STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Eugene Thomas, SCDC #222351, Applicant, v. State of South Carolina, Respondent.	)	Case No. 2019-CP-23-1381 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Eugene Thomas (Applicant) on March 15, 2019. The State made its return on April 15, 2020, requesting the application be summarily dismissed.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its May 2010 term, the Greenville County Grand Jury indicted Applicant for third-degree burglary (2009-GS-23-9349), armed robbery (2009-GS-23-9350), and possession of a weapon during commission of a violent crime (2009-GS-23-93580).

On September 10, 2012, Petitioner proceeded to a jury trial before the Honorable R. Markley Dennis, Jr. Scott D. Robinson, Esquire, represented Applicant. Assistant Solicitor Jennifer Tessitore prosecuted the case. The following day, the jury convicted Applicant of the lesser-included offense of attempted armed robbery and as indicted of the burglary and weapons charges. Judge Dennis sentenced Applicant to life imprisonment without the possibility of parole

(LWOP) for attempted armed robbery pursuant to section 17-25-45 of the South Carolina Code.[1] Applicant received a five-year concurrent sentence for the burglary and weapons charges.

Applicant filed a timely notice of appeal. Timothy Gehret, Esquire, and Chief Appellate Defender Robert M. Dudek perfected the appeal on Applicant's behalf by briefing the following issues to the Court of Appeals:

> I. Did the circuit court err in denying Appellant's motion for directed verdict because the State's circumstantial evidence was not substantial enough to create any more than a mere suspicion of guilt?
>
> II. Did the circuit court err in denying Appellant's motion to suppress the pre-trial photo lineup identification because it was unduly suggestive and unreliable under the totality of the circumstances?
>
> III. Did the circuit court err in refusing to charge the lesser included offense of strong armed robbery because no proof of a weapon or threat of a weapon was ever presented?

Following briefing an oral argument, the Court of Appeals affirmed Applicant's convictions in an unpublished opinion issued October 15, 2014. *State v. Thomas*, Op. No. 2014-UP-360 (S.C. Ct. App. filed Oct. 15, 2014). The case was returned to the circuit court on November 3, 2014.

Initial PCR Action (2015-CP-23-2998) and Subsequent Appeal

Applicant filed his first PCR action on May 7, 2015, alleging he was being held in custody unlawfully based on:

> 1. Counsel failed to communicate the full extent and consequences of the plea offer;

[1] Applicant had a prior second-degree murder conviction from 1981 in Florida, which qualifies as a "most serious offense" under section 17-25-45(A)(1)(b). Section 17-25-45(A)(1) requires a person with one or more convictions of a most serious offense be sentenced to LWOP.

2. Counsel failed to object to constructive amendment of the indictment and failed to move for a verdict in arrest of judgment and entry of judgment of acquittal based upon lack of jurisdiction for unindicted attempted armed robbery offense;
3. Counsel failed to move to suppress the gun and dice gain obtained during search incident to arrest;
4. Counsel failed to present an alibi defense and instead opted for last closing argument;
5. Counsel failed to investigate or research;
6. Counsel failed to object to the State's closing argument insinuating prior bad acts;
7. Counsel failed to object to erroneous jury charge;
8. Prosecutorial misconduct via failure to disclose State's fingerprint analyst.

The State made its return on November 30, 2015, requesting an evidentiary hearing be held on Applicant's claims of ineffective assistance of counsel. On August 24, 2016, the court convened a hearing at the Greenville Courthouse before the Honorable John C. Hayes III. At the conclusion of the hearing, the record was left open because Applicant's alibi witness were not available to testify. The hearing reconvened on August 27, 2016. Applicant was present at all stages of the hearing and represented by Brian P. Johnson, Esquire. Assistant Attorney General Patrick L. Schmeckpeper represented the State. Applicant testified at the hearing, as did his trial counsel Scott Robinson, Esquire. Witnesses Demeco Thomason and Yvonne McBee also testified. On November 4, 2016, Judge Hayes issued an order denying the application on all grounds and dismissing with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender Robert Pachak filed a petition for a writ of certiorari on the issue of whether defense counsel was ineffective in failing to call an alibi witness at trial. The Supreme Court granted certiorari, both parties submitted briefs, and the Court heard oral arguments. On June 19, 2019, the Court issued an opinion dismissing certiorari

as improvidently granted. *Thomas v. State*, Op. No. 2019-MO-031 (S.C. Sup. Ct. filed June 19, 2019). The case was returned to the circuit court on July 8, 2019.

