Appendix A

FILED: December 11, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

MANDATE

The judgment of this court, entered July 29, 2024, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Nwamaka Anowi, Clerk

Appendix B

FILED: December 3, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Harris, and Judge Quattlebaum.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix C

FILED: September 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

ORDER

Upon consideration of appellant's motion to reconsider the court order denying the petition for rehearing and rehearing en banc as untimely, the court grants the motion and accepts the petition as filed.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix D

FILED: September 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

ORDER

This court's mandate issued 08/20/2024, is recalled for the limited purpose of considering a timely petition for panel and/or en banc rehearing.

For the Court--By Direction

/s/ Nwamaka Anowi, Clerk

Appendix E

FILED: August 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

ORDER

The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local Rule 40(c). The petition in this case is denied as untimely.

For the Court--By Direction

/s/ Nwamaka Anowi, Clerk

Appendix F

FILED: August 20, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

MANDATE

The judgment of this court, entered July 29, 2024, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Nwamaka Anowi, Clerk

Appendix G

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071

JOHN DOUGLAS ALEXANDER,

Petitioner - Appellant,

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Henry M. Herlong, Jr., Senior District Judge. (6:23-cv-03145-HMH)

Submitted: July 25, 2024 Decided: July 29, 2024

Before GREGORY, HARRIS, and QUATTLEBAUM, Circuit Judges.

Dismissed by unpublished per curiam opinion.

John Douglas Alexander, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

John Douglas Alexander seeks to appeal the district court's order accepting the recommendation of the magistrate judge and dismissing Alexander's 28 U.S.C. § 2254 petition as successive. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When, as here, the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Alexander has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

Appendix H

FILED: July 29, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7071
(6:23-cv-03145-HMH)

JOHN DOUGLAS ALEXANDER

Petitioner - Appellant

v.

JONATHAN NANCE, Warden, Tyger River Correctional Institution

Respondent - Appellee

J U D G M E N T

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

John Douglas Alexander, Petitioner, vs. Jonathan Nance, Respondent.	)	C.A. No. 6:23-03145-HMH-KFM **OPINION & ORDER**

This matter is before the court for review of the Report and Recommendation of United States Magistrate Judge Kevin F. McDonald, made in accordance with 28 U.S.C. § 636(b)(1) and Local Civil Rule 73.02 for the District of South Carolina.[1] John Douglas Alexander ("Alexander") is a pro se state prisoner seeking habeas corpus relief pursuant to 28 U.S.C. § 2254. In his Report and Recommendation filed on August 17, 2023, Magistrate Judge McDonald recommends that Alexander's § 2254 petition be dismissed without requiring the respondent to file an answer or return, as successive and unauthorized. (R&R, generally, ECF No. 17.)

Alexander filed objections to the Report and Recommendation on September 5, 2023. (Objs., ECF No. 19.) Objections to the Report and Recommendation must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review,

[1] The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). "To trigger de novo review, an objecting party 'must object to the finding or recommendation on that issue with sufficient specificity so as reasonably to alert the district court of the true ground for the objection.'" Elijah v. Dunbar, 66 F.4th 454, 460 (4th Cir. 2023) (quoting United States v. Midgette, 478 F.3d 616, 622 (4th Cir. 2007)). In the absence of specific objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, Alexander's objections are non-specific or unrelated to the dispositive portions of the magistrate judge's Report and Recommendation. Therefore, after a thorough review of the magistrate judge's Report and the record in this case, the court adopts Magistrate Judge McDonald's Report and Recommendation and incorporates it herein.

It is therefore

ORDERED that Alexander's § 2254 petition is dismissed as successive and unauthorized , and without requiring the respondent to file an answer or return. It is further

ORDERED that a certificate of appealability is denied because Alexander has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
September 8, 2023

NOTICE OF RIGHT TO APPEAL

The Petitioner is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

Other Events

6:23-cv-03145-HMH Alexander v. Warden Tyger River

KFM-Inmate,PRIOR

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 9/11/2023 at 9:13 AM EDT and filed on 9/11/2023

Case Name: Alexander v. Warden Tyger River
Case Number: 6:23-cv-03145-HMH
Filer:
WARNING: CASE CLOSED on 09/11/2023
Document Number: 21

Docket Text:
JUDGMENT. Petition is dismissed as successive and unauthorized. (rweb,)

6:23-cv-03145-HMH Notice has been electronically mailed to:

6:23-cv-03145-HMH Notice will not be electronically mailed to:

John Douglas Alexander
194748
Tyger River Correctional Institution
U6-4A
200 Prison Road
Enoree, SC 29335

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=9/11/2023] [FileNumber=11438973-0] [2ee37d7358798ba93c12e88443faca42a4b69499ed98c2446f835435f6a7e55489879139e0eee145a44f036da71b55bbe3903a46a648da177f321834f2b5503a]]

Other Orders/Judgments

6:23-cv-03145-HMH Alexander v. Warden Tyger River

KFM-Inmate,PRIOR

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 9/11/2023 at 9:08 AM EDT and filed on 9/8/2023

Case Name: Alexander v. Warden Tyger River
Case Number: 6:23-cv-03145-HMH
Filer:
Document Number: 20

Docket Text:

ORDER RULING ON REPORT AND RECOMMENDATION. Alexander's petition is dismissed as successive and unauthorized. It is further ORDERED that a certificate of appealability is denied. Signed by Honorable Henry M Herlong, Jr on 9/8/23. (rweb,)

6:23-cv-03145-HMH Notice has been electronically mailed to:

6:23-cv-03145-HMH Notice will not be electronically mailed to:

John Douglas Alexander
194748
Tyger River Correctional Institution
U6-4A
200 Prison Road
Enoree, SC 29335

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=9/11/2023] [FileNumber=11438947-0] [1f3712e98d97218e3a5eb24809f3f9704361de27fe310e5b2a1a66890bd05187a1d1e3038269c6fb1f2b8223dc91a59b547acfafa586a96500ecdef499596df5]]

Other Orders/Judgments

6:16-cv-00600-HMH Alexander v. Cartledge

KFM-Inmate

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 2/1/2017 at 10:53 AM EST and filed on 2/1/2017

Case Name: Alexander v. Cartledge

Case Number: 6:16-cv-00600-HMH

Filer:

Document Number: 51

Docket Text:

ORDER RULING ON REPORT AND RECOMMENDATION [49]. ORDERED that Respondents motion for summary judgment, docket number [12], is granted, and the habeas petition, docket number [1], is denied. It is further ORDERED that Petitioners motion for default judgment, docket number [15], is denied, and Petitioners motion for summary judgment, docket number [16], is denied. It is further ORDERED that a certificate of appealability is denied because Petitioner has failed to make a substantial showing of the denial of a constitutional right. Signed by Honorable Henry M Herlong, Jr on 2/1/2017. (kric,)

6:16-cv-00600-HMH Notice has been electronically mailed to:

Donald John Zelenka dzelenka@scag.gov, lbrawley@scag.gov

Susannah R Cole scole@scag.gov, pmckoy@scag.gov

6:16-cv-00600-HMH Notice will not be electronically mailed to:

John Douglas Alexander
194748
McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

