STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT
Troy Luke Burks, SCDC #160726, Applicant, v. State of South Carolina, Respondent.	)	Case Nos.: 2018-CP-23-3312 ~~2021-CP-23-3840~~ **CONDITIONAL ORDER OF DISMISSAL AND ORDER MERGING APPLICATIONS** ENTERED ON PACER

This matter comes before the Court by way of post-conviction relief (PCR) actions commenced by Troy Luke Burks (Applicant) on June 14, 2018, and August 12, 2021. The State made its return on February 16, 2022 requesting the actions be summarily dismissed.

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. Applicant was arrested on March 10, 1989, after kidnapping the victim at gunpoint and violently sexually assaulting her in her own home. During its July 1989 term, the Greenville County Grand Jury indicted Applicant for first-degree criminal sexual conduct (CSC) (1989-GS-23-5346) and kidnapping (1989-GS-23-5348). Dorothy A. Manigault, Esquire, represented Applicant on these charges.

On September 13, 1989, Applicant was convicted as indicted following a jury trial before the Honorable C. Victor Pyle, Jr. Judge Pyle sentenced Applicant to consecutive terms of life imprisonment for kidnapping and thirty years for CSC. Applicant subsequently filed a *pro se* notice of appeal; however, on October 26, 1989, the Supreme Court issued an order of abandonment for

failure to timely serve the notice of appeal. Applicant then filed a petition to reinstate his appeal, which the Court denied on January 11, 2019.

A. Initial Post-Conviction Relief Action and Subsequent Appeal: 1996-CP-23-0837

On March 27, 1996, Applicant filed his first PCR action, raising multiple claims of ineffective assistance of trial counsel, trial court error, and prosecutorial and police misconduct. The State requested an evidentiary hearing through its return on July 10, 1996.

On October 8, 1998, the PCR court convened an evidentiary hearing before the Honorable Larry R. Patterson. Applicant was present at the hearing and represented by Christopher Posey, Esquire. Assistant Attorney General Barbara M. Tiffin appeared on behalf of the State. On February 18, 1999, Judge Patterson issued an order denying the application on all grounds and dismissing the action with prejudice.

Applicant subsequently filed a *pro se* motion to alter or amend pursuant to Rule 59(e), SCRCP. A notice of appeal from Judge Patterson's order of dismissal was subsequently filed. On October 26, 1999, the Supreme Court dismissed the appeal to allow Judge Patterson to rule on the pending Rule 59(e) motion. On February 18, 2000, the State filed a return and motion to dismiss in response to the Rule 59(e) motion. Judge Patterson denied the motion by order dated February 22, 2000, finding the motion was not timely filed and served.

Applicant filed a *pro se* notice of appeal on February 28, 2000. Appellate Defender Daniel T. Stacy perfected Applicant's appeal by filing a petition for writ of certiorari with the Supreme Court, raising the following issues:

> I. Whether petitioner is entitled to a belated appeal pursuant to *White v. State?*
>
> II. Whether petitioner received a fair PCR hearing when the transcript of his trial was not provided despite S.C. Code

§17-27-70 (a) requiring the state to provide one at PCR?

The State filed a return to the petition on September 18, 2000. On July 5, 2001, the Court issued an order denying Applicant's petition. The case was remitted back to the circuit court on July 25, 2001.

B. Federal Habeas Corpus Action: 3:02–1930–HMH

On May 30, 2002, Applicant filed a *pro se* 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, raising multiple allegations of ineffective assistance of counsel, prosecutorial misconduct, and due process violations. *See Burks v. Pate*, No. 3:02-1930-20BC.[1] Respondent filed a return and motion for summary judgment on October 23, 2002. On October 28, 2002, the Honorable Joseph R. McCrorey, United States Magistrate Judge, entered a *Roseboro*[2] order, advising Applicant of his responsibility to properly respond to the motion for summary judgment. Applicant filed a response on October 31, 2002.

On June 12, 2003, Judge McCrorey 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 July 7, 2003. On July 28, 2003, the Honorable Henry M. Herlong, Jr., United States District Judge, issued an order adopting and incorporating the R&R by reference; granting Respondent's motion for summary judgment; and dismissing the petition with prejudice. *Burks v. Pate*, No. 3:02-CV-1930-HMH (D.S.C. July 28, 2003).

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

[2] *See Roseboro* v. *Garrison*, 528 F.2d 309 (4th Cir. 1975) and *Webb* v. *Garrison*, No. 77-1855 (4th Cir. July 6, 1977) (requiring courts to provide explanation of dismissal/summary judgment procedures in federal habeas corpus cases).

