

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON)
)
)
Marcus L. Martin, SCDC #299118,)
)
Applicant,)
)
v.)
)
State of South Carolina,)
)
Respondent.)
)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2020-CP-04-1323

CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Marcus L. Martin (Applicant) on July 13, 2020. The State made its return on September 20, 2021, requesting the action be summarily dismissed.¹

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Anderson County Clerk of Court. On April 21, 2003, Applicant murdered Reginald D. Jackson during the course of an armed robbery.

During its May 2003 term, the Anderson County Grand Jury indicted Applicant for murder

¹ The State’s return was originally due on November 8, 2020. *See* Rule 12(a), SCRCPC (“[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 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).

(2003-GS-04-1735); two counts of armed robbery (2003-GS-04-1736;-1737); assault and battery with intent to kill (ABWIK) (2003-GS-04-1738); criminal conspiracy (2003-GS-04-1733); and possession of a firearm during the commission of a violent crime (2003-GS-04-1734).

A. 2004 Guilty Plea

On January 13, 2004, Applicant proceeded to a jury trial before the Honorable J. Cordell Maddox, Jr. Robert Gamble, Esquire, represented Applicant and Assistant Solicitor Druanne White prosecuted the case. After the jury was sworn, however, Applicant elected to plead guilty as indicted to all charges without negotiations or recommendations from the State as to sentencing. Judge Maddox sentenced Applicant to an aggregate term of thirty years' imprisonment.² Applicant did not appeal his convictions or sentences.

B. Initial Post-Conviction Relief Action and Subsequent Appeal: 2004-CP-04-2184

On July 19, 2004, Applicant filed his first PCR action, asserting claims of denial of the right of appeal, ineffective assistance of counsel, subject matter jurisdiction, and denial of the right to prove the elements of murder beyond a reasonable doubt. The State requested an evidentiary hearing through its return on September 1, 2004. On April 10, 2007, Applicant filed an amended Application, raising the following additional grounds for relief:

1. Applicant's plea was entered involuntarily, and is therefore unenforceable by the due process clause of the 14th Amendment, U.S. Constitution
 - a. Applicant's guilty plea was entered involuntarily because it was entered without an understanding of the mandatory punishment for the offense to which he was pleading.
2. Counsel was ineffective by failing to properly move to quash the indictments, when the indictments fail to comply with mandated requirements for the filing of indictments.

² Applicant was sentenced to concurrent terms of thirty years' imprisonment for murder, thirty years for each armed robbery charge, twenty years for ABWIK, five years for criminal conspiracy, and five years for possession of a firearm during the commission of a violent crime.

On November 15, 2007, the PCR court convened an evidentiary hearing before the Honorable John C. Hayes, III. Applicant was present at the hearing and represented by Rodney W. Richey, Esquire. Assistant Attorney General Daniel E. Grigg appeared on behalf of the State. Applicant and plea counsel both testified at the hearing.

On November 29, 2007, Judge Hayes issued an order granting relief based on counsel's failure to advise Applicant of the elements of the charges to which he pled. The State filed a timely motion to alter or amend pursuant to Rule 59(e), SCRCF. On January 3, 2008, Judge Hayes issued an order denying the State's motion.

The State filed a timely notice of appeal. On November 26, 2012, Assistant Attorney General Walt W. Whitmire filed a petition for writ of certiorari to the Supreme Court on the following issue:

Did the PCR court err in finding that plea counsel was ineffective for failing to explain the elements of each charge against [Applicant] and the possible sentences that he was facing, which resulted in a plea that was not knowingly and voluntarily entered into.

Deputy Chief Appellate Defender Wanda H. Carter filed a return on Applicant's behalf. The matter was subsequently transferred to the Court of Appeals pursuant to Rule 243(1), SCACR.