The following document(s) are associated with this transaction:

Other Orders/Judgments
6:16-cv-00600-HMH Alexander v. Cartledge **CASE CLOSED on 02/01/2017**

CLOSED,KFM-Inmate

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 2/9/2017 at 7:55 AM EST and filed on 2/8/2017
Case Name: Alexander v. Cartledge
Case Number: 6:16-cv-00600-HMH
Filer:
WARNING: CASE CLOSED on 02/01/2017
Document Number: 55

Docket Text:
ORDER re [51] Order Ruling on Report and Recommendation. IT IS ORDERED that Alexanders motion to alter or amend the judgment, docket number 54,is denied. Signed by Honorable Henry M Herlong, Jr on 2/8/2017. (kric,)

6:16-cv-00600-HMH Notice has been electronically mailed to:

Donald John Zelenka dzelenka@scag.gov, lbrawley@scag.gov

Susannah R Cole scole@scag.gov, pmckoy@scag.gov

6:16-cv-00600-HMH Notice will not be electronically mailed to:

John Douglas Alexander
194748
McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=2/9/2017] [FileNumber=7697081-0]

Appendix J

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

John Douglas Alexander, Petitioner, vs. Jonathan Nance, Respondent.	C/A No. 6:23-cv-03145-HMH-KFM **REPORT OF MAGISTRATE JUDGE**

The petitioner, proceeding *pro se*, brings this action pursuant to 28 U.S.C. § 2254 for habeas relief. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court. For the reasons set forth below, it is recommended that the petitioner's § 2254 petition be summarily dismissed.

ALLEGATIONS

Petitioner's Conviction and Sentence

The petitioner is currently serving a sentence of life imprisonment for assault and battery with intent to kill and five years for possession of a weapon during the commission of a violent crime imposed by the Spartanburg County General Sessions Court.[1] *See* Spartanburg County Public Index, https://publicindex.sccourts.org/Spartanburg/PublicIndex/PISearch.aspx (enter the petitioner's name and K140772, 2006GS4204462A) (last visited August 16, 2023). The petitioner was found guilty by a jury.

[1] The court takes judicial notice of the records in the petitioner's criminal case in the Spartanburg County General Sessions Court, as well as the petitioner's post-conviction relief actions in the Spartanburg County Court of Common Pleas and a prior action in this court brought pursuant to § 2254. *See Phillips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (courts "may properly take judicial notice of matters of public record."); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'").

Id. The petitioner appealed, and his conviction and sentence were affirmed. *State of S.C. v. Alexander*, C/A No. 2010-UP-265, 2010 WL 10079920 (S.C. Ct. App. Apr. 29, 2010).

Petitioner's Prior Collateral Attacks in the State Court

On May 6, 2010, the petitioner filed a post-conviction relief action ("PCR") in the Spartanburg County Court of Common Pleas. *See* Spartanburg County Public Index (enter the petitioner's name and 2010CP4202428) (last visited August 16, 2023). In the PCR, the petitioner asserted ineffective assistance of counsel ("IAC") based upon trial counsel's failure to object to the petitioner not being present during a critical stage in the trial, conceding that the evidence did not support self-defense, failure to present a meaningful defense, failure to prepare an insanity defense, failure to challenge a juror's selection despite the juror knowing the judge, failure to seek mistrial for use of word malice at trial, and failure to object to jury instructions. *Id.* The petitioner also asserted that the trial judge conspired with the solicitor to convict the petitioner and utilized an improper jury instruction. *Id.* The petitioner also asserted that his due process rights were violated and prosecutorial misconduct. *Id.* The petitioner's PCR was denied on March 16, 2012. *Id.* The petitioner appealed, the petitioner's case was transferred to the South Carolina Court of Appeals, and dismissed on May 21, 2015. *Alexander v. State of S.C.*, C/A No. 2012-211390 (S.C. Ct. App. May 21, 2015).

After the denial of his federal habeas petition, outlined *infra*, the petitioner filed a second PCR action in the Spartanburg County Court of Common Pleas on September 14, 2018. *See* Spartanburg County Public Index (enter the petitioner's name and 2018CP4203181) (last visited August 16, 2023). The petition was dismissed on March 27, 2023 (last visited August 16, 2023). The petitioner appealed, and his appeal was dismissed. *Alexander v. State of S.C.*, C/A No. 2023-000520 (S.C. May 16, 2023).

The petitioner also filed a PCR action in the Spartanburg County Court of Common Pleas on October 26, 2020, for his 2007 convictions as well as an unrelated conviction from 1993. *See* Spartanburg County Public Index (enter the petitioner's name and 2020CP4203720) (last visited August 16, 2023). The petition was dismissed on October 26, 2021. *Id.*

Petitioner's Prior Collateral Attacks in this Court

The petitioner filed his first federal habeas petition in this court pursuant to § 2254 on February 22, 2016. *Alexander v. Cartledge*, C/A No. 6:16-cv-00600-HMH (D.S.C.). The petition raised twenty-two grounds for relief. *Id.* at doc. 1. The petitioner's petition was denied on the merits on February 28, 2017. *Alexander v. Cartledge*, C/A No. 6:16-cv-00600-HMH, 2017 WL 770570 (D.S.C. Feb. 28, 2017). The petitioner appealed, and the Fourth Circuit dismissed the appeal. *Alexander v. Cartledge*, 699 F. App'x 171 (4th Cir. 2017). He filed a petition for a writ of certiorari with the United States Supreme Court that was denied on April 30, 2018. *Alexander v. Williams*, 138 S.Ct. 1708 (2018).

Petitioner's Present Action

The petitioner then filed the instant action again seeking habeas relief for his convictions for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime (docs. 1; 10). As ground one for relief in the amended petition, the petitioner alleges violations of his due process and equal protection rights based on IAC of trial and appellate counsel (*id.* at 7). The petitioner's second ground for relief is that he was prevented from fully litigating his claims before the PCR court (*id.*). Grounds three and four for relief are that the trial judge provided an improper jury charge for "implied malice consent" (*id.* at 8). Ground five for relief is that the jury was improperly provided examples of conduct it could use to infer malice (*id.* at 8–9). Ground six for relief is that the trial judge failed to give a jury charge on the law of self-defense (*id.* at 9). For relief, the petitioner seeks immediate release from prison (*id.* at 19).

During this same time, the petitioner also filed a motion with the Fourth Circuit Court of Appeals, seeking permission to file the instant successive federal habeas petition. *In re John Douglas Alexander*, C/A No. 23-210 (4th Cir. 2023). On July 12, 2023, the petitioner's motion was denied (doc. 10-1 at 1). *Id.*

STANDARD OF REVIEW

The undersigned has reviewed the petition pursuant to the Rules Governing Section 2254 Cases in the United States District Courts; the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214; and other habeas corpus statutes. As a *pro se* litigant, the petitioner's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. *See Erickson v. Pardus*, 551 U.S. 89 (2007) (*per curiam*). The mandated liberal construction means that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. However, the requirement of liberal construction does not mean that the Court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. *See Weller v. Dep't of Soc. Servs.*, 901 F.2d 387, 391 (4th Cir. 1990).

