STATE OF SOUTH CAROLINA COUNTY OF OCONEE	IN THE COURT OF COMMON PLEAS FOR THE TENTH JUDICIAL CIRCUIT
Dennis Maurice Temple, SCDC #274802, Applicant, v. State of South Carolina, Respondent.	Case No. 2020-CP-37-0695 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Dennis Maurice Temple (Applicant) on January 18, 2020. The State made its return on September 14, 2021, requesting the action be summarily dismissed.[1]

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. On March 9, 2010, over the course of approximately nine hours, Applicant violently attacked and sexually assaulted a Clemson student, Catherine McGough, after dragging her across the gravel yard of a storage facility by a belt around her neck and holding her hostage in his storage unit. He was arrested two days later.

[1] The State's return was originally due on April 17, 2020. *See* Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State's request to accept its return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

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During its September 2010 term, the Oconee County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct (CSC) (2010-GS-37-887, -889); kidnapping (2010-GS-37-888); and grand larceny, valued five-thousand dollars or more (2010-GS-37-886).

A. Pre-Trial

On May 20, 2010, a hearing convened before this Court on the State's motion to require Applicant to submit to HIV and other STD testing pursuant to S.C. Code Ann. § 16-3-740(B). Applicant knowingly and voluntarily waived his right to assistance of counsel with this matter. This Court granted the State's motion, finding probable cause to believe Applicant committed the offense and transmitted bodily fluids. (App'x 1–8).

Applicant initially retained R. Mills Ariail, Jr., Esquire to represent him for purposes of requesting a bond reduction. On June 30, 2010, a hearing convened before the Honorable Alexander S. Macaulay. At that time, Applicant insisted on representing himself in all future matters. Out of an abundance of caution, Judge Macaulay appointed Wilson Burr, Esquire, to represent Applicant and informed Applicant he was no longer entitled to *pro se* filings. Mr. Burr subsequently assigned the case to Sarah Drawdy, Esquire, and Keith Denny, Esquire, to represent Applicant at trial. (App'x 10–18).

On July 29, 2010, a hearing convened before the Honorable J. Cordell Maddox, Jr., on Applicant's *pro se* motion to have his attorneys relieved. Applicant argued the motion was based on a breach of trust with his attorneys. Judge Maddox granted Applicant's motion and gave him thirty days to retain private counsel. (App'x 19–29).

On September 14, 2010, a hearing convened before Judge Maddox on several pretrial matters, including lingering issues concerning counsel. Judge Maddox ultimately appointed Kurt Tavernier, Esquire, as Applicant's fourth and final attorney on the case. (App'x 31–48).

On September 22, 2010, a *Schmerber*[2] hearing convened before Judge Macaulay regarding Judge McIntosh's order requiring Applicant to submit to HIV and other STD testing. Applicant was present and was represented by Mr. Tavernier. Samples were subsequently taken from Applicant in the presence of Mr. Tavernier. Judge Macaulay issued rulings on several additional pretrial matters. (App'x 49–74).

On October 21, 2010, another hearing convened before Judge Maddox on Applicant's *pro se* motion to relieve Mr. Tavernier. Applicant told Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." (App'x 78). Mr. Tavernier apprised Judge Maddox the allegation was entirely false and based upon Applicant's ulterior disappointment in Tavernier's decision not to raise frivolous arguments and objections. (App'x 81–82). Applicant then stated to Judge Maddox, "I have fifteen [15] years' experience in the law." (App'x 80). Judge Maddox ruled that he would not appoint a fifth attorney to represent Applicant. Judge Maddox warned him, "You're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." (App'x 85).

At Mr. Tavernier's request, Judge Maddox subsequently issued an amended order on November 15, 2010, clarifying Mr. Tavernier's role in Applicant's case. (R. 111–18). Specifically, Judge Maddox ordered that Mr. Tavernier serve only as an advisor with legal training to "assist [Applicant] in preparation for and at trial." (R. 111).

On December 7, 2010, a final pre-trial hearing convened before Judge Maddox to conclude all substantive preliminary matters. Applicant was present and proceeded *pro se* with Mr. Tavernier as "advisory counsel." Judge Maddox warned Applicant that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation.

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[2] *Schmerber v. California*, 384 U.S. 757 (1966).

During the course of the hearing, Judge Maddox commented, "I've gone over exhaustively your right to counsel." Based on exhaustive inquiries regarding Applicant's Sixth Amendment rights, Applicant made the final determination to proceed to trial *pro se* with the assistance of Mr. Tavernier as advisory counsel. Applicant apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial *pro se*. (App'x 107–198).