C. Second Post-Conviction Relief Action: 2002-CP-23-6375

On September 16, 2002, Applicant filed a second PCR action,[3] raising multiple allegations of prosecutorial misconduct, due process violations, and ineffective assistance of PCR counsel. On July 30, 2003, the PCR court convened an evidentiary hearing before the Honorable John C. Few. Susannah C. Ross, Esquire, represented Applicant. By order signed September 22, 2003, and filed September 30, 2003, then-Judge Few granted Applicant a belated appeal from Judge Patterson's order denying post-conviction relief pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

D. *Austin* Appeal

Appellate Defender Aileen P. Clare represented Applicant on appeal. On November 8, 2004, the Supreme Court issued a writ of certiorari to address the question of whether the PCR judge properly granted Applicant *Austin* review, dispensed with further briefing, and reversed the order of the PCR judge. The Court found Applicant was not entitled to *Austin* review because the Court already reviewed Judge Patterson's order denying relief and denied Applicant's petition for writ of certiorari in 2001. *Burks v. State*, Op. No. 2004-MO-061 (S.C. Sup. Ct. filed Nov. 8, 2004).

E. Third Post-Conviction Relief Action: 2005-CP-23-5803

On September 12, 2005, Applicant filed a ***third*** PCR action, alleging he was being held in custody unlawfully based on the following (excerpted verbatim):

1. "After discovered evidence based on (1) counsel's perjury (2) State misconduct."
2. Ineffective assistance of trial counsel
   a. Failed to object to prosecutorial misconduct
   b. Failed to properly perfect appeal

[3] Applicant originally filed a document captioned "State Habeas Corpus;" however, this Court construed the action as an application for post-conviction relief.

c. Failed to object to the State's withholding of exculpatory evidence

3. Ineffective assistance of PCR counsel (Christopher T. Posey, Esquire) from 1996 PCR application
4. Ineffective assistance of appellate counsel (Aileen P. Clare, Esquire) from appeal of 2002 petition for writ of habeas corpus
5. "Fourteenth Amendment and Brady violation by lack of trial transcript."

The State made its return on February 10, 2006, requesting the application be summarily dismissed as untimely and successive. Pursuant to this request, the Honorable G. Edward Welmaker, acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on February 8, 2006, provisionally denying and dismissing the application while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed multiple responses. Judge Welmaker subsequently issued a final order signed July 6, 2006, and filed July 13, 2006, denying and dismissing the application with prejudice. Applicant did not appeal.

F. Fourth Post-Conviction Relief Action: 2012-CP-23-3902

On July 14, 2012, Applicant filed a ***fourth*** PCR action, alleging he was being held in custody unlawfully based on newly-discovered evidence. The State made its return on September 11, 2012, again requesting the application be summarily dismissed as untimely, successive, and because Applicant failed to make a *prima facie* case of newly-discovered evidence. Pursuant to this request, Judge Welmaker, again acting in his capacity as Chief Administrative Judge, issued a conditional order of dismissal on September 18, 2012, provisionally denying and dismissing the application while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response. The Honorable D. Garrison Hill, acting in his capacity as chief administrative judge, subsequently issued a final order signed January 15, 2013, and filed January 23, 2013, denying and dismissing the application with prejudice. Applicant did not appeal.

II. CURRENT APPLICATIONS

On June 14, 2018, Applicant filed a ***fifth*** application for post-conviction relief, alleging he is being held in custody unlawfully based on the following (excerpted verbatim):

1. "Ineffective assistance of counsel . . ."
   a. "In Kinard v. State which is exactly like my case/ineffective assistance"
2. "No conviction trial transcript available for 3/27/1996 PCR hearing"
   a. "14th Amend and Brady violations when no trial transcript was used"
3. "Falsely accused of gun arrest by prosecutor/prejudice to jury"
   a. "Missing trial transcript cover-up trial court error and appeal request"

Applicant requests relief as follows:

"To reduce life sentence to 30 years" [4]

a) "In November 11, 1992, an act to amend Article 9, Chapter 3, title 16 code of law[*sic*] of South Carolina decreased the penalty for kidnapping and conspiracy to kidnap from maximum life imprisonment to (30) thirty years."

b) "Appellate court may distrub[*sic*] trial justice decision on motion to reduce sentence when imposed sentence is grossly disparate from other similar offender's sentences."