DISCUSSION

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (the "AEDPA") amended 28 U.S.C. § 2254 and other habeas statutes:

> The AEDPA effected a number of substantial changes regarding the availability of federal postconviction relief to individuals convicted of crimes in federal and state courts. Of particular importance here are the provisions of the AEDPA codifying and extending judicially constructed limits on the consideration of second and successive applications for collateral relief. Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus or § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals.

In re Vial, 115 F.3d 1192, 1194 (4th Cir. 1997) (footnote and internal citation omitted). The "gatekeeping" mechanism created by the AEDPA amended § 2244(b) to provide:

> The prospective applicant must file in the court of appeals a motion for leave to file a second or successive habeas application in the district court. A three-judge panel has 30 days to determine whether "the application makes a prima facie showing that the application satisfies the requirements of" § 2244(b).

Felker v. Turpin, 518 U.S. 651, 657 (1996) (internal citations omitted).

The instant action qualifies as a second or successive § 2254 action because the petitioner has previously filed a § 2254 petition, which was denied on the merits. *Alexander*, 2017 WL 770570. It appears that the petitioner may assert that this petition is not successive based upon "newly discovered evidence"; however, because the petitioner's prior petition was adjudicated on the merits (with the respondent's motion for summary judgment granted), this qualifies as a successive petition. *Id.*

Nevertheless, 28 U.S.C. § 2244(b)(2) provides that in some circumstances a petitioner may bring a second or successive § 2254 action. That statute permits a court of appeals to determine whether to authorize a successive petition. Thus, the United States Court of Appeals for the Fourth Circuit—not this District Court—is the proper tribunal to decide whether to authorize a successive § 2254 petition. *See United States v. Winestock*, 340 F.3d 200, 205–06 (4th Cir. 2003), *abrogated in part on other grounds by United States v. McRae*, 793 F.3d 392 (4th Cir. 2015). As noted above, the petitioner's request to file a successive § 2254 petition on the grounds set forth in this matter was denied on July 12, 2023, by the Fourth Circuit Court of Appeals (doc. 10-1 at 1). As such, because this matter is successive and the petitioner did not obtain authorization from the Fourth Circuit Court of Appeals to file it, this Court does not have jurisdiction to consider it. *Id.*

RECOMMENDATION

Accordingly, it is recommended that the petitioner's § 2254 petition be dismissed without requiring the respondent to file an answer or return.[2] ***The attention of the parties is directed to the important notice on the next page.***

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

August 17, 2023
Greenville, South Carolina

[2] The petitioner cannot cure the deficiencies noted herein; however, dismissal without prejudice is recommended because the Court of Appeals has held that dismissals for lack of subject-matter jurisdiction must be without prejudice. *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 185 (4th Cir. 2013).

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a *de novo* review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
250 East North Street, Room 2300
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

Other Orders/Judgments

6:23-cv-03145-HMH-KFM
Alexander v. Warden Tyger River

KFM-Inmate,PRIOR

U.S. District Court

District of South Carolina

Notice of Electronic Filing

The following transaction was entered on 8/17/2023 at 1:58 PM EDT and filed on 8/17/2023

Case Name: Alexander v. Warden Tyger River
Case Number: 6:23-cv-03145-HMH
Filer:
Document Number: 17

Docket Text:

REPORT AND RECOMMENDATION. It is recommended that the petitioner's § 2254 petition be dismissed. Objections to R&R due by 8/31/2023. Add an additional 3 days only if served by mail or otherwise allowed under Fed. R. Civ. P. 6 or Fed. R. Crim. P. 45. Signed by Magistrate Judge Kevin McDonald on 8/17/23. (rweb,)

6:23-cv-03145-HMH Notice has been electronically mailed to:

6:23-cv-03145-HMH Notice will not be electronically mailed to:

John Douglas Alexander
194748
Tyger River Correctional Institution
U6-4A
200 Prison Road
Enoree, SC 29335

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1091130295 [Date=8/17/2023] [FileNumber=11404705-0] [92d49ccef9091ddb63f391f0e08786eb4dfd54acc65442d00c3d9526e8fa163af8a06fef7c2941978f7940de9dde8a1454f71855d077243acf692bcaa77de330]]

Appendix K

FILED: July 12, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-210

In re: JOHN DOUGLAS ALEXANDER

Movant

ORDER

Movant has filed a motion under 28 U.S.C. § 2244 for an order authorizing the district court to consider a second or successive application for relief under 28 U.S.C. § 2254.

The court denies the motion.

Entered at the direction of Judge Agee with the concurrence of Judge Niemeyer and Senior Judge Traxler.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix L

The Supreme Court of South Carolina

John Alexander, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2023-000520

ORDER

In the explanation required by Rule 243(c) of the South Carolina Appellate Court Rules (SCACR), Petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, we dismiss the notice of appeal filed by Petitioner. The remittitur will be sent as provided by Rule 221(b), SCACR.

Petitioner has also filed a motion to stay the time for ordering the transcript and a motion to stay the time for filing the petition for a writ of certiorari and appendix. The motions are denied as moot.

C.J.

J.

J.

J.

J.

Appendix M

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
John Alexander, #194748, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-42-03181 **FINAL ORDER OF DISMISSAL**

This matter comes before the Court pursuant to a post-conviction relief application filed by Applicant John Alexander on September 14, 2018. Respondent moved to summarily dismiss the application on August 4, 2020, for untimeliness, successiveness, for failure to establish a *prima facie* case of newly discovered evidence, and barred by the doctrine of *res judicata*.

Pursuant to this request, and after reviewing the attached pleadings pertinent to this matter, this Court issued a conditional order of dismissal dated August 31, 2020, provisionally summarily dismissing the application, but affording Applicant twenty days from service of the conditional order to provide sufficient reasons as to why this order should not be finalized. Applicant was personally served with this conditional order of dismissal on September 25, 2020, as evidenced by the attached affidavit of personal service.

Applicant has filed many documents with the Court since the return and motion to dismiss was filed and the conditional order of dismissal executed. On August 14, 2020, Applicant filed "Applicant's second motion for a hearing on the motion for an ex parte order (for approval of indigent funding request) and motion for discovery; and motion for a hearing on the motion for order for mental health examination, motion for appointment of counsel, and motion for summary disposition." In this filing, Applicant requested an ex parte order on this application

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or, in the alternative, a "hearing to show cause why the motion should be granted." Applicant requested discovery, consisting of "grand jury [e]mpanelment documents." Applicant requested a mental health examination. He also requested counsel be appointed to represent him. Applicant requests the matter be summarily dismissed in his favor because of the State's untimeliness.

On August 17, 2020, Applicant filed a "motion for a stay or, in the alternative, to hold post-conviction relief proceeding in abeyance." In this response, Applicant requests the case be stayed or held in abeyance because Applicant does not have access to the law library. Applicant request either the appointment of counsel or the court wait to move forward on this case until SCDC's "modified quarantine order" is lifted.

