

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
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 Gary L. Petty, #264235, )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 Respondent. )  
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IN THE COURT OF COMMON PLEAS  
 IN THE SEVENTH JUDICIAL CIRCUIT  
  
 Case No.: 2019-CP-42-04184  
  
**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief application filed by Gary L. Petty (hereafter “Applicant”) on November, 26, 2019. 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. During the April 1999 term, the Spartanburg County Grand Jury indicted Applicant for grand larceny more than \$1,000 but \$5,000 (1999-GS-42-2357), first-degree criminal sexual conduct (1999-GS-42-2358), and first-degree burglary (1999-GS-42-2359). The underlying facts surrounding the charges consisted of Applicant breaking into the victim’s home, assaulting her, and stealing a bracelet and some cash. (Tr. 51). Michael Morin, Esquire represented Applicant. Assistant Solicitor Teri Stone, Esquire prosecuted the case. On February 7-10, 2000, Applicant proceeded to trial before the Honorable Lee S. Alford and a jury, where he was found guilty as indicted. Alford sentenced Applicant to life imprisonment for first-degree burglary, thirty years’ imprisonment for first-degree criminal sexual conduct, and five years’ imprisonment for grand larceny, sentences running concurrently.

Applicant filed a timely notice of appeal that was perfected by Katherine G. Link, Esquire. The following issues were addressed on appeal:

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1. Did the court err in failing to suppress appellant's statements and all evidence that was the fruits of those statements?
2. Did the court err in failing to exclude evidence of the DNA results, where the state failed to comply with discovery by producing accurate copies of those results to the defense in advance of trial?

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Petty*, 2002-UP-359 (S.C. Ct. App. filed May 21, 2002). The remittitur was issued on June 6, 2002.

***First PCR Action: (2003-CP-42-1781)***

Applicant subsequently filed his first PCR application on May 19, 2003, in which he alleged the following grounds for relief:

1. "A violation of 6<sup>th</sup> amendment right to effective assistance of counsel."
  - a. "Counsel failed to fully investigate case and failure to seek some remedy with respect to the inaccurate copies of the DNA analysis provided during discovery
2. "Lack of subject matter jurisdiction."
  - a. "Violation of Article III Sect. 17 of the S.C. Const. 'Single Subject Clause.'"

Respondent made its return and motion to dismiss on or about March 12, 2004, moving to summarily dismiss the lack subject matter jurisdiction allegation and requesting a hearing on the ineffective assistance of counsel claim.

Applicant, through PCR Counsel David M. Collins, Jr., filed his first amendment to the PCR application on or around January 4, 2005, alleging:

1. Ineffective assistance of counsel for:
  - a. Failure to fully investigate the facts and circumstances surrounding the Defendant's charges and failed to properly prepare for trial.
  - b. Failure to adequately object to the admission of the State's DNA evidence on the grounds that the State had failed to fully and accurately disclose the documentation related to the DNA evidence during discovery.
  - c. Failure to consult with an expert witness, before or during the trial, regarding the State's DNA and trial counsel failed to call an expert witness at trial to rebut the claims of the State's expert witness regarding the DNA evidence presented at trial.
  - d. Failure to object to premature jury instructions given by the court during the

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- State's case in chief.
- e. Failure to challenge the admissibility at trial of Defendant's prior statements given to law enforcement officials.
  - f. Failure to disclose a potential conflict of interest involving one of the State's witnesses.
  - g. Failure to object to improper comments by the Solicitor during the State's closing argument.

The second amendment to the PCR application was filed on or around February 2, 2005.

In the amendment, Applicant, through PCR Counsel, reasserted the allegations in the first application and also alleged:

1. Counsel was ineffective for:
  - a. Failure to challenge the admissibility of Nancy Skraba as an expert witness at trial.
  - b. Failure to conduct an adequate cross-examination of the alleged victim at the trial of the case.
  - c. Failure to object to improper hearsay testimony during the State's case in chief and failed to request curative measures after the improper testimony was presented to the jury.
  - d. Failure to adequately address the elements which the State was required to prove and the lack of evidence presented on those elements in Counsel's closing argument.
  - e. Failure to move to quash defendant's indictment for first degree burglary on the ground that it lacked any specific references to aggravating circumstances.
  - f. Failure to adequately challenge the admission of Defendant's prior record at the trial.
  - g. Failure to challenge the court's erroneous jury charge on the issue of "reasonable doubt."
2. Defendant's indictment for First Degree Burglary was insufficient because it lacked specific references to any aggravating circumstances.

An evidentiary hearing into the matter was convened on April 7, 2005, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by David M. Collins, Jr., Esquire. Molly R. Crum, Esquire, of the South Carolina Attorney General's Office, represented the Respondent. On June 10, 2005, the Honorable John M. Milling, presiding judge, issued the order of dismissal denying Applicant's PCR application.