[4] The relief Applicant seeks is not available because the Uniform Post-Conviction Procedure Act does not provide a vehicle for sentence reduction. *See Clark v. State*, 259 S.C. 378, 382–83, 192 S.E.2d 209, 210 (1972) (per curiam) (holding that an inmate cannot seek a "time cut" in his sentence via post-conviction relief if the sentence was within the statutorily defined limits); John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. Rev. 235, 268 (1994) (noting that "[t]he lack of jurisdiction to reduce otherwise proper sentences seems not to be widely recognized by many inmates who file pro se applications seeking a reduction in their sentences"). If this Court finds a defect in the original proceedings, the appropriate relief would be a new trial on the original indictments. *See generally Singleton v. State*, 313 S.C. 75, 85–86, 437 S.E.2d 53, 59–60 (1993) (discussing section 17-27-20(B) and the appropriate relief in PCR cases); *Gilstrap v. State*, 252 S.C. 625, 628, 168 S.E.2d 88, 89 (1969) (stating that even under the assumption that all the allegations were true, the relief to be granted on PCR is remand for a new trial); *Smith v. State*, 413 S.C. 194, 195, 775 S.E.2d 696, 696 (2015) ("We now clarify the proper remedy is a new trial.").

On August 12, 2021, Applicant filed a ***sixth*** application for post-conviction relief, alleging he is being held in custody unlawfully based on the following (verbatim):

1. "The conviction or the sentence was in violation of constitution of U.S. or of the state."
2. "That his sentence has expired his probation parole unlawfully revoked or otherwise was unlawfully held in custody or restraint."
3. "Section 16-3-910(A) whoever kidnap another person is not to exceed thirty years unless for murder as in section 16-3-20"

Before this Court are the Greenville County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; 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 actions.

III. ORDER MERGING CURRENT APPLICATIONS

As discussed above, Applicant currently has two post-conviction relief actions pending with this Court— the first of which was filed June 14, 2018 (2018-CP-23-3312) and the second was filed August 12, 2021 (2021-CP-23-3840). An applicant is generally not permitted to have multiple post-conviction relief proceedings challenging the same convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (PCR rules "contemplate adjudication on the merits of the original petition, one bite as the apple as it were"); *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981) (successive applications for post-conviction relief strongly disfavored); *see also* S.C. Code Ann. § 17-27-90 ("All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application.").

Accordingly, this Court finds the two proceedings must be merged, with the application filed June 14, 2018 (2018-CP-23-3312) being the surviving case, and the application filed August

12, 2021 (2021-CP-23-3840) considered an amendment to the 2018 application and closed by the Greenville County Clerk of Court.

IV. 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[5] (Act). Specifically, the Act requires:

> (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

[5] S.C. Code Ann. §§ 17-27-10 to -160.

> 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 claims his application is timely under subsection 17-27-45(B) based on the Supreme Court's opinion in *Kinard v. State*, 418 S.C. 478, 795 S.E.2d 15 (2016) (per curiam),

which was issued December 7, 2016. In *Kinard*, the Court held plea counsel was ineffective by failing to file an appeal on the defendant's behalf despite his express instructions to do so. *Kinard* is wholly inapplicable to Applicant's case, in part because Applicant filed a *pro se* notice of appeal; however, it was deemed abandoned because he failed to timely serve the notice of appeal on respondents. Additionally, the Supreme Court rejected Applicant's claim he was entitled to a belated direct appeal pursuant to *White v. State*[6] on appeal of his first post-conviction relief application. Finally, even if *Kinard* was somehow applicable, this application would still be untimely under subsection 17-27-45(B) because it was filed over a year after the opinion was issued.

Further, the claims Applicant raises in his current applications are not based on newly-discovered evidence; therefore, subsection 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. Applicant was convicted on September 13, 1989, and the order of abandonment was issued regarding his appeal on October 26, 1989. These applications were filed on June 14, 2018, and August 12, 2021—*over twenty years* after the requisite filing period expired.

Accordingly, this must should 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

[6] 263 S.C. 110, 208 S.E.2d 35 (1974).

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

This Court finds this action must further be summarily dismissed because it is successive to Applicant's *four* 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*, 275 S.C. 615, 274 S.E.2d 415; *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). The 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*, 305 S.C. at 450, 409 S.E.2d at 394 (clarifying that any new ground raised in a subsequent application is limited to those grounds that "*could not have been raised* . . . in the previous application[;]" thus, "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application"); *see also id.* at 452, 409 S.E.2d at 395 ("[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."). The 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).

Before a Court will hold an evidentiary hearing, the Applicant must make a *prima facie* showing that he is entitled to relief. *Welch*, 246 S.C. 258, 143 S.E.2d 455. Applicant has failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief 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)). Applicant has failed to meet the burden imposed upon him, and this Court must summarily dismiss the application as successive to Applicant's previous PCR actions.

C. *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant's previous state and federal proceedings, this Court finds this action is further 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.*; *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth*, 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* bars 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.

Here, Applicant has previously litigated a petition for habeas corpus relief in federal court and four PCR applications in the circuit court. The allegations in the current application are critically similar to those pursued in Applicant's previous collateral actions, all of which were dismissed. Specifically, Applicant has unsuccessfully raised the issue regarding the trial transcript at least three times. 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*.

