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Filed: Clerk of Court, Saluda, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SALUDA	)	FOR THE ELEVENTH JUDICIAL CIRCUIT
Frank Tolen, Jr., SCDC #246966,	)	Case No. 2019-CP-41-0156
Applicant,	)	
v.	)	**CONDITIONAL ORDER OF DISMISSAL**
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Frank Tolen, Jr. (Applicant) on July 15, 2019. The State made its return on March 23, 2020, requesting the application be summarily dismissed.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its January 1998 term, the Saluda County Grand Jury indicted Applicant for armed robbery (1998-GS-41-0165) and possession of a firearm by a person previously convicted of a crime of violence (1998-GS-41-0166). Applicant and a co-defendant, Wade Brannon ("Brannon"), were accused of robbing Oaton Dyson at gunpoint as he napped in his 18-wheeler in Saluda County. During the robbery, Dyson escaped to a nearby house when Applicant fumbled with his gun. Applicant and Brannon pursued Dyson but ran away after Dyson screamed and lights turned on in the neighborhood.

A. Trial: January 26–27, 1998

On January 26, 1998, Applicant proceeded to a jury trial before the Honorable James W.

Johnson, Jr. Vannie Williams, Esquire, represented Applicant. Former Assistant Solicitors Ervin J. Maye and Julius H. Baggett prosecuted the case. On January 27, 1998, the jury found Applicant guilty as indicted. Judge Johnson sentenced Applicant to life imprisonment without the possibility of parole (LWOP) for armed robbery pursuant to section 17-25-45 of the South Carolina Code.[1] Applicant received a five-year concurrent sentence for the weapons charge.

B. First PCR Action: 1998-CP-41-0064

Applicant filed his first PCR action on April 15, 1998. The State made its return on July 24, 1998. On November 15, 2000, the court convened an evidentiary hearing into the matter before the Honorable Rodney A. Peeples. Applicant was present at the hearing and represented by S. Murray Kinard, Esquire. George R. DeLoach, Esquire, formerly of the South Carolina Attorney General's Office, represented the State. Judge Peeples subsequently issued an order finding Applicant was entitled to belated appellate review pursuant to *White v. State*.[2]

Applicant filed a timely notice of appeal. Appellate Defender Robert M. Pachak perfected the appeal by filing an *Anders*[3] brief with our Supreme Court. The Court affirmed Applicant's convictions and sentenced in an unpublished opinion on March 22, 2002. *Tolen v. State* (S.C. Sup. Ct. filed March 22, 2002). The case was returned to the circuit court on April 9, 2002.

D. Second PCR Action: 2002-CP-41-0085

Applicant filed his second PCR action on May 17, 2002. The State made its return on December 13, 2002. On April 17, 2003, the court convened an evidentiary hearing into the matter before the Honorable Kenneth G. Goode. Applicant was present and represented by H. Wayne

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[1] Applicant had two prior armed robbery convictions from 1989 in Aiken County and from 1990 in Lexington County. Armed robbery qualifies as a "most serious offense" under section 17-25-45(C)(1). Section 17-25-45(A)(1) requires a person with one or more convictions of a most serious offense be sentenced to LWOP.

[2] 263 S.C. 110, 208 S.E.2d 35 (1974).

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

Floyd, Esquire. B. Allen Bullard, Jr., Esquire, formerly of the South Carolina Attorney General's Office, represented the State. On June 24, 2003, Judge Goode issued an order granting the application on a number of grounds, vacating the LWOP sentence, and granting the Applicant a new trial.

The State filed a timely notice of appeal and petition for writ of certiorari with our Supreme Court. The Court granted certiorari, and both parties submitted briefs on the following issues:

> I. Did the PCR court err in granting a new trial on the grounds that trial counsel was ineffective?
>
> II. Did the PCR court err in granting relief on the grounds that Applicant did not receive written notice that the State would seek life without parole pursuant to S.C. Code Ann. § 17-25-45?

On December 19, 2005, the Court issued an opinion dismissing certiorari as improvidently granted with respect to the PCR court's ruling on the issue of the State's failure to give proper notice of intent to seek LWOP pursuant to section 17-25-45(H), vacated the remainder of the PCR court's rulings, and remanded the matter for a new trial. *Tolen v. State*, Op. No. 2005-MO-061 (S.C. Sup. Ct. filed Dec. 19, 2005).