On December 18, 2009, the Court granted certiorari. Following briefing and oral argument, the Court issued an unpublished *per curiam* opinion reversing the PCR court's grant of relief and remanding "for a finding of whether Martin in fact understood the elements of the crimes he plead to." *Martin v. State*, 2011-UP-480 (S.C. Ct. App. filed Nov. 2, 2011). The remittitur was issued on December 2, 2011.

C. Remand to the PCR Court and Subsequent Appeal

On remand, Judge Hayes denied the application on all grounds and dismissed the action

with prejudice. Applicant filed a timely notice of appeal. Deputy Chief Appellate Defender Carter perfected Applicant's appeal by filing a petition for writ of certiorari with the Supreme Court on the following issue:

The PCR judge erred by finding in the Order on Remand that [Applicant] did not establish his burden of proving that he was uninformed of the elements of all of the offenses to which he pled guilty and that no prejudice resulted in the case because no evidentiary basis existed in the entire record to support the PCR judge's findings.

The matter was subsequently transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On September 25, 2014, the Court denied Applicant's petition. The case was remitted back to the circuit court on October 13, 2014.

D. Federal Habeas Corpus Action: 1:14-4278-BHH-SVH

On December 3, 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. *See Martin v. Cartledge*, 1:14-4278-BHH-SVH.³ Applicant raised the following allegations in his *pro se* petition (verbatim):

1. "Due Process Violation – 'Insufficient' plea colloquy between the court (plea) and the Petitioner."
 - a. "While originally starting off as a trial, the circumstances changed to a guilty plea, after strenuous urgings from defense counsel."
 - b. "Judge quickly accepted the transition and entered into a plea colloquy between himself, defense counsels, and defendants."
 - c. "During the colloquy between the Judge and the Petitioner, the court failed to ensure the 'crime elements' and sentencing terms."
2. "Due Process Violation – Improper 'Reversal on Remand.' (PCR and S. C. Court of Appeals)"

³ 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.

- a. “After PCR relief, Petitioner became ‘Respondent’ on certiorari.”
 - b. “South Carolina Supreme Court transferred case to S.C. Court of Appeals for certiorari review.”
 - c. “Court of Appeals (Remanded) Petitioner’s case back to PCR, ‘after’ ‘revising’ the relief from ‘due process violation,’ to one of ‘I.A.C.!’ All PCR relief, was then ‘retracted’ by the PCR Court!”
3. “Due Process Violation – Unknowing, Involuntary, and Unintelligent guilty plea.”
- a. “Petitioner was ‘not able ‘to’ review discovery’ until PCR presentation.”
 - b. “Petitioner was not ‘ensured’ the understandings of the chargis[sic], elements, or sentencing guidelines, by either the plea court or defense counsel.”
 - c. “Petitioner testified ‘going through the formalities of the plea unknowingly and unintelligently’ on the advice of counsel.”
4. “Ineffective Assistance of Counsel – Involuntary and Unintelligent guilty plea.”
- a. “Defense counsel testified that ‘after’ seating a jury for trial, he ‘begged and cajoled’ Petitioner to plead guilty, stating that he (counsel) ‘did not know what to do.’ ”
 - b. “Plea counsel failed to ‘properly investigate’ circumstances and Brady materials.”
 - c. “Plea counsel never ‘provided or reviewed discovery’ with (Pet.)”
 - d. “Counsel never explained the ‘elements’ nor proper sentencings.”

Respondent filed a return and motion for summary judgment on March 26, 2015. On November 5, 2015, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued a report and recommendation that Respondent’s motion for summary judgment be granted and the petition be dismissed with prejudice. Applicant filed objections to the R&R on December 7, 2015, and Respondent filed a response.

On January 26, 2016, the Honorable Bruce Howe Hendricks, United States District Judge, issued an order adopting and incorporating the R&R by reference; granting Respondent’s motion

for summary judgment; denying the petition; and denying a certificate of appealability. *Martin v. Cartledge*, No. CV 1:14-4278-BHH (D.S.C. Jan. 26, 2016).

On February 23, 2016, Applicant filed a notice of appeal with the Fourth Circuit Court of Appeals. On August 2, 2016, the Fourth Circuit issued an unpublished *per curiam* opinion denying a certificate of appealability, denying leave to proceed *in forma pauperis*, and dismissing the appeal. *Martin v. Cartledge*, 667 F. App'x 793 (4th Cir. 2016). Applicant filed a petition for rehearing *en banc*, which the Court denied by order filed September 9, 2016.

E. State Habeas Corpus Action: 2018-CP-04-0522

On March 14, 2018, Petitioner filed a “Petition for Writ of Habeas Corpus pursuant to § 17-17-10 et. al. and Article 1§18 of the S.C. Constitution” with the Anderson County Clerk of Court, alleging he is being held in custody unlawfully based on “Actual Innocence; Miscarriage of Justice; A Denied Right of Due Process; and a Violation of the U.S. Constitution, Fifth and Fourteenth Amendment.”

The State made its return and motion to dismiss on April 20, 2018, requesting the action be summarily dismissed. This Court subsequently issued an order denying and dismissing the action with prejudice as barred by the doctrine of *res judicata* and for lack of subject matter jurisdiction. Applicant did not appeal.

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:⁴

1. “Ineffective Assistance of Plea Counsel”

⁴ These claims are excerpted verbatim from Applicant’s PCR application, amended PCR application, and memorandum.

- a. “Failure to inform, clearly specify, and explain the sentencing requirement as to mandatory minimum or day-for-day sentencing”
 - b. “Failure to ensure that deficiencies in the plea colloquy were cured as to my being advised and informed and therefore knowing the exact and specific sentencing requirements; thereby allowing my Due Process rights to be violated as I entered my plea unknowingly, unintelligently and thus not voluntarily”
 - c. “Failure to explain elements of the crimes on or off the record”
2. “Ineffective Assistance of PCR Counsel/(Fishburne v State, 2019 WL 3437787)”
 - a. “Failure to request, obtain, inspect, and enter in as exhibit, the file folder whereupon Plea Counsel claimed note regarding sentencing requirements for crimes was written”
 - b. “Failure to file a cross-appeal as to issue regarding my lack of knowledge and understanding of requirements of a mandatory sentence. Austin v. State, 305 SC 453, 409 SE2d 395 (1991); Rule 71.1(g), SCRPC; King v. State 308 SC 348, 349; Wicker v. State, 310 S.C. 8, 425 SE2d 25 (1992)”
1. “Ineffective Assistance of Appellate Counsel/(United States v. Marshall, 872 F2d 213(2017))”
 - a. “Failure to appeal the South Carolina Court of Appeals’ opinion and decision to reverse my grant of post-conviction relief and remand to the PCR court for findings. Austin v. State, 305 SC 453, 409 SE2d 395 (1991); Rule 71.1(g), SCRPC; King v. State 308 SC 348, 349; Wicker v. State, 310 S.C. 8, 425 SE2d 25 (1992)”
 - b. “Failure to sufficiently comprehend the ambiguities which did exist and were used as sentencing terms, the clearly deficient and vague plea colloquy with regard of the misunderstandings of the sentencing requirements, and therefore consequently erroneously conceded during oral argument that the record of the plea proceeding was ‘sufficient’ with regard to sentencing maximums and minimums. Such failure and err being detrimental by causing unfavorable judgment in PCR and upon review of the same.”
2. “Austin Appeal – Austin v. State, 305 SC 453, 409 SE2d 395 (1991); King v. State 308 SC 348, 349”

Applicant requests relief as follows:

“Sentence Vacated/Remanded, or Conviction Vacated & Remanded. Sentence 85% and not day-for-day”

Attached to this return and incorporated by reference are the Anderson 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 plea transcript; Applicant’s prior post-conviction relief records challenging these convictions and the appeals 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. Newly-Discovered Evidence

As an initial matter, Applicant’s assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without

merit. The Uniform Post-Conviction Procedure Act⁵ (the Act) states a person may institute a PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). “If the applicant contends there is evidence of a material fact not previously presented, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” S.C. Code Ann. § 17-27-45(C).

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). 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).

In his memorandum, Applicant states the following regarding his newly-discovered evidence claim:

“Applicant has only recently discovered material which is genuine and which reveals Applicant’s attempts to show unto this Court the ambiguity of the terms used in his sentencing and the exigent need

⁵ S.C. Code Ann. § 17-27-10 to -160.

that the exact terms of the sentence be explained to Applicant and defendants on the record. The record of the plea should clearly reflect that Applicant understood the exact terms of the plea and sentences which were possible. However, the record of the plea proceeding is void of any true thorough conversation, explanation, and sufficient understanding with regard to the exact terms of the plea and sentencing with regard to day-for-day. Applicant has only recently discovered an identical matter within the case of Charlie Ellis Cutshaw, Jr. v. State, 2019 WL 3049589 – (PCR case), where in this case, Robert D. Cook, Solicitor General and the PCR court has recognized also the ambiguity which exists within the sentencing terms. This case specifically discusses the term mandatory minimum and finds that mandatory minimum in this case does not provide for day-for-day sentencing.”

Although this claim has been litigated at least twice, Applicant’s discovery of materials that purportedly support his claim that his plea was involuntary does not constitute newly-discovered evidence under *Jamison*. Applicant cites specifically to a formal opinion promulgated by the South Carolina Attorney General’s Office on June 18, 2019.⁶ Even if this opinion could somehow be interpreted as newly-discovered evidence, it is completely irrelevant to Applicant’s situation. The opinion merely states that a court would likely conclude that the enactment of section 24-13-150(A) is controlling with respect to the mandatory minimum twenty-five year drug trafficking statutes. Applicant was convicted of murder, armed robbery, ABWIK, criminal conspiracy, and possession of a firearm during the commission of a violent crime. The opinion focuses on the drug statutes only.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch*, 246 S.C. 258, 143 S.E.2d 455. Applicant has failed to make such a showing based on the information set forth in application. Because his allegations of newly-discovered evidence offer him no grounds for relief, Applicant has failed to meet his burden under

⁶ It is well-settled that an Attorney General’s opinion may be persuasive authority, however, it is not binding on any court. *State v. Ramsey*, 409 S.C. 206, 212, 762 S.E.2d 15, 18 (2014).

sections 17-27-20(A)(4) and 17-27-45(C).

B. Statute of Limitations

This Court further finds this action must be summarily dismissed for failure to comply with the filing procedures of the Act, which requires the following:

- (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(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 also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

As discussed in Section A, *supra*, Applicant has failed to make a *prima facie* case of newly-discovered evidence. Therefore section 17-27-45(C) does not apply. Section 17-27-45(A) provides that an applicant must file his application within one year after the entry of a judgment of conviction. In this case, Applicant was convicted on January 13, 2004. This application was filed on July 13, 2020—almost *fifteen 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).

C. 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). Section 17-27-90 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.

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.”).

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’s current allegations of ineffective assistance of plea counsel and involuntary guilty plea based on the mandatory minimum sentence were raised and ruled upon in his previous post-conviction relief application, state habeas action, and federal habeas petition. Because the remaining allegations *could have* been raised in Applicant’s previous state and federal proceedings, this action 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. *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.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch*, 246 S.C. 258, 143 S.E.2d 455. Applicant had a full opportunity to litigate all of his claims in his previous PCR action and federal habeas corpus action. He has failed to show that a successive application is appropriate or why he could not have raised

these claims in his prior collateral actions; thus, these allegations are 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))).