D. *Laches*

This Court further finds this action must 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*, 366 S.C. at 140, 620 S.E.2d at 745 (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 *twenty 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. The trial transcript is no longer available. *See, e.g.*, Rule 607(i), SCACR (court reporter only required to retain records for five years). 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. Illegal or Expired Sentence

Notwithstanding Applicant's failure to raise these issues in his prior actions, Applicant's claims challenging the legality of his sentence are without merit. Specifically, Applicant claims the life sentence he is currently serving for kidnapping exceeds the maximum authorized by law because the **current** version of the section 16-3-910 provides a maximum sentence of thirty years'

imprisonment.[7] However, at the time of Applicant's trial, the kidnapping statute carried a mandatory life sentence. *See* S.C. Code Ann. § 16-3-910 (1985). The statute was amended in 1991.[8]

In *State v. Varner*, the defendant claimed he should be re-sentenced under the amended kidnapping statute, which was enacted while his appeal was pending. 310 S.C. 264, 423 S.E.2d 133 (1992). Our Supreme Court found the defendant was not entitled to resentencing because he was sentenced "before amended section 16-3-910 became effective and there is no language in the act which would require its retroactive application to him." *Id.* at 265, 423 S.E.2d at 133 (citing *Hercules, Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 262 S.E.2d 45 (1980) (prospective application is presumed absent a specific provision or clear legislative intent to the contrary)); *see Id.* at 265, 423 S.E.2d at 134 ("[A] criminal defendant receives the benefit of punishment mitigated by legislative amendment only when the amendment becomes effective before sentence is pronounced." (citations omitted)). Applicant's life sentence—which he received well before the statute was amended—is valid. Accordingly, these claims must be summarily dismissed.

F. Failure to State a Claim

To the extent Applicant challenges the South Carolina Department of Probation, Parole, and Pardon Services' (DPPPS) determination of parole eligibility or calculation of good time credits, these allegations must be summarily dismissed for raising a non-collateral or administrative matter, which is not reviewable through post-conviction relief. *Al-Shabazz v. State*,

[7] Both version of the statute contain an exception related to offenders sentenced for murder under section 16-3-20 that is not applicable to Applicant's case.

[8] Act No. 117, 1991 S.C. Acts 416 (codified at S.C. Code Ann. § 16-3-910 (Supp. 1991)).

338 S.C. 354, 527 S.E.2d 742 (2000). An applicant may commence a post-conviction relief action on the following grounds:

> 1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> 2. United States or the Constitution or laws of this State;
> 3. That the court was without jurisdiction to impose sentence;
> 4. That the sentence exceeds the maximum authorized by law;
> 5. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> 6. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> 7. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

S.C. Code Ann. § 17-27-20(A); *see Al-Shabazz*, 338 S.C. at 368, 527 S.E.2d at 749 (explaining that an application for PCR is not the appropriate method for raising a sentencing credits issue unless it has caused an inmate to remain imprisoned past the expiration of his lawful sentence).

Post-conviction relief "is a proper avenue of relief *only when the applicant mounts a collateral attack challenging the validity of his conviction or sentence*." *Al-Shabazz*, 338 S.C. at 368, 527 S.E.2d at 749. The only non-collateral matters that are reviewable through post-conviction relief are those that are specifically enumerated in the Uniform Post-Conviction Procedure Act: (1) a claim that the applicant's sentence has expired and (2) a claim that the applicant's probation, parole, or conditional release has been unlawfully revoked. *Id.* Claims that

affect only the duration of the sentence or quality of the inmate's confinement do not affect the validity of the conviction or sentence and therefore are considered non-collateral attacks on the conviction. *Cooper v. State*, 338 S.C. 202, 206, 525 S.E.2d 886, 888 (2000).

As discussed in Section F, *supra*, Applicant's claim that his sentence has expired based on the amended kidnapping statute is meritless. To the extent Applicant claims he was improperly denied parole or that SCDC incorrectly calculated his good time credits, such non-collateral or administrative matters must be reviewed through the Administrative Procedures Act. *Al-Shabazz*, 338 S.C. at 378–79, 527 S.E.2d at 754–55 Accordingly, these claims must be summarily dismissed pursuant to Rule 12(b)(6), SCRCP, they are not cognizable claims under the Act.

G. 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. . . . [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 (citations omitted).

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*, 397 U.S. at 773–74 (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 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 repeated attempts to relitigate his convictions and sentences through successive and time-barred applications is contrary to the recognized need for finality of litigation.

V. CONCLUSION

Pursuant to S.C. Code Ann. § 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 Greenville 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 – 13th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Greenville 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 Feb, 2022.

LETITIA H. VERDIN
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina