

**NOTICE OF APPEAL FROM A PCR DENIAL BY THE COURT OF
COMMON PLEAS**

THE STATE OF SOUTH CAROLINA
In Supreme Court of SC

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Case #2019-CP-43-00023

The State,

Respondent,

v.

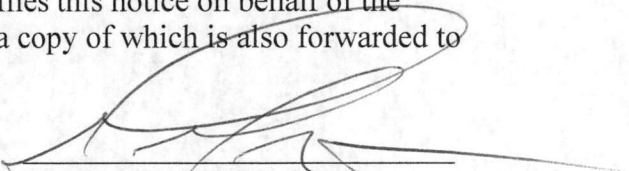
Favian A Hayes

Appellant.

NOTICE OF APPEAL

Favian A Hayes, appeals the decision of the Court, in the order dated April 15, 2021, received by counsel on April 21, 2021, where Mr. Hayes was denied his request for Post-Conviction Relief. Mr. Hayes was represented at the hearing by Timothy L. Griffith, Attorney at Law who files this notice on behalf of the Appellant. The order herein attached and a copy of which is also forwarded to the SCCID Appellate Division.

Dated 4/22/21


Timothy L. Griffith, Esquire
2338 Mount Vernon Dr.
Sumter, SC 29154
Telephone: (803) 499-2012
Attorney for Appellant (relieved)
Will not be representing on appeal

Other Counsel of Record:
Michael Neubauer, Esquire
Assistant Attorney General
South Carolina Attorney General's Office
P.O. Box 11549, Columbia, S.C. 29211

RECEIVED

APR 27 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

RECORDED

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Favian A. Hayes, #293544,
Applicant,
v.

2021 APR 15 PM 1:57
JAMES C. CAMPBELL
CLERK OF COURT
SUMTER COUNTY, S.C.

Case No.: 2019-CP-43-00023

State of South Carolina,
Respondent.

**ORDER GRANTING RESPONDENT'S
PARTIAL MOTION TO DISMISS, AND
ORDER OF DISMISSAL**

CERTIFIED TRUE COPY
OF ORIGINAL FILED

Sherry H. How
DEPUTY CLERK OF COURT
SUMTER COUNTY
SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief filed on January 8, 2019, by Applicant Favian A. Hayes (Applicant) alleging he was entitled to post-conviction relief based on constitutionally ineffective assistance of plea counsel and ineffective assistance of appellate counsel. In response, Respondent filed its Return. Thereafter, Applicant, through appointed counsel Timothy L. Griffith, Esquire, filed a supplemental application dated February 25, 2021, also alleging allegations of ineffective assistance of plea counsel, PCR judicial conflict, "newly discovered evidence", and allegations of ineffective assistance of appellate counsel. Respondent subsequently filed an Amended Return and Partial Motion to Dismiss.

A hearing on Applicant's partial motion to dismiss and a subsequent evidentiary hearing convened on March 11, 2021, before this Court via the WebEx Virtual Courtroom platform. Applicant was present and was represented by counsel Griffith. Respondent was represented by Assistant Attorney General Brianna L. Schill of the South Carolina Attorney General's Office. At the outset of the hearing, Respondent made its Partial Motion to Dismiss, arguing Applicant's allegations of ineffective assistance of plea counsel, PCR judicial conflict, and newly discovered evidence warranted summary dismissal, and that Applicant could only go forward on his allegation

of ineffective assistance of appellate counsel at the evidentiary hearing. As discussed below, this Court granted Respondent's partial motion to dismiss on the basis that Applicant's application, with the exception of allegation against appellate counsel, are barred by the statute of limitations, barred as successive, barred by the doctrine of res judicata, fail to state cognizable PCR claims, and fail to make a prima facie case of newly discovered evidence. This Court proceeded on an evidentiary hearing only as to Applicant's allegations of ineffective assistance of appellate counsel. At the evidentiary hearing, testimony was taken from Applicant and Applicant's revived direct appeal attorneys: former Assistant Appellate Defender John H. Strom, Esquire and Deputy Chief Appellate Defender Wanda H. Carter, Esquire.

Following a thorough review of the record in its entirety, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to post-conviction relief and denies this application with prejudice.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections.¹ On June 1, 2009, Applicant appeared in the Sumter County Court of General Sessions before the Honorable Howard P. King, circuit court judge, and pled guilty to possession of cocaine base-2nd offense (2007-GS-43-0801), criminal conspiracy (2008-GS-43-0646), and armed robbery (2008-GS-43-0646). Assistant Solicitor Catherine Fant of the Third Circuit Solicitor's Office prosecuted the case. Assistant Public Defender David Sullivan represented Applicant. Judge King sentenced Applicant to imprisonment for five years for possession cocaine base-2nd offense, five years for

¹ Applicant is also serving sentences for threatening the life, person, or family of a public official (2010-GS-32-9932) and threatening to bomb (2010-GS-32-9986) arising out of Greenville County guilty pleas.

criminal conspiracy, and twenty-five years for armed robbery, with all sentences to be served concurrently.

Applicant's counsel filed a timely notice of appeal on Applicant's behalf, but did not provide an explanation as required under Rule 203(d)(1)(B), SCACR either in his notice of appeal or in response to letters from the South Carolina Court of Appeals. Accordingly, on September 3, 2009, the Court of Appeals issued an order dismissing Applicant's appeal. Applicant then filed a motion to reinstate his appeal and various other motions. By order dated October 15, 2009, the Court of Appeals denied Applicant's motion to reinstate his appeal. The remittitur was returned to the circuit court in November 17, 2009.

Applicant's First PCR Action: 2009-CP-43-2206

Applicant filed an application for post-conviction relief on September 22, 2009 (2009-CP-43-2206), alleging the following claims:

1. "Ineffective Assistance of Counsel/"Involuntary Guilty Plea"
 - a. "Failure to investigate possible defense..."
 - b. "Counsel gave defendant 'erroneous advice' to Client stating Client would receive a mandatory minimum 10 yrs. 'upon pleading.'"
2. "Conflict of Interest."
 - a. "Counsel represented another client that pertain to my Rule 5 & also has common knowledge of defendant case and was scheduled to testify against defendant."
3. "Judge Abuse of Discretion."
 - a. "Trial judge abuse his discretion by ignoring possible conflict of interest and not further inquiring."
4. "Ineffective of Assistance of Appellate Lawyer."

The State made its return, requesting an evidentiary hearing. An evidentiary hearing was convened on March 23, 2012, at the Sumter County Courthouse before the Honorable W. Jeffrey Young, then-circuit court judge. Applicant was present at the hearing and was represented by Patrick Killen, Esquire. Respondent was represented by Assistant Attorney General Mary S. Williams of the South Carolina Attorney General's Office. At the hearing, Applicant testified on

his own behalf. Plea counsel Sullivan, investigator Christopher Hilditch, and co-defendant Brandon McFadden also testified. By written order signed May 16, 2012, and filed May 22, 2012, Judge Young denied and dismissed the application with prejudice.

Applicant then appealed the denial of his post-conviction relief action. (Appellate Case No. 2012-212175). Applicant was represented by Appellate Defender Kathrine H. Hudgins of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a petition for writ of certiorari in the South Carolina Supreme Court raising the following issue:

Did the PCR judge err in refusing to find counsel ineffective for failing to provide an explanation pursuant to Rule 203(d)(1)(B)(iv) showing that the plea judge's refusal to relieve counsel, based on a conflict of interest, was an issue that could be raised in a direct appeal of the guilty plea?

Respondent filed a return to the petition. Thereafter, the case was transferred to the South Carolina Court of Appeals. By Order dated July 3 2014, the Court of Appeals denied Applicant's petition for a writ of certiorari. The remittitur was returned to the circuit court on July 23, 2014.

Applicant's Second PCR Action: 2015-CP-43-653

On March 9, 2015, Applicant filed a second PCR application alleging "newly discovered evidence." Respondent subsequently filed a Return and Motion to Dismiss requesting the action be summarily dismissed as successive, untimely, and for failing to meet the newly discovered evidence standard. By Order signed April 6, 2015, and filed April 24, 2015, this Court conditionally dismissed Applicant's PCR application, while giving Applicant twenty days from the date of service to respond to the Conditional Order of Dismissal. Applicant subsequently filed a response to the Court's Conditional Order of Dismissal. After considering Applicant's response to the Conditional Order of Dismissal, this Court issued a Final Order of Dismissal, signed October 28, 2015, and filed November 5, 2015, denying and dismissing Applicant's second PCR application with prejudice.

Federal Habeas Petition: 4:14-cv-03778-RMG

Applicant also filed a habeas corpus petition in the United States District Court for the District of South Carolina (4:14-cv-03778-RMG), alleging the following grounds:

Ground one: Ineffective assistant of counsel

Supporting facts: Counsel David F. Sullivan, Esq., failed to investigate case; had counsel would of investigate he would found out that during an bond hearing that was conducted on 10-30-07, he would have known that lead Det. Rickburg in Robbery case stated in open court that eh victims in said case "couldn't identify, because assailants had their faces covered." Counsel could have used such trans [?] to "impeach" victim and/or Det. on cross-examination. [Ground continues, see attachment, p. 6 of Petition].

Ground two: "Conflict of Interest"

Supporting facts: David F. Sullivan, guilty plea counsel took appellate Brady motion and exposed contents of discovery to another one of his clients [?] was an potential witness for the State, one's Stacey Rhodes took several documents and photos from appellate discovery. Counsel motive - [See attachment, p. 7 of Petition].