On December 13, 2010, Applicant proceeded *pro se* to a jury trial before Judge Maddox with Mr. Tavernier serving as advisory counsel. After jury selection, Applicant attempted to rescind his waiver of right to counsel and moved for a continuance so that Mr. Tavernier could represent him at trial. Judge Maddox denied the motion.

B. Summary of Evidence Adduced at Trial

Catherine McGough, a Clemson University student, was preparing to leave South Carolina for the summer and travel to Ireland. Around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit, Unit 177, at All Safe Storage located in Seneca, South Carolina. She then began walking to her car when she encountered a male (whom she identified as Applicant at trial and after viewing a photograph line-up after the incident)[1] who wanted her to purchase shoes he was selling at that time. McGough showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough went back to close the door. Applicant pushed her down in the unit and managed to place a belt around her neck. Applicant then dragged her against her will to another storage unit, Unit 193, where he bound her and raped her and later a placed a bottle of solution into her vagina after ejaculating in her. He then kept her tied up inside the storage room and locked in the storage bin while he fled in her vehicle, stealing it. McGouch remained in the storage room for hours until

she was able to free herself from her bindings. McGouch then eventually managed to call 911 from a cell phone, reported the kidnapping and rape, and waited for police to arrive. (App'x 282–322).

Oconee Officer Neill Burkett was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. (App'x 356–60). Oconee police had to break into Storage Unit 193 where they discovered the victim. Officer Brian Danielson transported McGough from the incident location to the local hospital. (App'x 412–13). At the hospital, a SANE kit was performed.

The victim was treated at the hospital for injuries she sustained in the kidnapping and sexual assault. The victim had a swollen nose and a contusion over her eye. She also had a bruise on her arm consistent with having been tied up. She had a similar bruise to her forearm and wrist. She also had multiple bruises or abrasions to her left shoulder. She also had abrasions on the lower part of her abdomen and back consistent with being dragged by her assailant as she described at trial. Her left thigh and left knee and lower leg had multiple scrapes and abrasions on it also consistent with being dragged. The victim also had a ligature mark around her neck consistent with her report of being strangled or dragged with a belt tied around her neck. (App'x 386–93).

Officer Greg Reed created a photographic lineup, which he showed to McGough. She identified the picture of Applicant as the perpetrator of her kidnapping and rape. (App'x 457).

Police executed a search warrant on Applicant's storage unit, Unit 193. Applicant had rented this storage unit in his own name, Dennis Temple. The owner of the storage facility identified Applicant from a photo line-up as the person who rented Unit 193. Records produced by the storage facility also showed Applicant recently rented Unit 193, and Applicant entered the storage facility approximately two (2) to three (3) minutes after the victim entered the facility on the day of the crimes. The owner of the storage facility also testified Applicant operated a tennis

shoe business and stored tennis shoes in his storage bin in the storage facility and had attempted to sell her tennis shoes in the past as well. Inside Applicant's storage unit, police found strips of clothing consistent with those described by the victim as used by Applicant to bind the victim. Police also found a bottle as described by the victim. Police also found socks, similar to those described by the victim as used to gag her during the sexual assault and kidnapping, and police found a leather belt, similar to that described by the victim as that placed around her neck during the kidnapping and sexual assault. Forensic testing determined the victim's DNA was on the socks and on the belt recovered by police. Applicant's DNA was also found on several of the items as well. Applicant's DNA was found in the rape victim's stolen car after it was recovered by police. The car was valued at $19,000. It was recovered abandoned in Anderson County. Applicant's DNA was also found in a rectal swab from the victim's rape protocol kit taken at the hospital after the rape and kidnapping. (App'x 282–347; 356–432; 441–99; 501–31; 539–70; 571–601).

C. Verdict & Direct Appeal

On December 15, 2010, after fifteen minutes of deliberations, the jury convicted Applicant as indicted. Judge Maddox sentenced Applicant to consecutive terms of thirty years' imprisonment for first-degree CSC, thirty years for kidnapping, and ten years for larceny—an aggregate term of one-hundred years imprisonment.[3]

Applicant filed a timely notice of appeal. Deputy Chief Appellate Defender Wanda H.

[3] Petitioner had an extensive criminal record which was provided to the court at sentencing. Petitioner was convicted in 1993 of possession of cocaine and possession with intent to distribute. Petitioner was convicted in 1995 of possession with intent to distribute or distribution of drugs within proximity of a school, simple assault, DUS 2nd, and malicious injury to personal property. Petitioner was convicted in 2001 of strong armed robbery and received a sentence of ten (10) years. Petitioner was convicted in 2007 of fraudulent check and in 2009 of petit larceny. And, Petitioner was convicted in 1992 in Rome, Georgia of providing false information to police. (App. 652-53).