On August 24, 2020, Applicant filed an "amendment to the motion for a stay or, in the alternative, to hold the post-conviction relief proceeding in abeyance." In this amendment, Applicant requested Respondent produce Grand Jury Empanelment Documents and "all other documents, audio and video recordings, CDs, written reports, etc. not previously disclosed in the *Brady* motion." Applicant requested a stay or the case be held in abeyance, pending a decision before the Court of Appeals in *Alexander v. Alan Wilson*, case number 2020-000679. Applicant claims that there was exculpatory evidence awarded in the complaint yields material evidence of overwhelming proof that the Applicant was not properly indicted and that he was tried, convicted, and sentenced in violation of his federal and state constitutional rights.

On October 29, 2020, Applicant filed a letter, requesting copies of the three verdict forms sent to the jury for the underlying convictions.

On May 19, 2021, Applicant filed a document entitled "motion seeking verification." In this response, Applicant stated that he was proceeding forward in this case *pro se* and requested the Court verify whether or not a conditional order of dismissal in the case existed and that all

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further orders or rulings be sent directly to Applicant unless and until another attorney is hired to represent him.

On May 19, 2021, Applicant filed a document entitled "notice". In this document, Applicant stated he retained Mr. William Yarborough, III, for this action. However, Mr. Yarborough filed a 2020 action instead while this matter remained pending. After the return and motion to dismiss was filed, Mr. Yarborough sent Applicant a letter, abruptly ending his representation of Applicant.[1] In his response, Applicant stated he was intending to proceed forward *pro se* in both actions and requested the Court resume sending him all paperwork concerning his case directly.

On May 19, 2021, Applicant filed a document entitled "motion for change of venue." In this document, Applicant requested a change of venue because of his claim that Judge Cole presided over his jury trial in "a highly biased and prejudicial manner." He claimed Judge Hayes was also biased and prejudiced because he oversaw his first PCR hearing. Applicant claimed he was forced to challenge the "unlawful[], intentional and wi[ll]ful[] distortion and fudging of his post-conviction relief transcript of record by the court reporter. Applicant claims that it is impossible for him to receive a fair and impartial decision on this matter because of the conflicts, particularly because Judges Cole and Hayes are not in a position where they can easily vacate the convictions "absent retaliation and/or dread and anxiety of losing its legal professional career." Applicant claims that Respondent acknowledged this conflict and, in so doing, sent the conditional order of dismissal to Judge Kelly instead. Accordingly, Applicant requested the court grant his motion for change of venue to another county where Judges Cole and Hayes "cannot

[1] Mr. Yarborough did not move to relieve himself through the court and was listed as attorney of record in the 2020 action until the case's final resolution (2020-CP-42-03720).

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adversely influence an unjust or unfavorable outcome on any of his pre-hearing filings or in the post-conviction relief proceeding."

On May 19, 2021, Applicant filed a document entitled "notice and motion requesting to be served." In this document, Applicant restated that Mr. Yarborough sent him a letter attaching Respondent's return and motion to dismiss and abruptly ending his representation of Applicant via correspondence with Applicant. In this motion, he stated he wanted a copy of the conditional order of dismissal in the 2018 PCR case served on him, so he could respond to the conditional order.

On May 19, 2021, Applicant filed "objection to conditional order of dismissal; order granting motion to file return out of time and denying motion for summary disposition." In this response, Applicant requested the court declare the conditional order of dismissal, as executed by Judge Kelly, null and void because "South Carolina does not recognize[] duel or hybrid jurisdiction." Specifically, Applicant claims Judge Kelly does not have jurisdiction over the matter because Judge Kelly's office is in Gaffney and Applicant filed the application in Spartanburg. Applicant claims that by sending the order to Judge Kelly in Gaffney, Respondent unilaterally changed venue without cause and without requesting the Court that they be able to do so. Applicant attached a "petition for emergency request for judicial notice and action" addressed to Chief Justice Beatty. In this petition, Applicant stated that by sending the order to Judge Kelly and having him sign the conditional order, a conflict of interest and miscarriage of justice occurred to deny and deprive Petitioner of Due Process and Equal Protection rights to a fair and impartial PCR proceeding. Applicant stated that Respondent, aware that both Judges Hayes and Cole were conflicted out of the matter, sent the proposed order to Judge Kelly "with malicious intent and bad faith." Applicant claims that Judge Kelly signed the conditional order,

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within a number of weeks of Respondent's filings, but never ruled on Petitioner's many *pro se* filings. Applicant claims it is impossible for him to receive a "fair, just, and impartial post-conviction relief proceeding" in Spartanburg and requests the State Supreme Court take "judicial actions to order a change of venue."

On May 21, 2021, Applicant filed a copy of the complaint concerning Mr. Yarborough he sent to the disciplinary counsel. In the complaint, Applicant alleges Yarborough violated the rules of professional conduct for failing to act competently and diligently in representing him, for failure to return unpaid fees, by carelessly and abruptly withdrawing from representation, failure to communicate, for committing fraud, deceit, and representation, and for failure to visit him. The basis of the complaint was that Yarborough agreed to represent him for $12,000, $3,500 of which was paid up front. Yarborough was hired for this action, but filed a separate application instead. Yarborough stated he would meet with him once COVID was over, but the day after the State's return and motion to dismiss was filed, Yarborough sent Applicant a letter, returning $2,500 and abruptly ending representation. Applicant stated he paid $3,500 to Yarborough and was directed to route his stimulus checks to Yarborough's bank account. In addition to the allegations listed above, Applicant claims Yarborough failed to file an adequate PCR application, failed to amend the application, failed to send him relevant documents, failed to visit him, failed to register as counsel on record through SCDC or Global Tel Link so he could accept Applicant's collect calls, filed frivolous claims that were barred on procedural grounds, and abruptly withdrew representation. Applicant claims he should receive an additional $2,800 back from Yarborough because of the lack of work he did on the case. Applicant requested Yarborough be suspended from the practice of law. Attached to this complaint were several letters sent from Yarborough to Applicant during course of the representation.

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On June 8, 2021, Applicant filed "Applicant's Response to Conditional Order of Dismissal; Order Granting Motion to File Return out of Time and Denying Motion for Summary Disposition." In this response, Applicant stated that he discovered new evidence after his trial and first PCR proceeding. He stated that this case should not be summarily dismissed because there was a failure on the part of the first PCR Court to afford him a full and fair evidentiary hearing. Applicant cites to portions of his prior transcript where he attempted to restate the allegations and the judge interrupted him, asking Counsel to ask questions about the allegations and having Applicant respond accordingly. Applicant claims the PCR transcript was distorted and Applicant was prevented from having his allegations ruled upon.

He claims he has newly discovered evidence of the prosecutor abusing the grand jury process in violation of Applicant's Due Process rights. Specifically, he stated that the State had sole possession of grand jury empanelment documents, which kept Applicant from knowing about the abuse until recently. He stated he obtained this in a 2020 FOIA matter. He stated that these documents show that the possession of a weapon charge was never presented to the grand jury.

Applicant also claims there were multiple procedural irregularities, including the denial of a self-defense jury instruction. Though Applicant recognized that Counsel's failure to object to the judge's decision not to issue the charge, he stated that the PCR Court went too far in finding that the charge would not have been issued even if Counsel objected. He claims this jury instruction was proper and should have been afforded. Applicant requested a PCR hearing to flesh this issue out more fully.