Ground three: Involuntary guilty plea

Supporting facts: Counsel gave appellate erroneous advise to plead guilty to Robbery offense, stating that appellate was to receive an (10) year sentence same as codefendant Brandon McFadden, received, if appellate pleaded guilty. Appellate told Hon. Judge King, that coun. enlighten appellate that coun. advised him that he was to receive an (10) year sentence upon pleading. Appellate told Judge King the only reason he was pleading-[See attachment, Ground 3 page 4].

Ground four: Ineffective assistance of counsel on appellate law.

Supporting facts: Counsel David F. Sullivan, esq. filed Notice of Appeal on 6-1-09. Court of Appeals sent coun. an Notice, requesting an "written explanation," for Appellate N.O.A., with an (14) day deadline, failure to do so would result in an Order of Dismissal, Rule 203 (d)(1)(B), on 7-23-09. Counsel failed to respond to Notice. On 8-13-09, C.O.A. sent another "Notice," stating the same as first Notice. Counsel refused to respond to that correspondence as well. Instead sent Appellate an correspondence (11) days later out of the (14) day deadlines. [Ground continues, See attachment Ground 4, p. 11].

In response, the State filed a motion for summary judgment. On May 28, 2015, the Honorable Thomas E. Rogers, III, magistrate judge, issued a report and recommendation recommending that the State's motion for summary judgment be denied unless the State allowed Applicant leave to

appeal his guilty plea conviction out of time and recommended the remaining claims be dismissed. The Honorable Richard Gergel, United States District Judge, entered a conditional order granting the writ of habeas corpus only as to Applicant's direct appeal rights and directing the State to restore Applicant's direct appeal rights.

In response to Judge Gergel's order, on motion by the State, the South Carolina Supreme Court issued an order for the Court of Appeals to recall the remittitur in the direct appeal and reinstate the appeal. After the Court of Appeals recalled the remittitur, Applicant submitted an explanation pursuant to Rule 203 (d)(1)(B)(iv), SCACR. The Court of Appeals then ordered the appeal to proceed on June 16, 2016. Applicant, through then-Appellate Defender John H. Strom of the South Carolina Commission on Indigent Defense-Office of Appellate Defense filed a brief raising the following issue:

The trial court abused its discretion in finding Hayes freely, voluntarily, and intelligently pled guilty to armed robbery, conspiracy, and possession of cocaine base; where prior to the court's acceptance of the guilty plea, the trial judge improperly denied Hayes's motion to relieve counsel without conducting an adequate inquiry into Hayes's complaint that counsel had an actual conflict of interest, due to his simultaneous representation of State's witness, Stacy Rhodes, that resulted in the total breakdown of the attorney-client relationship.

The Court of Appeals affirmed Applicant's pleas and sentences by unpublished opinion. State v. Hayes, 2018-UP-025 (filed January 17, 2018), finding the issue was not preserved for appellate review because Applicant argued different grounds to the plea court and conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant, through Appellate Defender Lara M. Caudy, Esquire, filed a petition for rehearing, which was denied by the South Carolina Court of Appeals. Applicant, through Deputy Chief Appellate Defender Wanda H. Carter, then filed a petition for writ of certiorari to the South Carolina Supreme Court, which was denied on May 24, 2018. The remittitur was returned to the circuit court on May 30, 2018.

SUMMARY OF EVIDENCE

On July 31, 2007, after 10:00 p.m., Applicant and a co-defendant armed robbed Young's Market [convenience store] on Oswego Road in Sumter County. Applicant and his co-defendant wore disguises, from the nose down, over their faces. Applicant's co-defendant entered the store first with the handgun. The gun belonged to Applicant. Applicant came into the store after his co-defendant. Applicant's co-defendant pointed the gun at the store clerk's head [Latasha Skinner] and demanded the store's money. The clerk was forced to give them the cash register money and to open the store safe. Applicant emptied the store safe of its money. Applicant and his co-defendant then fled the store with the store's money and went to a nearby house. The store clerk called the police. She was able to describe the two perpetrators, their clothing, and the gun that was used. Prior to trial, the clerk was shown a photo-graphic line-up, and she positively identified Applicant as the second individual who entered the store and committed the armed robbery.

Applicant and his co-defendant were arrested after a police investigation. Applicant's co-defendant provided a statement which incriminated not only himself but also Applicant in the armed robbery. Police also executed search warrants on Applicant's home and that of his co-defendant where police found distinctive clothing in both locations worn by the perpetrators of the armed robbery and seen in the surveillance video of the convenience store. Police also found where Applicant had rented a motel room and partied with his co-defendant and friends after the armed robbery. Applicant paid for the room for three days with cash costing several hundred dollars. Applicant checked into the motel room shortly after the armed robbery and after being questioned by police near the crime scene. Police recovered photographs believed to have been taken by Applicant with a disposable camera in the motel room that showed the gun used in the armed

