for post-conviction relief is being dismissed because it is successive and untimely, a written explanation as required by Rule 243(c), SCACR must be filed with the Notice of Appeal. See Rule 203(d)(1)(B)(v), SCACR; Rule 243(c), SCACR. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. Respondent's motion to dismiss the PCR application is granted;
2. The PCR application is denied and dismissed with prejudice; and
3. Applicant will remain in the custody of the South Carolina Department of Corrections to complete service of his sentences.

AND IT IS SO ORDERED this 30 day of March, 2018.

J. Cordell Maddox, Jr.
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

ALAN WILSON
ATTORNEY GENERAL

March 16, 2018

Via email and Via Regular Mail
The Honorable J. Cordell Maddox, Jr.
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622

Re: **Julius Irick Gilyard, Jr. #256932 v. State of South Carolina**
2015-CP-32-02465

Dear Judge Maddox:

As requested, enclosed please find a proposed Order of Dismissal in the above referenced post-conviction relief matter. A Word version of the attached proposed Order has been forwarded by email. If this order meets with Your Honor's approval, please forward to the Lexington County Clerk of Court office, to be filed and served on all parties. I am providing the Applicant a copy of this proposed order by copy of the letter.

Sincerely,

Alphonso Simon, Jr.
Assistant Attorney General

AS:dmd
Enclosures
cc: Lexington County Clerk of Court (w/copy of encl.)
Julius Irick Gilyard, Jr., #256932 (w/copy of encl., and copy of email)