

concerning the documents in his petition for writ of certiorari in his PCR appeal. Applicant claims that if these records were presented at trial, he would not have been found guilty. Applicant alleges prosecutorial misconduct for allegedly cutting cross-examination of the expert witness short. Beyond stating a full cross-examination would have established his innocence in front of the jury, he fails to show what would have been unearthed if the cross-examination lasted longer. Applicant claims he received ineffective assistance of PCR counsel in his original action and, thus, this PCR action is a “continuation of the ‘one bite of the apple.’”

On October 21, 2019, Applicant filed a document entitled “reply to conditional order of dismissal.” In this response, Applicant claims he has new evidence consisting of eyewitness accounts recorded by a Medical Doctor that contradict the State’s case at trial. Applicant claims false testimony was given and the State failed to correct it. Applicant claims that if false testimony was not presented in the State’s case, he would not have been convicted of the most serious offense. He also claims that the State’s failure to disclose medical records constituted a *Brady*¹ violation. Applicant claims that the State impeded Counsel’s cross-examination of the expert witness at trial until the State excused her from the courtroom. He claims if cross-examination was not stopped prematurely, a different outcome would have been achieved at trial. Applicant admits the medical records he alleges were newly discovered were used during cross-examination of the medical expert at trial he raised an issue concerning the medical records in his PCR appeal and federal habeas corpus cases.

This Court has reviewed these responses in full and finds neither are sufficient enough to warrant an evidentiary hearing. Consequently, this Court finds this application must be summarily dismissed with prejudice.

¹ *Brady v. Maryland*, 373 U.S. 83 (1963).

In Applicant's PCR application and subsequent filings, he has continued to fail to establish a *prima facie* case of newly discovered evidence. Applicant's allegation that the medical records are newly discovered evidence because they were "wrongly excluded evidence at trial" is without merit. Applicant knew about these records long before he filed this application; something Applicant himself admits in stating he raised it in his 2014 PCR appeals case and his 2015 habeas corpus action. Applicant filed this application on June 24, 2019; well outside the year in which he could file an application after discovery of the evidence. Additionally, Applicant seemingly admits the documents were used at trial and, thus, must have been known prior to trial or could have been discovered through exercise of due diligence. Further, Applicant has failed to show why these documents, if admitted at trial, would have been material to the issue of guilt or innocence or were not merely cumulative or impeaching. Thus, this Court maintains its position set in the conditional order, finding Applicant has failed to establish a *prima facie* case of newly discovered evidence.

The application remains barred by the doctrine of *res judicata*. The claims concerning failure to cross-examine and object to the State's expert witness were previously raised in his PCR appeal and federal habeas actions. The finality of previous court rulings must be respected and, thus, the application remains dismissed as barred by the doctrine of *res judicata*.

In Applicant's PCR application and subsequent filings, he has continued claim he is entitled to relief because of ineffective assistance of PCR Counsel; a claim not cognizable in a PCR action. As stated in the conditional order, the only exception to the rule barring PCR relief because of ineffective assistance of PCR Counsel is found in a claim that PCR Counsel failed to appeal in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). Applicant has not made such a claim and, in fact, his first PCR action was appealed and dismissed by the Supreme Court of


South Carolina. Thus, Applicant has not overcome the procedural defaults set forth in the conditional order of dismissal through addressing his failure to state a claim.

Additionally, this Court finds that the application is barred through the statute of limitations. Applicant was convicted on May 26, 2010, and the remittitur from his direct appeal issued on March 23, 2012. Thus, his PCR application was due on March 24, 2020. The current application was not filed until June 24, 2019. Applicant has failed to sufficiently explain the seven year delay between the remittitur of his appeal and this pursuit of remedy through the PCR process. Thus, the Court shall dismiss the matter as barred by the statute of limitations.

Further, Applicant's application is barred on successiveness grounds. Applicant's current allegations were or could have been raised in earlier proceedings based upon Applicant's prior PCR application or in his federal habeas corpus action and Applicant has not sufficiently proven why these issues could not have been raised earlier. Thus, the current application is successive and barred.

Before this 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). Applicant has failed to make such a showing based on the information set forth in his responses, and, consequently, is not entitled to an evidentiary hearing. Thus, the Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed because it fails to state a *prima facie* case of newly-discovered evidence, because ineffective assistance of PCR counsel is not cognizable under the Uniform Post-Conviction Procedure Act, and because the application is untimely, successive, and barred by the doctrine of *res judicata*. Accordingly, this Court finds no reason why the conditional order of dismissal should not be finalized.

IT IS THEREFORE ORDERED that, for the reasons set forth in the conditional order

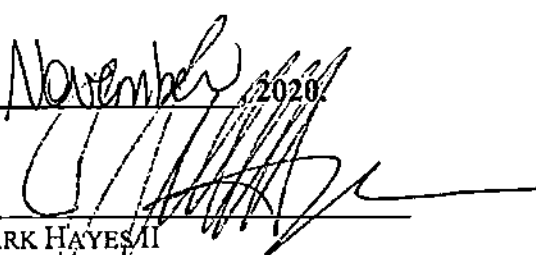

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of dismissal, the PCR application is hereby denied and dismissed with prejudice.

This court hereby advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order to secure appellate review. *See* Rule 203, SCACR.

Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 20th day of November, 2020.



J. MARK HAYES II
Chief Administrative Judge
Seventh Judicial Circuit

Cherokee, South Carolina



ALAN WILSON
ATTORNEY GENERAL

December 2, 2020

The Honorable Brandy W. McBee
Cherokee County Clerk of Court
Post Office Box 2289
Gaffney, South Carolina 29342

Re: Donald S. Jones, #33690 v. State of South Carolina
2019-CP-11-00466

Dear Ms. McBee:

Enclosed please find the original **Final Order of Dismissal** signed by the Honorable J. Mark Hayes, II, in the above-captioned case, for filing in your office.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

/s Chelsey F. Marto
Chelsey F. Marto
Assistant Attorney General

CFM/ec

Enclosure

FILED IN THE OFFICE
CLERK OF COURT
2020 DEC - 7 A 9: 51
BRANDY W. MCBEE
CHEROKEE COUNTY, SC