robbery and cash and drugs. Police also discovered where Applicant deposited \$1,000 in a bank account the morning after the armed robbery, and Applicant had no means of gainful employment at the time. Some of the young men who had been partying with Applicant and his co-defendant informed police Applicant and his co-defendant had excessive amounts of cash on their persons in the days following the robbery. During the investigation, Applicant was arrested in possession of .76 grams of cocaine base/crack cocaine. The gun used in the armed robbery was also recovered by police. Applicant would not admit to police to committing the armed robbery, but he did admit being with his co-defendant, McFadden, all night the night of the robbery. As previously stated, McFadden confessed to police and to Applicant's involvement. McFadden told police he and Applicant got \$4,000 from the robbery which they split. McFadden also implicated Applicant as the other perpetrator at McFadden's guilty plea to the armed robbery. At his guilty plea, Applicant admitted he was the taller perpetrator who emptied the store safe, but did not carry a weapon.

CURRENT ACTION BEFORE THE COURT

In his current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Conflict of Interest²
2. Ineffective Assistance of Appellate Counsel

As requested relief, Applicant requests "Reverse and Remanded, New Trial!!!" Respondent subsequently filed a Return, Partial Motion to Dismiss, and Motion for a More Definite Statement dated March 18, 2019. On February 25, 2021, Applicant served upon Respondent an amended application alleging the following:

² It appears this allegation pertains to the alleged conflict of interest of Applicant's plea counsel.

A. Ineffective Assistance of Plea Counsel:

1. "His attorney informed him that he would receive 10 years. He saw a recommendation in writing from the SOL that the rec would be ten years. HIS ATTORNEY did not inform him that the Judge did not have to accept the recommendation...Had he known that, he would not have plead guilty and would have gone to trial."
2. "He did no[t] get to see all of his discovery and – HIS ATTORNEY did not go over the discovery with him."
3. "His ATTORNEY Also represented a defendant that was set to testify against him were he to go to trial, and that defendant removed pictures from Mr. Hayes' discovery packet. This represents a clear conflict."
4. "HIS ATTORNEY did not investigate the case. There was no evidence linking Mr. Hayes to the crime (according to Mr. Hayes), and an investigation would have shown that."

B. Ineffective Assistance of Remand Appellate Counsel

5. "His first attorney was replaced when that attorney took a job in DC. He was later appointed an attorney that was pregnant at the time and later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard."

C. PCR Judge Conflict

6. "His PCR Judge was Judge Young, whose father had previously owned the store that was robbed, which Mr. Hayes believes was a conflict and prejudiced Judge Young in his case."

D. "Newly Discovered Evidence"

7. Mr. Hayes' co-defendant received 10 years (the recommendation by the SOL) while Mr. Hayes received 25. The same person was later released after serving his sentence, and (according to Mr. Hayes) robbed the same store with the same MO."

In response, Respondent filed an Amended Return and Partial Motion to Dismiss dated March 3, 2021. At the evidentiary hearing, Applicant indicated he would be proceeding on the allegations contained in his amended application. The State renewed its partial motion to dismiss and this Court found the allegations of ineffective assistance of plea counsel, PCR judicial conflict, and

“newly discovered evidence” were procedurally barred and must be summarily dismissed. The evidentiary hearing proceeded only as to Applicant’s allegation of ineffective assistance of revived direct appeal counsel. Applicant testified on his own behalf, and Respondent presented testimony from appellate counsels, John H. Strom, Esquire, and Wanda H. Carter, Esquire.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Respondent’s Partial Motion to Dismiss

With respect to Respondent’s partial motion to dismiss, this Court reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court summarily dismisses the allegations of ineffective assistance of plea counsel, PCR judicial conflict, and newly discovered evidence, as there is no genuine issue of material fact which would necessitate an evidentiary hearing. See S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); 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). Respondent moved for partial summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

Successiveness

This Court finds allegations against plea counsel’s performance are barred as successive as they must have been raised in his initial post-conviction relief action pursuant to S.C. Code § 17-27-90. As Applicant already had a fully adjudicated post-conviction relief action addressing plea counsel’s performance and enjoyed an appeal to review the dismissal of that action, he is barred from raising any claims against plea counsel’s performance, including a purported conflict of

interest, now in this successive post-conviction relief action. Moreover, Applicant's allegation regarding the alleged PCR judicial conflict could have been brought in his 2015 PCR application.

In South Carolina, successive applications for post-conviction relief are disfavored and the burden rests firmly on an applicant to establish that any new ground raised in a subsequent application could not have been earlier raised in his or her 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. 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. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id. An 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).

In Applicant's case, his allegations against plea counsel's performance must have been raised in his initial post-conviction relief action. Moreover, it is clear that many of these allegations of ineffective assistance of plea counsel were addressed in his prior post-conviction relief action.