Carter perfected Applicant's appeal by filing an *Anders*[4] brief with the Court of Appeals on the following issue:

> The trial judge erred by what was in effect coercing [Applicant] to appear *pro se* at trial because although he waived his right to counsel prior to trial; ultimately, he rescinded that waive rafter the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

Applicant filed a *pro se* brief in response. On September 11, 2013, the Court issued an unpublished *per curiam* opinion affirming Applicant's convictions and granting appellate counsel's request to be relieved. *State v. Temple*, No. 2013-UP-350 (S.C. Ct. App. filed Sept. 11, 2013). The case was remitted back to the circuit court on September 27, 2013.

D. First Federal Habeas Corpus Action: 8:14-3499-JFA-JDA

On August 26, 2014, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *Temple v. McFadden*, 8:14-3499-JFA-JDA.[5] The Honorable Jacquelyn D. Austin, United States Magistrate Judge, subsequently issued a report and recommendation that Applicant's petition be dismissed without prejudice for failure to exhaust state remedies on September 9, 2014. Applicant did not file timely objections to the R&R. On September 30, 2014, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order dismissing the petition without prejudice in accordance with the R&R and denying a certificate of appealability. *Temple v. McFadden*, No. 8:14-3499-JFA (D.S.C. Sept. 30, 2014). Applicant did not appeal.

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

[5] In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a United States Magistrate Judge.

E. Initial Post-Conviction Relief Action and Subsequent Appeal: 2013-CP-37-0729

On October 15, 2013, Applicant filed his first PCR action, raising the following grounds for relief (verbatim):

1. "In violation of S.C. Code Ann. Section 22-3-710, and 4th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 10 & 3; abuse of discretion, or error of law and breach of duty."
    a. "Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest arrests that was[*sic*] issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to criminal activity, (2) there was[*sic*] no facts connecting applicant to the storage unit #193, (3) there was[*sic*] no facts connecting storage unit #193 to any criminal activity, (4) there was[*sic*] no facts under by the alleged victim stating the applicant was identified as the accused, (5) there was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7). There was no probable cause to arrest."
2. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3; abuse of discretion, or error of law and breach of duty."
    a. "Judge in suppression hearing on arrest warrants failed to correct the record and failed to make specific findings of facts[*sic*] to mixed questions of law before its ruling in the suppression hearing on the arrest warrants."
3. "In violation of the 6th and 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 14 & 3; abuse of discretion, or error of law and breach of duty."
    a. "(1) Applicant was coerced to represent himself during trial, and (2) ineffective assistance of appellate counsel."
4. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 11 & 3; abuse of discretion, or error of law; and breach of duty."
    a. "Indictments were not issued within 90 days."
5. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3."
    a. "(1) The six man photo lineup of the applicant and five other black[*sic*] was assemble[*sic*] and shaded in a[*sic*] unduly and suggestive way, that gave way to irreparable

misidentification and (2) trial court judge failed to make specific findings of facts[*sic*] to mixed questions of law before its ruling in suppression hearing on the photo lineup."

6. "In violation of S.C. Code Ann. Section 16-3-740, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
    a. "Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[*sic*] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial."
7. "In violation of S.C. Code Ann. Section 17-13-140, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
    a. "Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[*sic*] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial."
8. "In violation of Schmerber v. California, 384 U.S. 757 (1966) and14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
    a. "Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused. As a result, the state did not have all of the elements required in the statute or case law to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial."
9. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3."
    a. "The state failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the state further failed to disclose other materal[*sic*] in its possession or control to the applicant which would have

contradicted the state's claims or cleared defendant of blame."

10. "In violation of 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
    a. "Once the state presented its case against the applicant during trial, the applicant was denied by judge to present witnesses for his defense."
11. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 3 & 14"
    a. "One of the initial juror[*sic*] started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrances[*sic*]."
12. "In violation of 5th, 6th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
    a. "Threw out the trial the solicitors consistly[*sci*] claimed that the applicant used clearning solution to clean out the alleged victim after he raped her. These allegation[*sic*] was[*sic*] unfounded by the evidence and cause inflammation, confusion and prejudice among the jurors."
13. "In violation of the 4th, 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution and S.C. Code Ann. § 22-3-710 (1976) and S.C. Constitutions, Article 1, Section 3, 10 & 14; abuse of discretion, or error of law, and breach of duty."
    a. "Arrest warrants affidavit briefly stated facts unfounded and not true at the time of the arrest of applicant and not sworn too[*sic*]."
14. "In violation of 5th, 6th, and 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
    a. "Trial judge and solicitor leading the state witness on what to testify to or say on cross examination."