Applicant alleged newly discovered evidence consisting of the substance of an in-chambers meeting right before the jury trial. He stated that a self-defense defense was discussed

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at the meeting. He cited to the trial transcript in showing that a conversation in chambers occurred on this issue. Applicant claims he is entitled to another PCR hearing on this issue because *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018), made clear that findings of fact and conclusions of law need to be placed on the record. Applicant claims that this new law entitles him to a new direct appeal or PCR.

Applicant claims there is newly discovered evidence of actual innocence. In establishing this claim, he argues that the Court should not have used the phrases inferred malice, implied malice, and malice aforethought. Applicant acknowledged that this issue was previously ruled on in his first PCR action, but stated that the law has recently changed, making mention of implied malice impermissible.

Applicant also claims he has newly discovered evidence indicating he is guilty of the lesser-included offense assault and battery. He claims this is substantiated by his lengthy history of mental health issues. He claims he told Counsel to investigate his mental health issues before the trial. He claims that he is not guilty based upon law that came out years after his trial.

Applicant claims his application is not barred for *res judicata* because issues concerning the grand jury documents were not known at the time of his first PCR action, because many of his allegations are supported by findings of the first PCR action, and because new law was released after the first PCR action, which impacts his convictions. Applicant claims he is entitled to a new PCR hearing because of the newly discovered evidence and in the interest of due process. Applicant also requests a new direct appeal.

On July 6, 2021, Applicant filed a letter with the clerk of court, informing the court that he has been transferred to Tyger River Correctional Institution and requested all further correspondence be sent to his new address. On August 21, 2021, current PCR Counsel,

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J. Falkner Wilkes, Esquire, entered his notice of representation in this case.

On October 26, 2021, Applicant filed a document entitled "affidavit." In this response, Applicant claims he had an evidentiary hearing in his prior PCR action before Judge Hayes on December 8, 2011. He stated that Judge Hayes stopped him from presenting his own arguments and evidence twice during that hearing because it "was not conductive to the Court's time." He stated the Court prevented him from presenting an additional ground at the first evidentiary hearing. He stated that the appellate court prevented him from presenting this issue as well. Applicant claims that PCR Counsel failed to file a 59(e) in the prior action and that when he filed a *pro se* 59(e), the Court informed Applicant that it was procedurally barred by hybrid representation. Applicant stated he petitioned the South Carolina Supreme Court and the United States District Court of South Carolina seeking alternative remedies to address this issue thereby, but was told that he needed to seek the assistance of an attorney and that they could not give him legal advice. Applicant stated he wanted this allegation addressed.

Applicant, through PCR Counsel J. Falkner Wilkes, Esquire, filed a memorandum in opposition to the conditional order of dismissal on November 17, 2021, and November 19, 2021.[2] In this response, he argues that the words "implied malice" were used during jury instructions during trial, in contrast to *Belcher*, which was decided when Applicant's direct appeal was pending. Though he acknowledges that this issue was raised in his first PCR action and on appeal, he claims it was not raised "effectively". He claims this issue was not properly preserved on appeal during the first PCR action, which prevented him from truly having his one bite at the apple. He claims that the factual issues raised support a second evidentiary hearing allowing him to have the issues effectively presented and fully litigated.

[2] It was seemingly the same memorandum that was filed on both dates.

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This Court has reviewed all responses in full and finds none are sufficient enough to warrant an evidentiary hearing. Consequently, this Court finds this application must be summarily dismissed with prejudice.

In Applicant's PCR application and subsequent filings, Applicant has continued to fail to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, or could have been, discovered before his trial. Allegations already raised in prior actions, including the self-defense argument and the implied malice issue, are not newly discovered. Allegations based upon discoveries in the trial transcript, including the in-chambers discussion, are not newly discovered because they were already known or could have been know through exercising reasonable diligence. New creations in the law that do not apply retroactively are not newly discovered evidence. Actual innocence is not newly discovered, as Applicant could have made that argument at the time. Accordingly, Applicant has failed to make such a *prima facie* showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter shall remain summarily dismissed.

Applicant had a full opportunity to litigate all his allegations in his prior actions. Several of Applicant's present allegations, including those regarding a self-defense instruction and implied malice, are indistinguishable from those offered in his prior PCR application and his prior federal habeas corpus application. Additionally, Applicant could have raised his additional allegation of "newly discovered evidence" in his prior actions. The prior PCR Court and the appellate courts issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

Applicant was convicted of assault and battery with intent to kill and possession of a firearm during commission of a violent crime on June 14, 2007. The remittitur from the direct appeal was issued on May 17, 2010. This application was filed on September 14, 2018. Applicant has failed to sufficiently explain the over eight year delay between the remittitur of his appeal and this pursuit of remedy through the PCR process. Thus, the Court shall dismiss the matter as barred by the statute of limitations.

Further, Applicant's application is barred on successiveness grounds. Applicant's current allegations were or could have been raised in earlier proceedings based upon Applicant's prior PCR applications and Applicant has not sufficiently proven why these issues could not have been raised earlier. Thus, the current application is successive and barred.

Before this Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965). Applicant has failed to make such a showing based on the information set forth in his responses, and, consequently, is not entitled to an evidentiary hearing. Thus, the Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed for untimeliness, successiveness, for failure to establish a *prima facie* case of newly discovered evidence, and barred by the doctrine of *res judicata*. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons in this Court's conditional order of dismissal, the PCR application is hereby denied and dismissed with prejudice. This court hereby advises Applicant that he must file and serve a notice of appeal within thirty days of the service of this order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of

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appeal.

AND IT IS SO ORDERED this 27th day of March, 2023.

R. KEITH KELLY[3]
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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CLERK OF COURT
SPARTANBURG COUNTY
ANN W. COX

[3] The Honorable J. Mark Hayes, II is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit. However, because he presided over Applicant's prior PCR action, this final order of dismissal is being sent to the Honorable R. Keith Kelly, Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit.

Appendix N

STATE OF SOUTH CAROLINA COUNTY OF SPARTANBURG	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
John D. Alexander, #194748 Applicant,	)	Case No.: 2018-CP-42-03181
v. State of South Carolina, Respondent.	)	**CONDITIONAL ORDER OF DISMISSAL; ORDER GRANTING MOTION TO FILE RETURN OUT OF TIME AND DENYING MOTION FOR SUMMARY DISPOSITION**

This matter comes before the Court by way of a post-conviction relief application filed by John Douglas Alexander (hereafter "Applicant") on September 14, 2018, Respondent made its Return, requesting the application be summarily dismissed.

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In November 2006, the Spartanburg County Grand Jury indicted Applicant for assault and battery with intent to kill (count one) and possession of a firearm during commission of a violent crime (count two) (2006-GS-42-04462). Thomas A. M. Boggs, Esquire, represented Applicant. Jennifer A.J. Jordan and Robert Coler, Esquires prosecuted the case. Applicant proceed to trial before the Honorable J. Derham Cole on June 13, 2007. On June 14, 2007, the jury found Applicant guilty as indicted. Judge Cole sentenced Applicant to life imprisonment pursuant to South Carolina Code Annotated Section 17-25-45 as to count one and five years' imprisonment as to count two.