D. Laches

This Court finds this action must further be summarily dismissed based on the equitable doctrine of *laches*. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. *McElrath v. State*, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). This requirement “guards the state’s legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available.” *Id.*

Where a PCR applicant fails to exercise reasonable diligence, the State may seek the summary dismissal through the equitable doctrine of *laches*, which is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Bray v. State*, 366 S.C. 137, 140, 620 S.E.2d 743, 745 (2005) (quoting *Whitehead v. State*, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002)); *see also RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 199, 644 S.E.2d 730, 734–35 (2007) (“*Laches* connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner.”). “Whether a claim is barred by *laches* is to be determined in light of the facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of right does not constitute *laches*.” *Whitehead*, 352 S.C. at 219, 574 S.E.2d at 202. Recognizing the importance of finality in litigation,

Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

The South Carolina General Assembly has likewise recognized this problem and instituted a one year statute of limitations. *See* S.C. Code Ann. § 17-27-45(A).

Applicant filed this PCR action over *fifteen years* after he was convicted. *See, e.g., Bray*, 366 S.C. at 140, 620 S.E.2d at 745 (affirming PCR judge's ruling that *laches* barred belated review of denial of PCR seven years after PCR hearing was held). Applicant's delay has greatly prejudiced the State (as well as Applicant). Absent some explanation or justification for the delay in seeking PCR, *laches* will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to review the applicant's claims. *McElrath*, 276 S.C. at 283, 277 S.E.2d at 890. Witness memories and physical evidence will have naturally faded and degraded. *State v. Serrette*, 375 S.C. 650, 654 S.E.2d 554 (Ct. App. 2007) (declining to remand for reconstruction of record noting such remedy "would undoubtedly be futile considering the passage of over ten years' time" when the delay was caused by appellant). As a result, Applicant's delay in bringing this action has affected the availability of evidence for this Court to review his claims. Therefore, this application must be summarily dismissed as barred by the equitable doctrine of *laches*.

E. Failure to State a Claim

Finally, Applicant's claim 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 on remand, he timely appealed to the South Carolina Supreme Court. Following the filing of the State’s return to the petition for a writ of certiorari, 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 the allegation for failing to state a cognizable claim upon which relief can be based.

F. 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)). 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

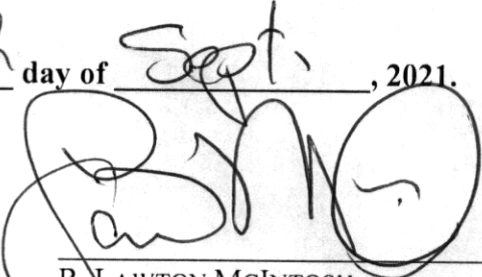
Pursuant to section 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this order upon him to show why this order should not become final. Applicant shall file any reasons he may have with the Anderson 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 Anderson 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 22 day of Sept., 2021.

'21 SEP 29 PM4:41:50
Anderson, SC COC, CP/GS


R. LAWTON MCINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson, South Carolina



ALAN WILSON
ATTORNEY GENERAL

September 20, 2021

The Honorable R. Lawton McIntosh
Circuit Court Judge
Post Office Box 8002
Anderson, South Carolina 29622

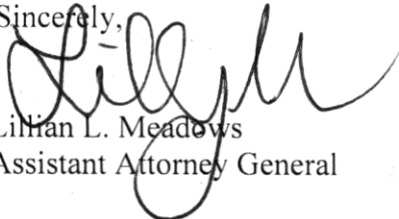
Re: Marcus L. Martin, 299118 v. State of South Carolina
2020-CP-04-1323

Dear Judge McIntosh:

Enclosed please find the proposed Conditional Order of Dismissal in the above-captioned case. Respondent's return and motion to dismiss was sent to your chambers on September 20, 2021 for your consideration. If this proposed order meets your approval, please sign and forward to the Anderson County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Lillian L. Meadows
Assistant Attorney General

LLM/geh
Enclosure(s)

cc: Marcus L. Martin, #29918

'21 SEP 29 PM 4:41:35
Anderson, SC COC, CP/6S