Hugh Welborn, Esquire, was appointed to represent Applicant on October 31, 2013. The State requested an evidentiary hearing through its return on July 7, 2014. On July 28, 2014, the PCR court convened an evidentiary hearing before the Honorable Edgar W. Dickson. Applicant was present at the hearing and represented by Mr. Welborn. Assistant Attorney General John W. Whitmire appeared on behalf of the State. Applicant testified at the hearing. By order signed

October 24, 2016, and filed October 31, 2016, Judge Dickson denied the application on all grounds and dismissed the action with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant's appeal by filing a *Johnson*[6] petition for writ of certiorari with the Supreme Court, raising the following issue:

> Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

Applicant filed a *pro se* petition in response. The case was subsequently transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On October 16, 2018, the Court issued an order denying Applicant's petition and granting appellate counsel's request to be relieved. The case was remitted back to the circuit court on November 9, 2018.

F. Second Federal Habeas Corpus Action (8:18-03258-JFA-JDA)

On November 29, 2018, Applicant filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *See Temple v. Lewis*, 8:18-03258-JFA-JDA. Applicant raised the following allegations in his *pro se* petition (verbatim):

> 1. "The trial judge erred by what was in effect coercing [Applicant] to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial."
> 2. "The PCR Court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether

[6] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal."

3. "Did the General Sessions Court have jurisdiction to hear appellant's criminal case when the magistrate never established it had probable cause to detain appellant on the arrest warrants."

Respondent filed a return and motion for summary judgment on April 1, 2019. On June 20, 2019, Judge Austin issued a report and recommendation that Respondent's motion for summary judgment be granted and the petition dismissed with prejudice because (1) grounds one and two of the petition fail to state a claim for relief; and (2) ground three is not a cognizable issue in a federal habeas action.

Applicant filed objections to the R&R on April 25, 2019, and later filed amended objections on August 26, 2019. Respondent replied to the original objections on July 24, 2019, and again to the amended objections on September 9, 2019. On October 31, 2019, Judge Anderson issued an order adopting and incorporating the R&R by reference; granting Respondent's motion for summary judgment; dismissing the petition with prejudice; and denying a certificate of appealability. *Temple v. Lewis*, No. CA 8:18-03258-JFA (D.S.C. Oct. 31, 2019).

II. CURRENT APPLICATION

In his **second and current** application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. "Ineffective assistance of counsels"
   a. "Applicant's counsel Sarah Drawdy and Keith Denny were ineffective for failing to object to the state's reasons establishing probable cause and failing to raise a fourth amendment claim in the July 16, 2010 preliminary hearing."
   b. "These failure[*sic*] were in violation of the applicant's 4th, 5th, 6th, & 14th Amendments of the United States Constitution."

c. "In addition, Applicant's PCR counsel was ineffective for failing to subpoena counsels to the PCR hearing and for failing to file a 59(e) motion when the court issued a[*sic*] order of dismissal in the case, which did not include specific findings of facts[*sic*] and conclusion[*sic*] of law and applicant's ineffective assistance of counsel claim against Sarah Drawdy and Keith Denny."

2. "In violation of Schmerber v. California, 384 U.S. 757 (1966) and14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
   a. "Applicant's Schmerber v. California claim should have been grounded[*sic*] as a[*sic*] ineffective assistance of counsel against Kurt Tavernier for failing to object to the state's allegations regarding applicant's identification and probable cause to arrest, and for failing to raise a fourth amendment claim in the September 22, 2010 Schmerber hearing."
   b. "These failure[*sic*] violated Applicant's 4th, 5th, 6th, & 14th Amendments of the United States Constitution, Article 1, section 3, 10, 12, & 14."
   c. "In addition, Applicant's PCR counsel was ineffective for failing to amend the PCR application as a[*sic*] ineffective assistance of counsel claim against Kurt Tavernier regarding the Schmerber hearing issues, and for failing to file a 59(e) motion when the court issued a[*sic*] order of dismissal in the case, which did not include specific findings of facts[*sic*] and conclusion[*sic*] of law on Applicant's Schmerber hearing claim."

3. "Applicant moves the court for a new trial because the state notified applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review."
   a. "As a result, Applicant's 5th, 6th, & 14th Amendments of the United States Constitution Rights have been violated."