Accordingly, his current claims against plea counsel, including that a conflict of interest existed, is successive and barred under S.C. Code Ann. § 17-27-90. Applicant's allegation regarding the initial PCR judge's alleged conflict is also successive, as he could have brought this allegation in his 2015 PCR application, as that application was the first PCR application filed after his adjudicated PCR application in 2012.³ This Court finds the allegations of ineffective assistance of plea counsel and alleged conflict of PCR judge are barred as successive to Applicant's prior PCR applications.

Res Judicata

Additionally, the allegations of ineffective assistance of plea counsel are summarily dismissed based on 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. Thus, a successive claim, pursuant to Rule 12(b)(6), SCRCP, can be dismissed as barred by *res judicata*.

Applicant already adjudicated many of these claims in his prior post-conviction relief action, his appeal of that action, and/or on his revived direct appeal. Alternatively, these allegations could have been brought in his initial PCR action. With respect to his original conflict of interest allegation, in his revived direct appeal, the Court of Appeals expressly found Applicant conceded there was no conflict of interest when he and plea counsel were questioned by the plea court. Applicant then filed a petition for rehearing and a petition for writ of certiorari to the South

³ However, as discussed below the allegation regarding an alleged conflict of the PCR judge is not a valid PCR allegation.

Carolina Supreme Court challenging these findings, both of which were denied. Accordingly, as this issue was already raised and ruled upon many times, Applicant is barred from raising it again in this current action. Moreover, although his allegation of a PCR judicial conflict is not a proper PCR claim, it also should have been brought in his 2015 PCR application, as that was the first PCR application brought after his initial adjudicated PCR application. Therefore, this Court finds Applicant's allegations of ineffective assistance of plea counsel and PCR judicial conflict must be summarily dismissed based on the doctrine of *res judicata*.

Statute of Limitations

This Court also finds the allegations of ineffective assistance of plea counsel, alleged conflict of PCR judge, and Applicant's allegation of "newly discovered evidence" 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:

(A) 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 upon an appeal, whichever is later.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this

chapter 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.

The South Carolina Supreme Court has held 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, 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.”

In the present case, Applicant is alleging he is entitled to post-conviction relief based on various allegations of ineffective assistance of plea counsel. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Based on Peloquin, Applicant had until November 18, 2010, to timely file an application challenging his convictions based on his claims of ineffective assistance of plea counsel – which are not based on a change of law or statute and is not newly discovered evidence. The current application was not filed until 2019, well after the statutory filing period expired.

Additionally, as discussed above, even if Applicant’s allegation of an alleged PCR judicial conflict constituted a cognizable PCR claim, which it does not, this allegation should have been brought, at least, within one year of the adjudication of his initial PCR application. Applicant’s allegation of alleged “newly discovered” evidence is likewise barred because Applicant has failed to show how why he could not have brought the claim, at the very least, within one year of when he could have discovered the evidence with due diligence pursuant to S.C. Code Ann. § 17-27-

45(C). Accordingly, these allegations are untimely pursuant to Section 17-27-45 and must be dismissed with prejudice for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

Allegation of Judicial Conflict of Initial PCR Judge Is Summarily Dismissed for Failure to State a Cognizable PCR Claim

In his amended application, Applicant alleges his original PCR judge, Judge Young, had a conflict that prejudiced his PCR evidentiary hearing. This Court finds this is not a cognizable claim for post-conviction relief. Moreover, this Court finds that any objection pertaining to Applicant's PCR judge should have been alleged and addressed at the time of his first PCR evidentiary hearing, as this allegation could have been discovered by Applicant at that time, and likewise, does not constitute newly discovered evidence.

Pursuant to the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160, an applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

S.C. Code Ann. § 17-27-20 (1976).

As mentioned above, Applicant's claim of an alleged conflict of the PCR judge is not a cognizable claim for post-conviction relief. Moreover, even if this could plausibly be construed as valid PCR claim, which it cannot, this allegation would still be barred by the statute of limitations as Applicant filed this application over seven years after the PCR evidentiary hearing, and would likewise be barred as successive and by the doctrine of *res judicata*. Accordingly, this Court summarily dismisses this allegation with prejudice.

Applicant's Allegation of "Newly Discovered Evidence" Fails to Meet the Newly Discovered Evidence Standard

Finally, in his amended application, Applicant alleges "newly discovered evidence" in the form of information pertaining to his co-defendant's sentence and crimes subsequently allegedly committed by his co-defendant. Applicant's assertion that he should be granted post-conviction relief as a result of newly-discovered evidence is without merit and fails to make a *prima facie* claim of newly discovered evidence. 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).

In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331-32, 737 S.E.2d 485, 485-86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore,

an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that;

“(1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the “interest of justice” requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.”

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

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). The information pertaining to Applicant's co-defendant is not relevant or material to Applicant's guilt and does not constitute newly discovered evidence. Accordingly, Applicant has failed to make a *prima facie* showing of newly discovered evidence and he is not entitled to an evidentiary hearing in the matter. Accordingly, this Court summarily dismisses this allegation with prejudice.

B. Evidentiary Hearing Regarding Allegation of Ineffective Assistance of Remand Appellate Counsel

As to the evidentiary hearing concerning Applicant's allegation of ineffective assistance of revived direct appeal counsel, this Court has thoroughly reviewed the record in its entirety, including the plea transcript, Applicant's records from the South Carolina Department of Corrections, applicable records from the Sumter County Clerk of Court, direct appeal records (both original and revived direct appeals), prior PCR records, federal habeas corpus records, and the

records for this current action. Additionally, this Court heard the testimony presented at the evidentiary hearing, and was able to observe the witnesses presented at the evidentiary hearing, which allowed the Court to scrutinize the credibility of all witnesses presented. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985):

Testimony from PCR Hearing

Applicant's Testimony

Applicant testified he is currently housed at Lee Correctional Institution, and that he has been incarcerated for thirteen years. Applicant testified he previously filed an application for post-conviction relief, and his application was denied after an evidentiary hearing. Applicant testified he did not see all of the discovery related to his case. Applicant testified he was offered a ten year plea offer and was not informed that the judge could accept a different offer. Applicant also testified he believed his attorney had a conflict of interest because he at some point represented a witness who was anticipated to testify against him had he taken his case to trial. Applicant testified this other witness took documents pertaining to Applicant's case from Applicant's trial counsel, when trial counsel went to visit the witness. Applicant testified his co-defendant maxed out in 2016 or 2017. Applicant testified his sister received a phone call from the co-defendant's sister, during which the co-defendant's sister indicated the co-defendant was arrested again for committing the same type of crime.

Applicant testified he was granted a belated appellate review around May of 2015. Applicant testified he was first represented by then-Assistant Appellate Defender Strom. Applicant testified he and Strom discussed Applicant's issues with his case, and that Applicant

was subsequently sent a letter indicating an oral argument would be held. Applicant testified two-to-three weeks later he received a notice from the office of appellate defense that Strom was no longer his attorney because Strom moved to Washington D.C. due to his new job. Applicant testified he was informed he would be represented by Lara Caudy, Esquire, who was pregnant at the time. Applicant testified Caudy was about to start maternity leave and did not have "much" experience. Applicant testified when Strom left the Office of Appellate Defense, his case became a "hot potato thing." Applicant testified when Caudy left for maternity leave, Carter became his appellate attorney. Applicant testified he did not have much communication with Carter regarding his case. Applicant testified he thought Carter and Caudy did not provide him with adequate representation.

Applicant testified Strom provided him great representation. He testified he believed if Strom had represented him during the entirety of his appeal, he ultimately would have won his appeal and ultimately released from prison. Applicant testified he felt his case would not get adequate representation from Carter due to Carter's "high title." Applicant testified he received "inadequate" communication from Carter, and that he only communicated with her when she would send him letters. Applicant testified he did not receive frequent phone calls from Carter. Applicant testified Carter and Caudy did not do what was required of them by law.

On cross-examination, Applicant reiterated that he was very happy with Strom's representation of him. Applicant testified his complaint about Carter was that she did not communicate with him enough and that she was assigned to his case for two months at most.

Strom's Testimony

Strom testified he has been practicing law since 2013, and that he worked at the Office of Appellate Defense for three years from 2014 to 2017. Strom testified he was assigned to

Applicant's appeal after he received belated appellate review by way of his federal writ of habeas corpus. Strom testified he raised all meritorious issues on appeal, but first evaluates the record and makes a decision about what issues he should bring after a full evaluation of the record on the law. Strom testified he communicated back and forth with Applicant during his representation of Applicant.

Strom testified the South Carolina Court of Appeals indicated it wished to hold an oral argument for Applicant's appeal. Strom testified ultimately no oral argument was held in this case. Strom also testified that the appellate courts occasionally send a letter indicating they wish to hold an oral argument but ultimately decide not to hold one.

Carter's Testimony

Carter testified she has been practicing law for thirty years. Carter testified that she was still employed by the Office of Appellate Defense, and that is how she came to represent Applicant. Carter testified she became involved in Applicant's appeal after Strom left the Office of Appellate Defense. Carter testified the case was transferred to Caudy after Strom left, but Caudy went on maternity leave thereafter. Carter testified Caudy drafted and filed the Petition for Rehearing that followed Strom's Briefs of Appellant. Carter testified her involvement was primarily concerned with the last petition in Applicant's case: the petition for writ of certiorari to the South Carolina Supreme Court. Carter testified that they were ultimately unsuccessful with Applicant's appeal. Carter testified the appellate defenders do not file a petition for writ of certiorari to the South Carolina Supreme Court for each and every direct appeal, but they will do so if it is appropriate, as they felt it was in this case. Carter testified she and her colleagues felt the issue was preserved for appellate review, which is why they filed the petition for rehearing and petition for writ of

certiorari to the Supreme Court. Carter testified they were disappointed by the ruling and believe the issue was preserved for appeal, and that the issue had merit.

Carter testified it was hard to recollect to the extent she communicated with Applicant while she was working on his case. Carter testified her office communicated with inmates regarding the status of their appeals, but the inmates are not necessarily heavily involved in the writing of the petitions directly, unless they wish to provide input. Carter testified the lawyers ultimately decide what issues are raised in the appellate filings, but they welcome any input from the inmates.

Carter testified no oral argument was held in Applicant's direct appeal. Carter testified she did not specifically recollect the extent of her communications with Applicant, but that when an inmate calls her, she will return their phone call.

Applicant's Allegation of Ineffective Assistance of Appellate Counsel⁴

Applicant alleges an allegation of ineffective assistance of counsel for failure to properly prepare Applicant's case and communicate with him. This Court disagrees with Applicant and denies and dismisses the allegation with prejudice.

Applicant, like all other defendants, has a right to the assistance of effective counsel as provided by the Sixth Amendment to the United States Constitution. U.S. Const. amend. VI; Strickland v. Washington, 466 U.S. 668 (1984); Lomax v. State, 379 S.C. 93, 665 S.E.2d 164 (2008). Applicant has the burden of proving the allegations in his post-conviction relief action, and when alleging that counsel was constitutionally ineffective, he must prove that "counsel's

⁴ This allegation states: "His first attorney was replaced when that attorney took a job in DC. He was later appointed an attorney that was pregnant at the time and later was also replaced by a last minute attorney who did not have time to prepare for the appeal to be heard."

conduct so undermined the proper functioning of the adversarial process that it cannot be relied upon as having produced a just result.” Strickland, 466 U.S. at 686.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland, 466 U.S. 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Petitioner such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. With respect to counsel in a guilty plea proceeding, the applicant must demonstrate that there exists at minimum a reasonable probability that, but for plea counsel’s errors, he would not have plead guilty and would have instead insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

With respect to prejudice, an applicant must demonstrate “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694. It is not enough “to show that the errors had some conceivable effect

on the outcome of the proceeding.” Id. at 693. Counsel’s errors must be “so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687. See Harrington, 562 U.S. 86.

A defendant is similarly constitutionally entitled to effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387 (1985). To prevail on an ineffective assistance of appellate counsel claim, “[f]irst, the burden of proof is upon petitioner to show that appellate counsel’s performance was deficient as measured by the standard of reasonableness under prevailing professional norms.” Southerland v. State, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999). “[...] [A]ppellate counsel is not required to raise every non-frivolous issue that is presented by the record.” Thrift v. State, 302 S.C. 535, 539, 397 S.E.2d 523 (1990). Appellate counsel has a professional duty to choose among potential issues according to their merit. Jones v. Barnes, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985). Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986). With respect to appellate counsel, the petitioner must then prove that because of appellate counsel’s deficient performance there is a reasonable probability that, but for appellate counsel’s unprofessional errors, the result of the appeal would have been different. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999) (citing Strickland, v. Washington, 466 U.S. 668 (1984)).

In assessing prejudice under Strickland, the question is not whether a court can be certain counsel’s performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Wong v. Belmontes, 558 U.S. 15 (2009);

Strickland, 466 U.S. at 693. Instead, Strickland asks whether it is “reasonably likely” the result would have been different. Id. at 696. This does not require a showing that counsel’s actions “more likely than not altered the outcome,” but the difference between Strickland’s prejudice standard and a more-probable-than-not standard is slight and matters “only in the rarest case.” Id. at 693, 697. The likelihood of a different result must be substantial, not just conceivable. Id. at 693. Harrington, 562 U.S. 86.

“The brevity of time spent in consultation with a defendant alone is not indicative of inadequate trial preparation.” Smith v. State, 404 S.C. 493, 500, 745 S.E.2d 378, 382 (Ct. App. 2012) (citing Harris v. State, 377 S.C. 66, 75, 659 S.E.2d 140, 145 (2008)). An applicant must present evidence to show how additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 404 S.C. at 500-01, 745 S.E.2d at 382 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)). Because the analysis for ineffective assistance of appellate counsel generally mirrors the analysis for ineffective assistance of trial counsel, this Court analyzes Applicant’s claim in this context.

Applicant testified several times he was happy with Strom’s representation of him and even testified he believed he would have won his appeal and would have been released from prison had Strom represented him during the entirety of his appeal. Applicant testified he spoke to Strom regarding the appellate issues in his case. Applicant testified Caudy represented him for a short period of time after Strom until she left for maternity leave. Applicant testified Carter only represented him for a couple of months. Applicant testified he felt his case would not get adequate representation from Carter due to Carter’s “high title.” Applicant testified Caudy and Carter did

not communicate with him to the degree Strom communicated with him. Applicant testified he received "inadequate" communication from Carter, and that he only communicated with her when she would send him letters. Applicant testified he did not receive frequent phone calls from Carter.

Strom testified he communicated with Applicant on several occasions regarding issues in his case. Strom testified he raises all meritorious issues on appeal after a review of the record and the law. Carter testified she became involved in Applicant's appeal after Strom left the Office of Appellate Defense and after Caudy went on maternity leave thereafter. Carter testified she drafted the Petition for Writ of Certiorari to the South Carolina Supreme Court after the South Carolina Court of Appeals affirmed Applicant's conviction and sentence and after the Court of Appeals denied Applicant's Petition for Rehearing filed by Caudy. Carter testified the Office of Appellate Defense does not file a petition for rehearing or a petition for writ of certiorari to the South Carolina Supreme Court for every criminal direct appeal. Carter testified the attorneys will review the record and the law to determine whether they should pursue a petition for rehearing or subsequent petition to the Supreme Court. Carter testified she could not recall exactly the extent of her communications with Applicant, but she testified that as a matter of course, her office contacts inmates regarding the status of their appeals. Carter testified the Office of Appellate defense always accept input from inmates, however, as appeals are based upon specific standards of review, the case records, and the law, the decision is ultimately up to the attorneys as to what issues will be presented on appeal.

This Court finds Strom's and Carter's testimony very credible. This Court finds Applicant's testimony on this issue credible only to the extent he testified he was happy with Strom's representation of him, that Strom communicated with him frequently, that Applicant believed Carter and Caudy did not communicate with him as frequently as Strom, and that he

received letters from Carter regarding the status of his case. It is clear based upon Applicant's testimony that he was not only satisfied with Strom's representation of him, but he wished Strom represented him throughout the entirety of his appeal. Applicant specifically commended Strom's representation of him several times and raved about his performance and communication. Moreover, to the extent he makes a general allegation that he was not pleased with Caudy and Carter because his case was a "hot potato thing" and because they did not communicate with him as frequently as Strom, this Court finds the allegation is without merit and, even if true, would not require this Court to grant post-conviction relief based upon any constitutional deprivations based upon the standard set forth above. Applicant is entitled to a constitutionally effective lawyer, not a lawyer specifically of his choosing.

Applicant failed to even allege how additional preparation or communication would have helped his case, and how specifically they should have prepared more. This court also notes that there is no obligation to file either a petition for rehearing or a petition for writ of certiorari to the Supreme Court of South Carolina. See Douglas v. State, 369 S.C. 213, 631 S.E.2d 542 (2006) (declining to impose a duty on appellate counsel to file a petition for rehearing or certiorari from a decision of the Court of Appeals in a criminal matter). All of Applicant's appellate attorneys reviewed the file and the law, and appropriately pursued what they felt was a potentially meritorious claim, albeit unsuccessfully. Accordingly, this Court finds neither Strom, Caudy, or Carter were deficient.

Moreover, Applicant has failed to meet his requisite burden as to how any alleged deficiency prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the appeal would have been different." Southerland, 337 S.C. at 616); Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. An applicant must present evidence to

show how additional time spent in consultation would have resulted in a different outcome; mere speculation as to how the alleged lack of preparation prejudiced an applicant is not sufficient to support a grant of relief. Id., 404 S.C. at 500-01, 745 S.E.2d at 382 (citing Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998); Skeen v. State, 325 S.C. 210, 214-15, 481 S.E.2d 129, 132 (1997)). Moreover, Applicant has made no allegation whatsoever that his appellate lawyers failed to raise a particular argument that they should have in Applicant's view. This Court finds Applicant has wholly failed to meet his requisite burden of proof as to his allegation of ineffective assistance of appellate counsel, and therefore, denies and dismisses this allegation with prejudice.

CONCLUSION

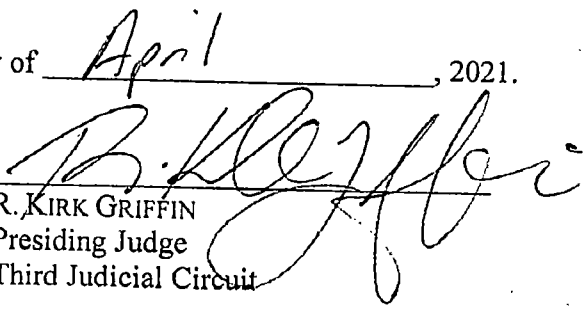
Based on all the foregoing, this Court finds Applicant has not established any other constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. Therefore, this application for post-conviction relief is denied and dismissed with prejudice.

This Court notes that if Applicant wishes to appeal this order, Applicant, though his counsel of record, must file and serve a notice of appeal within thirty days from the receipt of this Order. See Rule 203 and 243, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCR, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. This application for post-conviction relief is denied and dismissed with prejudice; and
2. Applicant shall remain remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15th day of April, 2021.


R. KIRK GRIFFIN
Presiding Judge
Third Judicial Circuit

Sumter, South Carolina