Federal Habeas Corpus Action: 1:19-2176-MBS-SVH

On August 1, 2019, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court, District of South Carolina In his petition, Applicant raised the following grounds for relief (verbatim):

1. Trial counsel was ineffective for failure to call alibi witnesses at Petitioner's trial
2. Trial counsel was ineffective for not "investigating" and "researching" whether or not Applicant's 1981 conviction for murder in Florida was a qualifying conviction for LWOP
3. Trial counsel was ineffective for failing to suppression of gun that was ultimately entered into evidence.
4. Trial counsel was ineffective for failure to object to the prosecutor's "opening" and "closing" arguments to the jury by referring to; or relying upon evidence not admitted into evidence by Trial Court. Thus violating the Rules Governing the admission of evidence, which violated Petitioner's 6th and 14th Amendments of the U.S. Constitution.
5. Inadequate Assistance of counsel at a critical stage at initial-review collateral proceeding.
6. Failed to communicate full extent and consequences of plea offer.
7. Failed to object to erroneous jury charge.
8. Failed to object to prosecutor's closing argument that insinuated bad acts.
9. Failed to object to a constructive amendment of the indictment.
10. *Brady violation* Prosecutor failed to disclose the State's fingerprint analyst was not certified by S.L.E.D.
11. Appellate counsel was ineffective for failing to raise reversible error which was meritorious on direct appeal.

The State filed a return and motion for summary judgment on September 26, 2019, to which Applicant filed a response on December 4, 2019. On January 13, 2020, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued a report and recommendation that the State's motion for summary judgment be granted and the petition dismissed with prejudice. Applicant

filed objections to the R&R on February 20, 2020. This matter is currently pending.

II. CURRENT APPLICATION

On March 15, 2019, while the appeal from his first PCR action was pending, Applicant filed a second PCR application, alleging he was being held in custody unlawfully based on (verbatim):

1. Denied due process in violation of my 5th, 6th, 8th, and 14th amendments
2. Newly discovered evidence and fraud upon the court
3. The court was without jurisdiction to impose sentence, which is subject matter jurisdiction.

Applicant filed a pro se memorandum with the application. On February 11, 2020, Applicant filed an amended application to include the following claims (verbatim):

4. "Petitioner was denied due process in violation of his 6th and 14th Amendments under Strickland v. Washington, 466 U.S. 668 (1984) due to Petitioner's PCR Counsel inadequate assistance of counsel at a critical stage at initial-review collateral proceeding."
    a. "Petitioner assert this ground pursuant to § 17-27-90 South Carolina Code which states the following: A ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original supplemental or amended application."
5. "Appellate counsel fail to file petition for writ of certiorari of a ineffective assistance of trial counsel for ruling to the highest state court and preserve for federal review."
    a. "Trial counsel was ineffective for failure to 'investigate' and 'research' whether or not Applicant's 1981 conviction was a qualifying conviction for LWOP"
    b. "Trial counsel was ineffective for failing to suppression of gun that was ultimately entered into evidence."
    c. "Trial counsel was ineffective for failure to object to 'opening' and 'closing' arguments to the jury by refererring to; or relying upon evidence not admitted

into evidence by violating the rules governing the admission of evidence, which violated Applicant's 6th and 14th Amendments of the U.S. Constitution and the South Carolina Constitution of Due Process."

6. "PCR counsel at a initial collateral review failure to raise ineffective assistance of trial counsel claims of meritorious value that was listed in PCR application."
    a. "Inadequate assistance of PCR counsel at a critical stage at a initial-review collateral proceeding."
    b. "Trial counsel fail to communicate full extent and consequences of plea offer."
    c. "Trial counsel failed to object to erroneous jury charge."
    d. "Trial counsel failed to object to Prosecutor's closing argument that had insinuated bad acts."
    e. "Trial counsel failed to object to a consecutive amendment of the indictment."
    f. "Trial counsel failed to object to the Brady violation of Prosecutor failure to disclose State's fingerprint analyst was not certified by SLED – South Carolina Law Enforcement Division
    g. "Appellate counsel on direct appeal was ineffective for failure to raise reversible error which was meritorious and objected by trial counsel."

Before this Court are the records of the Greenville County Clerk of Court regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's appellate records, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeals therefrom; Applicant's federal habeas records; and records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

This Court finds this application should be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; Applicant failed to make a *prima facie* case of newly discovered

evidence; and Applicant's claims are otherwise without merit.

Statute of Limitations

This Court finds Applicant's allegations, except for the claim of newly discovered evidence, should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act (Act). S.C. Code Ann. § 17-27-10 to -160 (2014). 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).

Our 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). Additionally, section 17-27-70(c) authorizes this Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *See also Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant was convicted on September 12, 2012, and the remittitur from the direct appeal issued on November 3, 2014. This application was filed on March 15, 2019—nearly five years after the requisite filing period expired. Therefore, Applicant's allegations, except for the claim of newly discovered evidence, must be summarily dismissed for failure to file within the time

mandated by the Act.

Newly-Discovered Evidence

This Court finds Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing, to be without merit. The Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). 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)).

The Great Seal

Applicant alleges his conviction is unconstitutionally invalid because there is no visible impression of the Great Seal on the following Acts of which he was convicted: 1993 Act No. 184, 1995 Act No. 7. This allegation is without merit, as our Supreme Court has held that absolute literal compliance is not essential to valid legislation, but substantial compliance is sufficient.

Smith v. Jennings, 67 S.C. 324, 45 S.E. 821, 824 (1903); *See e.g.* S.C. Op. Att'y Gen., 2017 WL 6189878 (S.C.A.G. December 1, 2017). Further, under the Enrolled Bill Rule, an act is deemed to be properly passed when it has been ratified by the presiding officers of the General Assembly, approved by the Governor, and enrolled in the Office of Secretary of State. *Medical Soc. of South Carolina v. Medical Univ. of South Carolina*, 334 S.C. 270, 278, 513 S.E.2d 352, 356 (1999); *Beaufort County v. Jasper County*, 220 S.C. 469, 487, 68 S.E.2d 421, 430 (1951); *State v. Town Council of Chester*, 39 S.C. 307, 17 S.E. 752, 755 (1893) ("when the bill . . . is deposited in the department of state, according to law, its authentication as a bill that has passed congress is complete and unimpeachable).

Other jurisdictions have upheld acts challenged as invalid because there was not strict compliance with a constitutional provision. *See Taylor v. Wilson*, 22 N.W. 119 (Neb. 1885) (finding an act was not unconstitutional when the president of the senate did not sign it as required by the state's constitution); *Commr's of Leavenworth Co. v. Higginbotham*, 17 Kan. 62 (Kan. 1876) ("[T]he mere failure of the president of the senate to do his duty cannot have the effect to invalidate the law.").

Additionally, our Supreme Court has upheld the appointment of an officer whose commission lacked the Great Seal as required by law. *State v. Toomer*, 7 Rich. 216, 229, 41 S.C.L. 216, 229 (1854). In *Toomer*, the Court explained if the State excused the delinquency of the officer and cured the defects, then the title has related back to the time of the election. *Id.* Moreover, section 2-7-45 of the South Carolina Code states:

> The Code of Laws of South Carolina, 1976, which contains the permanent laws of general application through the 1975 session of the General Assembly and which was presented to the members of the General Assembly during the 1977 session is hereby adopted as the Code of Laws of South Carolina, 1976, and is declared to be the only general statutory law of the State as of January 1, 1976.

Our Supreme Court has held codification of an act will cure a constitutional defect, and is part of the general statutory law of the State. *S.C. Tax Comm'n v. York Elec. Co-op., Inc.*, 275 S.C. 326, 333, 270 S.E.2d 626, 629-30 (1980). The acts Applicant currently challenges have substantial compliance with the requirements and were codified into the 1976 Code. Therefore, these laws are enforceable, and Applicant's allegation lacks merit.

In this case, Applicant's discovery of the missing Great Seals under Article III, Section 18 does not constitute newly discovered evidence. This "evidence" was discoverable prior to Applicant's direct appeal and PCR actions. Applicant filed a previous collateral action where he could have raised this allegation—Applicant cannot raise this allegation now under the guise of "newly discovered evidence."

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make a showing he is entitled to relief based on the Great Seal. 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, this matter must be summarily dismissed with prejudice.

Subject Matter Jurisdiction

Applicant further contends the circuit court lacked subject matter jurisdiction to sentence him to LWOP under the recidivist statute based on his prior Florida conviction. An applicant may challenge the subject matter jurisdiction of the trial court and such a claim is one that may be raised at any time. *See Brown v. State*, 343 S.C. 342, 540 S.E.2d 846 (2001), *overruled in part by Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005). However, "[c]ircuit courts obviously have subject matter

jurisdiction to try criminal matters." *Gentry*, 363 S.C. at 101, 610 S.E.2d at 499. *See also* S.C. Const. Art. V, § 7. Thus, Applicant must present evidence his case is of some class over which the circuit court does not have the authority to preside.