Applicant requests relief as follows:

> "vacate the conviction, a new trial, or overturn the conviction and sentences"

Before this Court are the Oconee County Clerk of Court records regarding the subject

convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; Applicant's federal habeas records; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

Because there is no genuine issue of material fact which would necessitate an evidentiary hearing, this Court hereby informs the parties of its intent to dismiss the application as procedurally barred. *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); *see also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an evidentiary hearing). Pursuant to section 17-27-70 and -80 of the South Carolina Code, this Court makes the following findings of facts and conclusions of law based upon the pleadings, records submitted by both parties, and the applicable law:

A. Statute of Limitations

As an initial matter, this Court finds this action must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act[7] (PCR Act). Specifically, the PCR 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.

[7] S.C. Code Ann. § 17-27-10 to -160

(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(A)–(C).

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. Consol. Sch. Dist. 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 Leamon*, 363 S.C. at 435, 611 S.E.2d at 49 ("Ignorance of the statute of limitations is not an excuse for late filing . . ."); *Sutton v. State*, 361 S.C. 644, 648, 606 S.E.2d 779, 781 (2004) (declining "to impose a duty on trial or appellate counsel to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application"), *abrogated on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005).

Applicant was convicted on December 15, 2010, and the remittitur from the direct appeal

was issued on December 27, 2013. This application was filed on September 18, 2020—almost *six years* after the requisite filing period expired. Accordingly, this action must be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619–20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive and *Res Judicata*

This Court finds this action must further be summarily dismissed because it is successive to Applicant's previous PCR action and barred by the doctrine of *res judicata*. 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). The PCR Act states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

S.C. Code Ann. § 17-27-90.

Section 17-27-90 is clear—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 or actions challenging these convictions. *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."). Thus, 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).

Here, Applicant has previously litigated the probable cause claim in his first PCR application and habeas corpus petition; thus, this allegation is successive and barred under section 17-27-90. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were" (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). As Judge Dickson stated in the order of dismissal, Applicant's allegation that the arrest warrant was not supported by probable cause was raised in his *pro se* brief on direct appeal and rejected pursuant to *Anders*. Judge Dickson further noted that the record clearly established Applicant's arrest was supported by probable cause. Additionally, Judge Anderson pointed out in the order dismissing Applicant's federal habeas petition that Applicant's subsequent indictment by the grand jury cured any purported deficiencies in the arrest warrants. *See, e.g.*, *Thompson v. State*, 251 S.C. 593, 596, 164 S.E.2d

760, 761 (1968); *Whitner v. Duke Power Co.*, 277 S.C. 397, 288 S.E.2d 389, 390 (1982) (a grand jury indictment overrides any potential probable-case-based challenge to a warrantless arrest).

Applicant also raised the *Schmerber* claim in his first PCR action, although he admits that he "should have" raised the claim in the context of ineffective assistance of counsel against Mr. Tavernier. Because this claim *could have* been raised in Applicant's previous state and federal proceedings, it is 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 Cas. 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. 275 S.C. 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 allegations in his prior actions. The finality of the previous courts' rulings should be respected, and this Court must summarily dismiss this action as barred by the principles of *res judicata*.

C. Failure to State a Claim

Finally, this Court finds Applicant's allegations of ineffective assistance of PCR counsel must be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant's contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley,* 481 U.S. 551 (1987); *see also Coleman v. Thompson,* 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id. Austin* "is limited to its particular factual situation" and is only

applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court's opinion in *Martinez v. Ryan,* 566 U.S. 1 (2012), held that "[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Our Supreme Court has held that "*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions." *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* "afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel." *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action. After the application was dismissed, he timely appealed to the South Carolina Court of Appeals. Following the filing Applicant's *pro se Johnson* petition, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g.*, *Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Applicant's allegations of ineffective assistance of post-

conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court must dismiss these allegations for failing to state a cognizable claim upon which relief can be based.

D. 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). . . [Here], Aice seeks to have more than one procedural "bite" at the apple. Aice 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.

305 S.C. at 451–52, 409 S.E.2d at 394–95.

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). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.' " *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring)); *see McMann v. Richardson,* 397 U.S. 759, 773–74 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). In his concurring and dissenting opinion in *Mackey v. United States*, 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.

401 U.S. 667, 691 (1971) (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 relitigate his convictions and sentences through this successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

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

Office of the Attorney General
Lillian L. Meadows
Post-Conviction Relief Division – 10th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 21st **day of** Sept**, 2021.**

R. LAWTON MCINTOSH
Circuit Court Judge
Tenth Judicial Circuit

FILED OCONEE COUNTY, SC
MELISSA C. BURTON
CLERK OF COURT
2021 SEP 23 P 2:54

Anderson, South Carolina