E. Re-Trial: November 7–9, 2006

On November 7, 2006, Applicant proceeded to a jury trial before the Honorable William P. Keesley. Andrew Thompson, Esquire, represented Applicant. Former Assistant Solicitor Ervin J. Maye again prosecuted the case. On November 9, 2006, the jury found Applicant guilty as indicted. Judge Keesley sentenced Applicant to LWOP for armed robbery pursuant to section 17-25-45.[4] Applicant received a five-year concurrent sentence for the weapons charge.

Applicant filed a timely notice of appeal. Appellate Defender Kathrine H. Hudgins

[4] Applicant was properly served with the State's notice of intent to seek LWOP on August 16, 2006, and August 18, 2006, pursuant to section 17-25-45(H). (R. 737–38).

perfected the appeal on Applicant's behalf by briefing the following issues for the Court of Appeals:

> I. Did Tolen's second trial after prevailing in post-conviction relief violate the constitutional prohibition against double jeopardy when the relief granted and later affirmed by the South Carolina Supreme Court affected only sentencing and not the actual conviction?
>
> II. Did the trial court lack subject matter jurisdiction to try Tolen a second time on the same indictment and the same charges when the error found by the PCR court and the South Carolina Supreme Court warranting remand went solely to sentencing and had no effect on the conviction?

On May 26, 2009, the Court issued an opinion affirming Applicant's convictions and sentences pursuant to Rule 220(b), SCACR and the following authorities: *State v. Santiago*, 370 S.C. 153, 163, 634 S.E.2d 23, 28 (Ct. App. 2006) ("As a general rule, if an issue was not raised and ruled upon below, it will not be considered for the first time on appeal."); *State v. Nelson*, 336 S.C. 186, 195, 519 S.E.2d 786, 790-91 (1999) (finding "where a verdict is set aside by a defendant's own motion and a new trial granted, the defendant may be again tried for the offense"). *Tolen v. State*, Op. No. 2009-UP-220 (S.C. Ct. App. filed May 26, 2009).

F. Third PCR Action: 2009-CP-41-0088

Applicant filed his third PCR action on June 30, 2009, alleging he was being held in custody unlawfully based on

1. Ineffective assistance of counsel
    a. Deprived of due process of law.
    b. Failure to object and move for mistrial.
    c. Failure to object to the State retrying the Applicant when the South Carolina Supreme Court ruled on the sentencing issue of the State's failure to give proper notice of intent to seek life imprisonment without parole.
2. Ineffective assistance of appellate counsel.
    a. Failure to review Applicant's case and raise all issues

that could have been reviewable in the Court of Appeals.

Prior to the hearing, Applicant, through counsel, amended his application to proceed on the following allegations:

1. Ineffective assistance of counsel.
    a. Failure to review the transcript of the previous trial and discuss it with the Applicant.
    b. Failure to make a *Batson* motion.
    c. Failure to object to the court's comments to the jury about the trial being that of a person who had previously been convicted of a violent crime.
    d. Failure to object to the introduction of a previous conviction despite stipulating to the said conviction.
    e. Failure to cross-examine the co-defendant regarding what type of deal he was offered to testify against the Applicant and the amount of time he was facing.
    f. Failure to attack the credibility of the witness' identification of the Applicant.
    g. Failure to cross-examine witnesses regarding how the Applicant became a suspect or what probable cause they had to arrest the Applicant.
    h. Failure to question the victim and law enforcement regarding a photo that indicated the victim identified the Applicant prior to court.
    i. Failure to object to hearsay testimony of Officer Bobby Jones.
    j. Failure to object to the Applicant being retried on the indictments.
2. Ineffective assistance of appellate counsel.
    a. Failure to raise issues that had merit in the Applicant's appeal.

On January 30, 2013, the court convened an evidentiary hearing into the matter before the Honorable R. Lawton McIntosh. Applicant was present and represented by Stephen Geoly, Esquire. Ashleigh R. Wilson, formerly of the South Carolina Attorney General's Office, represented the State. On April 1, 2013, Judge McIntosh issued an order denying the application on all grounds and dismissing with prejudice.

Applicant filed a timely notice of appeal. Mr. Geoly and E. Charles Grose, Jr., Esquire,

perfected the appeal by filing a petition for writ of certiorari, raising the following issues:

I. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to question the validity of the eyewitness identification of petitioner by the victim?

II. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to impeach the cooperating co-defendant about the potential sentences he faced for armed robbery if he had not cooperated with law enforcement and proceeded to trial?

III. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law when trial counsel failed to make a Batson motion because he did not understand the law?

IV. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because of complete breakdown of the attorney-client relationship when trial counsel refused to meet with Petitioner at the detention, failed to review with Petitioner the transcript of the prior trial, and failed to investigate the evidence the State intended to use at trial and the cumulative error denied petitioner a fair trial?

V. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law when appellate counsel failed to raise and brief the trial court's erroneous admission, over objection, of information that the investigating officer received from deceased witness Frontis Smith, when that information was inadmissible hearsay, violated the Confrontation Clause, and constituted prejudicial comments on Petitioner's character?

VI. Was petitioner denied effective assistance of counsel in violation of the Sixth Amendment of the United States Constitution and South Carolina law because trial counsel failed to object to his being [retried] after this Court remanded his case for resentencing only?

The State made its return to the petition on August 21, 2014. On December 10, 2014, our Supreme Court issued an order denying certiorari. The case was returned to the circuit court on December 30, 2014.

G. Federal Habeas Corpus Action: 1:15-cv-02503-RBH

On July 25, 2015, 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:

1. Trial counsel was ineffective for failing to sufficiently prepare for trial; investigate; meet with Petitioner.
2. Trial counsel was ineffective for failing to sufficiently challenge the victim's identification of the Petitioner.
3. Trial counsel was ineffective in failing to cross-examine Petitioner's co-defendant regarding his potential sentence.
4. Trial counsel was ineffective for failing to make a *Batson* motion following jury selection.

The State filed a return and motion for summary judgment on November 18, 2015, to which Applicant filed a response on May 31, 2016. On July 7, 2016, 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. Petitioner filed objections to the R&R on October 24, 2016. The Honorable R. Bryan Harwell, United States District Judge, issued an order accepting the report and recommendation, granting the motion for summary judgment, and dismissing the petition with prejudice on September 26, 2017.

On October 17, 2017, Applicant filed a notice of appeal with the Fourth Circuit Court of Appeals. The Fourth Circuit issued a *per curiam* opinion dismissing Applicant's appeal on August 3, 2018, finding Applicant failed to make the requisite showing for a certificate of appealability.

II. <u>CURRENT APPLICATION</u>

In his application for post-conviction relief, Applicant alleges he is being held in custody

unlawfully based on the following reasons:

1. "The sentence was in violation of the Constitution of the United States and the Constitution and laws of this State."
    a. "The Applicant was denied the protections afforded him under the Constitution of the United States in as much as his Fifth, Sixth, and Fourteenth Amendment Rights were denied."
2. "The Court was without jurisdiction to impose sentence"
    a. "Trial Court was without jurisdiction to sentence Applicant under the statutory guidelines of Title Code § 17-25-45, rendering his sentence unlawful."
3. "The sentence exceeds the maximum allowed by law"
4. "There exists evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice."

Applicant requests relief as follows:

"Vacation of unlawful sentence, remand for resentencing."

Applicant filed a "Brief and Memorandum of Law in Support of PCR Application," raising the following issues:

1. "Did the trial court have jurisdiction to sentence the Applicant to life imprisonment pursuant to S.C. Code Ann. § 17-25-45?"
2. "Did the Applicant meet the criteria necessary to qualify for sentencing pursuant to S.C. Code Ann. § 17-25-45?"

On October 28, 2019, Applicant filed a motion for judgment by default.

Before this Court are the records of the Saluda County Clerk of Court regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's appellate records, including the both trial transcripts; 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. The State reserves the right to amend this return upon receipt of any relevant materials.

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 doctrines of *res judicata*; Applicant failed to make a *prima facie* case of newly discovered evidence; and Applicant's claims are otherwise without merit.

A. 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 re-tried and convicted on November 9, 2006, and the remittitur from the direct appeal issued on May 26, 2009. This application was filed on July 15, 2019—*over ten years* after the requisite filing period expired. Therefore, this action be summarily dismissed for failure to file within the time mandated by the Act.

B. Successive

This Court finds this application should 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).

In the application, Applicant alleges "evidence of material facts, not previously presented and heard, that requires vacation of the sentence in the interest of justice." However, Applicant has failed to provide any specifics about the allegedly newly discovered evidence such as what it is or when Applicant discovered it. 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). Each of the allegations actually raised in his application involve "facts" that were or could have been raised in the prior PCR actions; thus, the current application is successive and barred by section 17-27-90. 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 the Court finds this action should be summarily dismissed as successive to Applicant's previous PCR applications.

C. Illegal Sentence and Subject Matter Jurisdiction

Notwithstanding Applicant's failure to raise these issues in his prior actions, this Court finds Applicant's claims challenging the legality of his sentence under section 17-25-45 to be without merit. Applicant first claims the circuit court lacked subject matter jurisdiction to impose a sentence under the Youthful Offender Act (YOA) for his April 20, 1990, conviction for armed robbery in Lexington. At the time of the Lexington conviction, Applicant was already serving a YOA sentence for an armed robbery conviction in Aiken. The Lexington judge sentenced Applicant to a consecutive six-year YOA sentence. Applicant points to subsection (5) of the

current version of section 24-19-50, which states that, "[i]n the event of a conviction of a youthful offender the court may. . . not sentence a youthful offender more than once under this chapter." However, the statute has been amended since Applicant received his second YOA sentence in 1990. At the time Applicant was sentenced, the statute stated that "[n]o youthful offender shall be sentenced more than ***twice*** under the provisions of this chapter." S.C. Code Ann. § 24-19-50(c) (amended 1996) (emphasis added). Therefore, the circuit court was within its discretion to sentence Applicant to a second YOA sentence.

Applicant again relies on the **current** version of the statute, which prohibits the imposition of a YOA sentence for conviction classified as a violent crime, including armed robbery. *See* S.C. Code Ann. § 24-19-10(d)(2). At the time of Applicant's 1990 convictions, however, that provision of the statute did not exist. In fact, the armed robbery statute at that time specifically allowed for the imposition of YOA sentences. *See* S.C. Code Ann. § 16-11-330(1) (amended 1996) ("Provided, that any person under the age of twenty-one sentenced under the [YOA] for the crime of armed robbery shall receive and serve a minimum sentence of at least three years, no part of which shall be suspended."). Applicant was under twenty-one when he received both YOA sentences.

Therefore, Applicant's prior convictions were both proper predicate offenses used for enhancement purposes under section 17-25-45. Applicant's claim of "lack of advice of collateral issues"—that he would not have pleaded guilty in 1990 had he known that his offenses would be used to seek a life sentence—also fails. *See Smith v. State*, 329 S.C. 280, 286, 494 S.E.2d 626, 629 (1997) (finding that classification of a crime as violent and non-violent is also a collateral consequence of sentencing and counsel is not ineffective for failure to inform a defendant of consequences of a violent crime conviction); *cf. United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir. 2006) ("It is one thing to prohibit capital punishment for those under the age of eighteen, but

an entirely different thing to prohibit consideration of prior youthful offenses when sentencing criminals who continue their illegal activity into adulthood."). Applicant has not raised any claim of ineffective assistance of plea counsel relating to his 1990 pleas. Moreover, any deficiency in this regard could have been raised in Applicant's prior PCR actions. Therefore, Applicant's allegation as it pertains to subject matter jurisdiction must be dismissed.

D. Res Judicata

This Court finds this application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth*, 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 actions. The finality of the previous court rulings should be respected, and the Court finds this application must be summarily dismissed as barred by the principles of *res judicata*.

E. 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), the 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 Lexington 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 – 11th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Lexington 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.

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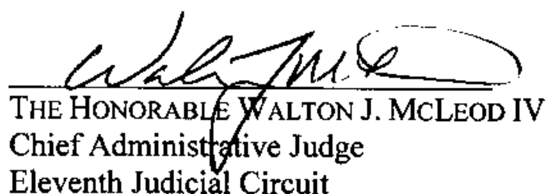
Filed: Clerk of Court, Saluda, SC.

AND IT IS SO ORDERED this 7 day of July, 2020.



THE HONORABLE WALTON J. MCLEOD IV
Chief Administrative Judge
Eleventh Judicial Circuit

Lexington, South Carolina