Applicant failed to present evidence his case is of some class over which the circuit court does not have the authority to preside. The Greenville County Grand Jury indicted Applicant for the charges Applicant is challenging in this action, all of which allege the criminal offenses occurred in Greenville County. Moreover, Applicant was tried for charges and was sentenced by a circuit court judge in the Greenville County Court of General Sessions. Accordingly, this allegation must be summarily dismissed because Applicant has failed to present any facts or evidence which would establish the convictions he challenges in this application are of a class over which the circuit court does not have the authority to preside.

Successive

The Court finds this application must also be summarily dismissed because it is successive to Applicant's previous PCR applications. 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.

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. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991 ("[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules."). 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 of denial of due process and lack of subject matter jurisdiction could have been raised in his prior PCR action—thus, the current application is successive and barred under section 17-27-90 of the South Carolina Code. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch,* 246 S.C. 258, 143 S.E.2d 455. Applicant has failed to present any sufficient reason why he could not have raised the current allegations in his previous PCR applications. Therefore, Applicant has failed to meet his burden, and this action must be summarily dismissed as successive to Applicant's previous PCR application.

Failure to State a Claim

The Court finds this application must further be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. In the amended application, Applicant cites the following portion of section 17-27-90 in support of his claim of ineffective assistance of PCR

counsel: "A ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application."

Applicant's contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding with the merits of a successive application. *See Kelly v. State,* 404 S.C. 365, 365, 745 S.E.2d 377 (2013) (recognizing that that "*Martinez*[2] is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions."); *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) ("*Martinez* does not afford [an applicant] a right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.")

Additionally, the United States Supreme Court has held that 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,* 305 S.C. at 452, 409 S.E.2d at 395.

The only recognized exception to the rule barring claims of ineffective assistance of PCR counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a

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[2] In *Martinez v. Ryan*, the United States Supreme Court addressed the issue of "whether a federal habeas court may excuse a procedural default of an ineffective-assistance claim when the claim was not properly presented in state court due to an attorney's errors in an initial-review collateral proceeding." 566 U.S. 1, 5 (2012) The Court held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." *Id.* at 17 (emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Id.* at 13–14.

general exception to this rule where prior PCR counsel fails to appeal the denial of the application. However, *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." *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

As discussed above, Applicant filed a timely notice of appeal in his original PCR application, which was perfected on Applicant's behalf by Appellate Defender Robert Pachak. The South Carolina Supreme Court then denied his petition for writ of certiorari. Applicant's allegation of ineffective assistance of PCR counsel does not fall within any exception to the rule barring such claims. Therefore, Applicant has failed to meet his burden, and this action must be summarily dismissed as successive to Applicant's previous PCR applications.

Res Judicata

The Court finds this application is further 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*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered "the trial record and the numerous allegations raised in the petitions ... and [it] dismissed [the petitions] on the

merits." *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616-17, 274 S.E.2d at 415-16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

> The language of Section 17-27-90 is not restricted to State proceedings but rather refers to "any other proceeding" where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*, *supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant had a full opportunity to litigate all of his current allegations—except his claim of newly discovered evidence—in his prior action. The finality of the previous court rulings should be respected, and this Court must summarily dismiss this application as barred by the principles of *res judicata*.

Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). **We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system**

> **Aice urges that we establish**. For these reasons, we hold the contention that prior PCR counsel was ineffective is not per se a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Aice, 305 S.C. at 451, 409 S.E.2d at 394 (emphasis added).

The United States Supreme Court has explained that "the principle of finality ... is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). In his concurring and dissenting opinion in *Mackey v. United States,* 401 U.S. 667, 691 (1971), Justice Harlan wrote:

> Finality in the criminal law is an end which must always be kept in plain view.... At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

Mackey, 401 U.S. at 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke,* 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Greenville County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Lillian L. Meadows, Esquire
Post-Conviction Relief Division – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville County Clerk of Court and opposing counsel within twenty (20) days, and the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 10 day of January, 2020.

ALEX KINLAW, JR.
Chief Administrative Judge
Thirteenth Judicial Circuit

Columbia, South Carolina

Copy mailed to
Attorney General JC
on 8/24/2020.