Applicant filed a timely notice of appeal. M. Celia Robinson, Esquire, of the Office of Appellate Defense perfected the appeal, and raised the following two issues:

1. Did the trial judge err in failing to issue a charge on the law of self-defense where such a charge was supported by the evidence and material to a fair presentation of

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the case?

2. Did the trial judge err in issuing a charge on the law which included an instruction on presumptions which lessened and shifted the prosecution's burden of proof.

The South Carolina Court of Appeals affirmed Applicant's conviction on April 29, 2010. *State v. Alexander*, Op. No. 2010-UP-265 (S.C. Ct. App. Filed April 29, 2010). The remittitur was issued on May 17, 2010.

First PCR Application: 2010-CP-42-2428

Applicant subsequently filed a PCR application on May 6, 2010, in which he alleged the following grounds for relief:

1. Ineffective Assistance of Counsel:
   a. Applicant was denied his non-waivable Constitutional right to be present at a "critical state" of his criminal trial;
   b. Counsel conceded at trial that the evidence didn't support a charge on self-defense;
   c. Counsel failed to present a meaningful or effective defense at trial;
   d. Counsel failed to adequately investigate, prepare for and advise Applicant of a possible defense based on insanity;
   e. Applicant was denied right to peremptory challenge and strike a juror who after being selected, sworn in and the trial started, was discovered to have been associated with the judge;
   f. Counsel failed to object to or request a mistrial when the phrase "malice and malice aforethought" was used forty-two times during closing arguments and the jury charge; and
   g. Counsel failed to object to the jury instructions.
2. Trial Judge's abuse of discretion, in that:
   a. Trial judge conspired along with the Solicitor to commit prosecutorial abuse by allowing the term "malice and malice aforethought" forty-two times during the closing argument and jury charge; and
   b. Jury instruction constituted prejudicial error.
3. Violation of due process, in that Applicant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights were violated.
4. Prosecutorial misconduct, in that:
   a. Prosecutor gave false impression to Court and jury which involved a corruption of the truth seeking function of the trial process; and
   b. *Brady* violation.

Respondent filed its return on October 19, 2010. An evidentiary hearing into the matter was convened on December 8, 2011, at the Spartanburg County Courthouse. Applicant was

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present at the hearing and was represented by John R. Holland, Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On March 26, 2012, the Honorable J. Mark Hayes, II, issued the order of dismissal denying Applicant's PCR application.

On April 11, 2012, Applicant filed a *pro se* motion to alter or amend the judgement of the order of dismissal of March 26, 2012. On April 27, 2012, Applicant filed an amendment to his motion to alter or amend the PCR judge's dismissal of the claim. On April 26, 2012, the State moved to dismiss Applicant's Rule 59(e) motion because South Carolina does not recognize hybrid representation, and Applicant was at that time represented by PCR Counsel John R. Holland, Esquire. Judge Hayes denied Applicant's motion in an order dated May 3, 2012.

On September 4, 2012, Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense, filed a *Johnson* petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant, which offered the following issue:

> Whether defense counsel was ineffective in failing to object to a jury charge instructing that malice may be inferred from the use of a deadly weapon where evidence was presented that the lesser included offense of assault and battery of a high and aggravated nature may have been committed?

On October 18, 2012, Applicant filed a *pro se* petition for writ of certiorari, which the Supreme Court treated as a *pro se* response to the *Johnson* petition. On May 7, 2013, Applicant filed a motion seeking to relieve counsel and appoint new counsel. Respondent made its return to the motion on March 22, 2013. On April 3, 2013, the Supreme Court denied Applicant's motion. The Supreme Court transferred the case to the South Carolina Court of Appeals. The South Carolina Court of Appeals denied the petition by written order filed May 21, 2015. The remittitur was issued on June 8, 2015.

On June 12, 2015, Applicant filed a motion to rescind the remittitur. The South Carolina

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Court of Appeals issued an order recalling the remittitur on June 25, 2015. On July 6, 2015, Respondent filed its return to the petition for rehearing. Applicant filed its reply on July 10, 2015. On August 20, 2015, the Court of Appeals denied Applicant's petition for rehearing. On September 21, 2015, the Supreme Court dismissed Applicant's petition for writ of certiorari. The remittitur was reissued on October 19, 2015.

Federal Habeas Corpus Petition: 6:16-600-HMH-KFM

Applicant filed a *pro se* petition for writ of habeas corpus under 28 U.S.C. § 2254 on March 3, 2016. Applicant set forth the following grounds for relief:

1. That by way in through ineffective assistance of counsel the Petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. As well as Article 1 Section 3 of the South Carolina Constitution.
2. That the Petitioner was denied and deprived of due process and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. As well as Article 1 Section 3 of the South Carolina Constitution by and through ineffective assistance of counsel.
3. That the Petitioner was denied and deprived of due process and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. As well as Article 1 Section 3 of the South Carolina Constitution. By and through ineffective assistance of counsel under Appellate Court Rule 407 Professional Conduct Rule 1.4 Communication Section(a)(2)(3) and (b) Communicating With Client Section three and five.
4. The petitioner contends that he was denied and deprived of Due Process and Equal Protection of Law as a result of trial counsel failing to afford or provide him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and South Carolina Constitution Article 1 Section 3.
5. That the Petitioner was denied and deprived of Due Process and Equal Protection of Law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, South Carolina Constitution Article 1 Section 3 and South Carolina Code Ann. (1976) Statute Section 50. By and through ineffective assistance of counsel.
6. The Petitioner asserts that he was denied and deprived of Due Process and Equal Protection of Law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1 Section 3 South Carolina Constitution.

Through and by way of ineffective assistance of counsel where trial counsel failed to object and allow Petitioner's guaranteed right to Federal Rules of Criminal Procedure Rule 43, 18 U.S.C.A. to be denied and deprived.

7. That the Petitioner was deprived and denied Due Process and Equal Protection of Law behind trial counsel failed to provide him the effective assistance of counsel guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article 1 Section 3 South Carolina Constitution.
8. That the Petitioner was denied and deprived of Due Process and Equal Protection of Law pursuant to the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article 1 Section 3 South Carolina Constitution. By way and through trial counsel's deficient assistance of counsel of failing to object to Solicitor Jordan's deliberate and intentional misconstruing as well as distorting the elements of Assault and battery of a high and aggravated nature during her Closing Arguments.
9. That the petitioner was denied and deprived of due process and equal protection of the law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Article One Section Three South Carolina. As a result of Solicitor Jordan given a false impression to the court and jury, which gave a corruption of the truth seeking function of the trial process. As such, pursuant to statute section 17-247-20 S.C. Code of Law (1976) there exists evidence of material facts not previously presented or heard which requires vacation of the conviction or sentence in the interest of justice.
10. That through and by way of ineffective assistance of counsel the petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth and Fourteenth Amendments as well as Article One Section Three of the South Carolina Constitution where trail counsel failed to object to Solicitor Jordan's Closing Argument stating Three false, misleading and deceitful statements to the trial judge and jury that, "Mr. Freeman sustained life-threatening injuries to the stomach." On the contrary, all facts, medical, surgical and examination Reports in testimony precisely and clearly demonstrates that Mr. Freeman's injuries were to the pelvis and non-life-threatening.
11. That the Petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth and Fourteenth Amendments as well as Article One Section Three of the South Carolina Const. By way and through ineffective assistance of counsel where trial counsel failed to object to Solicitor Jordan willfully violated Federal Rules of Criminal Procedure Rule 16(a)(1); and Brady v. Maryland, 473 US 83, 87 (1963) to withhold material, exculpatory and/or mitigating evidence from the Petitioner.
12. That the Petitioner was denied and deprive of due process and equal protection of law under the Sixth and Fourteenth Amendments and Article One Section Three

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of the South Carolina Constitution. Through and by way of ineffective assistance of counsel where trial counsel particularly behind trial counsel failed to pursue a *Missouri v. Seibert*, 542 U.S. 600, 124S.Ct. 2601 (2004) violation committed by the State.

13. That the Petitioner was denied and deprive of due process and equal protection of law under the Fifth, Sixth and Fourteenth Amendments and Article One Section Three S. C. Const. Behind trial counsel's failure to object to the trial court's partial bias and prejudicial General Intent To Kill Jury Charge.
14. That the Petitioner was denied and deprive of due process and equal protection of law under the Sixth Amendment of the United States Constitution behind trial counsel's failed to object to the trial court's sentencing the Petitioner to Life Without Parole where the State failed under Statute Section 17 – 25 – 45 (H) S.C. Code of Law (1976) to comply with Section 7. Timely notice.
15. That the Petitioner was denied and deprived of due process and equal protection of law under the Sixth Amendment of the United States Constitution behind trial counsel's failed to discover, utilize and presents to the trial Court and Jury critical exculpatory material evidence i.e., A Voluntary Statement made by the Petitioner's defense witness which profoundly supports and establishes the elements and jury charge of self-defense.
16. That the Petitioner was denied and deprived of due process and equal protection of law under the Sixth and Fourteenth Amendments of the United States Constitution as well as Article One Section Three of the South Carolina Constitution. Through and by way of ineffective assistance of counsel. Particularly, where trial counsel failed to object when the prosecution injected an arbitrary factor into the Juror's deliberation process and on misleading, deceiving and seducing the Jury to reach a wrongful verdict.
17. That the Petitioner was denied and deprived of due process and equal protection of law under the Fifth , Sixth, and Fourteenth Amendments as well as Article One Section Three and Article Five, Section Seventeen S. C. Const. Through and by way of ineffective assistance of counsel. Particularly, trial counsel failed to object where the trial court exercised no restraint, caution or circumspection to the requirement of neutrality or in making remarks and comments on the force, effect, weight and sufficiency of evidence, credibility of witness and guilt of the Petitioner as to the controverted facts.
18. That the Petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution as well as Article One Section Three S. C. Const. Through and by way of ineffective assistance of counsel. Particularly, behind trial counsel failing to object to the trial Court giving the Jury in answer to their question concerning malice through the bailiff, outside the presence of trial counsel or Petitioner.

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without making the Jury's question or the Court's answer part of the record.

19. That the Petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth, and Fourteenth Amendments. As well as Article One Section Three S. C. Constitution through and by way of ineffective assistance of counsel. Specifically, trial counsel failed to object when the trial Court issued an unconstitutional, highly prejudicial and bias Jury Charge to the jury.
20. That the Petitioner was denied and deprived of due process and equal protection of law under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, as well as Article One Section Three S. C. Const. Through and by way of ineffective assistance of counsel. Particularly, trial counsel failed to object to the trial Court's granting the prosecution's request for a charge that malice may be inferred from the use of a deadly weapon.
21. That the Petitioner was denied and deprived of due process and equal protection of law under the Sixth and Fourteenth Amendments of the United States Constitution, as well as Article One Section Three S. C. Constitution. Through and by way of ineffective assistance of counsel. Specifically, trial counsel failed to object to and seek to quash the indictment where it neglected to include the act or acts of malice the Petitioner would be held to answer for trial.
22. That the Petitioner was denied and deprived of due process and equal protection of law under the Sixth Amendment of the United States Constitution, as well as Article One Section Three S. C. Const. Through and by way of ineffective assistance of counsel. Concisely, trial counsel failed to petition the Circuit Court for a court – appointed psychiatrist examination and for an expert witness to assist in the preparation, utilization and presentation of the Petitioner's mental defects which yields mitigating evidence pertinent and relevant to the elements of malice and criminal intent.

Respondent filed its return and motion for summary judgment on April 25, 2016. On April 25, 2016, Applicant filed its motion for default and its motion for summary judgment. On May 12, 2016, Respondent filed its response in opposition to motions for entry of default and for summary judgment. On June 13, 2016, Applicant filed its response to summary judgment and return. On June 23, 2016, Respondent filed its reply to Petitioner's response to summary judgment and return.

On June 24, 2016, Applicant filed a motion to engage in discovery. Respondent filed its response opposing the motion on July 11, 2016. On July 18, 2016, Applicant filed a motion for a

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hearing on the Petitioner's motion for summary judgment, as well as its reply to Respondent's reply to Petitioner's response to summary judgment and return. On July 25, 2016, Applicant filed its reply to response in opposition to motion to engage in discovery.

On August 4, 2016, Respondent filed its response in opposition to motion for hearing on Petitioner's motion for summary judgment. On August 3, 2016, the Honorable Kevin F. McDonald issued an order denying the Applicant's motion to engage in discovery and denying Applicant's motion for a hearing on his motion for summary judgment.

On August 15, 2016, Applicant filed a motion to alter or amend judgment. On September 6, 2016, Respondent filed its response in opposition to Petitioner's motion to alter or amend judgment. On September 19, 2016, Applicant filed its reply to the Respondent's response in opposition to Petitioner's motion to alter or amend judgment.

On January 13, 2017, the Honorable Kevin F. McDonald issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition, motion for default judgment, and motion for summary judgment be denied. *Alexander v. Cartledge*, 6:16-0600-HMH-KFM, 2017 WL 782886 (D.S.C. 2017). Applicant filed no objection to the report and recommendation.

On February 1, 2017, the Honorable Henry M. Herlong, Jr., Senior United States District Judge adopted the Magistrate's report and recommendation and dismissed Applicant's petition. *Alexander v. Cartledge*, 6:16-0600-HMH-KFM, 2017 WL 782509 (D.S.C. 2017). Judge Herlong also denied Petitioner's motion for summary judgment and motion for default judgment.

On February 6, 2017, Applicant filed an untimely objection to report of magistrate judge. On February 8, 2017, Judge Herlong ordered that Applicant's motion to alter or amend the judgment be denied.

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On February 9, 2017, Applicant filed a renewed petition to alter or amend judgment pursuant to Rule 59(e) Fed. R. Civ. Proc. On February 14, 2017, Judge Herlong granted Applicant's renewed motion to alter or amend the judgment. Judge Herlong also vacated the February 1, 2017, order adopting the report and recommendation and dismissing the case. Judge Herlong also vacated the February 8, 2017 order denying Applicant's motion to alter or amend the judgment.

On February 23, 2017, Respondent filed its reply to Petitioner's objections to report and recommendation. Judge Herlong again summarily dismissed the petition by order dated February 28, 2017. *Alexander v. Cartledge*, 6:16-0600-HMH-KFM, 2017 WL 770570 (D.S.C. 2017). On March 8, 2017, Applicant filed its response to reply to Petitioner's objections to report and recommendation. On March 27, 2017, Applicant filed a petition to alter or amend judgment pursuant to Rule 59(e) Fed. R. Civ. Pro. On April 3, 2017, Judge Herlong denied Applicant's motion to alter or amend the judgment.

On April 28, 2017, Applicant filed a notice of appeal in the United States Court of Appeals for the Fourth Circuit. On May 2, 2017, Applicant filed a motion for certificate of appealability. On May 10, 2017, Applicant filed a request for appointment of Counsel. On October 17, 2017, the Fourth Circuit denied Applicant's motion for a certificate of appealability, denied the motion for appointment of counsel, and dismissed the appeal. *Alexander v. Cartledge*, 699 Fed.Appx. 171 (4th Cir. 2017). On November 3, 2017, Applicant filed a petition for rehearing and a petition for rehearing *en banc*. On December 12, 2017, the Fourth Circuit Court of Appeals denied both petitions.

On March 8, 2017, Applicant filed a petition for writ of certiorari to the United States Supreme Court. The petition was denied. *Alexander v. Williams*, 138 S.Ct. 1708 (2018).

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Applicant filed a petition for rehearing in the United States Supreme Court. This petition was denied.

II. Current Action before this Court

In his second and current PCR application, Applicant alleges he is being held unlawfully for the following reasons:

1. Due Process Violation
    a. "At a Post-Conviction Relief hearing the Applicant can and will produce clear, overwhelming material evidence and facts that "twice" during his initial post-conviction relief hearing the Honorable J. Mark Hayes II prohibited and disallowed Applicant to fully or fairly submit to the Court specific and concise grounds on which he based his allegations or, (supporting facts and evidence) that he is being held in custody unlawfully."
2. Newly Discovered Evidence
    a. "Applicant contends that Newly Discovered Evidence demonstrates that Solicitor Jennifer Jordan knowingly and intentionally abused the Grand Jury Process as well as used it for purpose of oppression and injustice in violation of S.C. Code Ann. Sec. 14-7-1700 and 14-9-210 (1976). And as a result, the constitutional error created a Fundamental Miscarriage of Justice which impeded and prevented Due Administration of Justice;"
    b. "Applicant contends that Newly Discovered Evidence establishes that the Trial Court's four separate Rulings to deny and deprive the Applicant a charge on the law of Self-Defense (where the evidence warranted such a charge) was contrary to the Interest of Judicial Economy which robbed him of Fundamental Fairness to the Due Process of a fair and impartial Jury Trail; and"
    c. "Applicant contends that Newly Discovered Evidence establishes that: (1) when a secret in chamber meeting was held and the trial court "Ruled" that no Self-Defense Instruction would be given to the Jury, at the beginning of the trail; and (2) during Jury Deliberations, when the Jury asked and the Court gave a Supplemental Malice Instruction in the absence of the Applicant and Trial Counsel; it was trial counsel's duty to put the substance of the "Ruling on the record."

In his amendment, filed July 22, 2019, Applicant alleged "actual innocence" as another PCR ground.

Before this Court are Applicant's Spartanburg County Clerk of Court Records,

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Applicant's South Carolina Department of Corrections Records, prior appellate records, the final orders of Applicant's previous PCR and federal habeas actions, and this PCR action's records.

III. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

Newly-Discovered Evidence

Applicant's assertion that his claims constitute newly-discovered evidence, such that he should be entitled to an evidentiary hearing, is without merit. The Uniform Post-Conviction Relief Act states that 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 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). An applicant requesting a new trial based on after-discovered evidence after a conviction must show that the evidence:

> (1) Is such as would probably change the result if a new trial was had;
> (2) Has been discovered since the trial;
> (3) Could not by the exercise of due diligence have been discovered before the trial;
> (4) Is material to the issue of guilt or innocence; and,
> (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

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Applicant has failed to allege facts sufficient to support his claim of newly discovered evidence. Each of Applicant's allegations involve "facts" that were, or could have been, discovered before his trial. Furthermore, Applicant's allegations regarding the self-defense charge have been raised *multiple times* in his prior actions in state and federal courts. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a *prima facie* showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this matter must be summarily dismissed.

Statute of Limitations

This Court finds that this application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the act requires as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.
>
> S.C. Code Ann. § 17-27-45(A).

The South Carolina 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).

Applicant was convicted on June 14, 2007, and the remittitur from his direct appeal issued on May 17, 2010. The current application was not filed until September 14, 2018—well after the one-year statutory filing period expired. Therefore, the application must be summarily dismissed as barred by the statute of limitations.

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Successive

This Court finds that this application must be summarily dismissed because it is successive to Applicant's previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that new grounds raised in a subsequent applications could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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

Under this statute, successive PCR applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised ... in the previous application." *Id.* at 450. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* 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).

Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant's claims of newly discovered evidence are non-specific and wholly unsupported. Applicant has failed to establish any

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sufficient reason why he could not have raised his current allegations of newly discovered evidence in his previous PCR application or in his federal habeas action. Therefore, he has failed to meet the burden imposed upon him, and the application must be summarily dismissed as successive to Applicant's previous PCR application.

Res Judicata

The application 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 Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. Applicant's present allegations are indistinguishable from those offered in his prior PCR application and his prior federal habeas corpus application. Additionally, Applicant could have raised his additional allegation of "newly discovered evidence" in his prior actions. The prior PCR Court and the appellate courts issued a final judgement on the merits on very same issues that Applicant now raises in his present action. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

IV. Timeliness of Return

Respondent has moved the Court accept this return for filing out of time. In light of no demonstrable prejudice to Applicant as a consequence of the delay, Respondent moves the Court accept the return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court

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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 extent the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Concordantly, the Court denies Applicant's motion seeking summary dismissal. The grant of post-conviction relief due to the State's failure to reply or lateness of reply is not appropriate. *See* Rule 55(e), SCRCP ("No judgment by default shall be entered against the State of South Carolina or an officer or agency thereof unless the claimant establishes his claim to relief by evidence satisfactory to the Court[.]"). A colorable claim for relief must be supported by evidence and testimony on the record and a meritless application cannot be saved by inaction by the State. Accordingly, the Court denies Applicant's motion for default judgment.

V. Conclusion

Pursuant to South Carolina Code Annotated 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Chelsey F. Marto, Jr., Esquire
PCR Division – Seventh Circuit
P.O. Box 11549
Columbia, South Carolina 29211

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

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Spartanburg County Clerk of Court and opposing counsel within twenty days from the date of the service of this Order, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 31st day of August, 2020.

R. Keith Kelly

R. KEITH KELLY
Chief Administrative Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

FILED
2020 SEP 16 AM 8:51
CLERK OF COURT
SPARTANBURG COUNTY
AMY W. COX