On April 20, 2006, Wanda H. Carter, Esquire filed a petition for writ of certiorari and a

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petition to be relieved as counsel in the Supreme Court of South Carolina on behalf of Applicant, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). The Supreme Court of South Carolina transferred the case to the South Carolina Court of Appeals. On September 28, 2007, by written order the South Carolina Court of Appeals denied the petition for writ of certiorari and granted the petition to relieve counsel. The remittitur was issued on October 16, 2007.

***First Habeas Corpus Action: (9:08-2967-RBH-P)***

Applicant then filed a federal writ of habeas corpus on September 4, 2008. After the report and recommendation was issued, Applicant filed objections on August 26, 2009. The United States District Court of South Carolina dismissed the petition by written order on September 21, 2009.

***Second PCR Action: (2009-CP-42-4363)***

Applicant filed his second PCR application on August 7, 2009, alleging:

1. "Insufficiency of evidence – pre-interrogation waiver is specific."
2. "Statutory and Constitutional 4<sup>th</sup> Amendment violation – 17-13-140 violation, no probable cause illegal body intrusion."
3. "Prosecutor(s) Corpus Delicti Rule Violation – no corroborating evidence."
4. Ineffective assistance of counsel, in that:
  - a. "Counsel failed to make adequate objections."
  - b. "Counsel failed to make motion to obtain DNA expert for the defense."

Respondent filed its return and motion to dismiss on May 13, 2010, requesting the matter be summarily dismissed for successiveness and untimeliness. On August 3, 2010, a conditional order of dismissal was signed by the Honorable J. Derham Cole, Esquire, conditionally summarily dismissing the application for failure to state a claim, successiveness, and untimeliness. The final order summarily dismissing the case was signed by the Honorable J. Mark Hayes, II, and filed on February 3, 2011.

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**Third PCR Action: (2011-CP-42-0251)**

Applicant filed his third PCR application on January 21, 2011, alleging:

1. Ineffective assistance of counsel, in that:
  - a. Counsel failed to object to there being no jury selection process, which led to Applicant's cousin being seated on the jury;
  - b. Counsel failed to object to improper comment of prosecutor and request directed verdict.
2. Denial of a fair trial, in that:
  - a. Applicant's 5<sup>th</sup> Amendment rights were violated due to his being compelled to provide DNA evidence against himself without due process, following a coerced statement and incarceration.
3. State's failure to prove their case:
  - a. State failed to prove by direct or circumstantial evidence that the Applicant caused physical injury to the victim or participated in the crime.

Respondent filed its return and motion to dismiss, moving to summarily dismiss for successiveness, untimeliness, failure to establish a *prima facie* case of newly discovered evidence, and as barred by the doctrine of *res judicata*. On March 6, 2012, the Honorable J. Derham Cole signed the conditional order of dismissal, summarily dismissing the case for untimeliness, successiveness, and as barred by the doctrine of *res judicata*. Judge Cole signed the final order of dismissal on January 14, 2013.

Applicant filed a notice of appeal on February 8, 2013. The Supreme Court of South Carolina dismissed the appeal because Petitioner failed to show that there was an arguable basis for asserting that the determination by the lower court was improper, as required by Rule 243(c), SCACR. The remittitur was issued on March 11, 2013.

**Fourth PCR Action: (2013-CP-42-2165)**

Applicant filed his fourth application for post-conviction relief on May 7, 2013. He alleged the following grounds for relief in his application:

1. "Ineffective assistance of appellate (PCR) counsel," in that
  - a. "Failure to protect my rights pursuant to Coe Ann. 17-27-100, right to seek appellate review of denial of original PCR application (1781)".

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Applicant then filed a motion captioned "amendment to post-conviction relief application" where he alleged the following grounds for relief:

1. "Ineffective assistance of appellate (PCR) counsel," in that
  - a. "Appellate counsel Wanda H. Carter failed to follow procedures set forth in *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988) in not briefing one arguable legal issue which arose during the post-conviction relief procedure."
  - b. "Instead, she presented issue of ineffective assistance of trial counsel because he lacked sufficient time to prepare petitioners case prior to plea proceeding (see enclosed Johnson petition)."
  - c. "This was error because had she reviewed the record she would have known Applicant had a trial and that this issue was not raised and ruled upon during post-conviction relief process, [preserving] it for appellate review. However, the Court of Appeals erroneously relieved counsel and made ruling on issue they had not jurisdiction, in violation of state laws, 17-27-80. Due to the Court of Appeals and appellate counsels illegality, Applicant has been denied appeal within the fully adjudication on the merits of his original PCR (order), dismissing application."

Respondent made its return and motion to dismiss on February 20, 2014, arguing the application was successive and untimely. On March 12, 2014, the Honorable J. Derham Cole issued a conditional order of dismissal. The Honorable J. Mark Hayes, II issued a final order on February 1, 2016 dismissing the matter with prejudice.

***Second Habeas Corpus Action: (0:15-4192-RBH-PJG)***

Applicant, by and through retained counsel William G. Yarborough, III, Esquire, subsequently filed a second petition for habeas corpus under 28 United States Code Section 2254 on October 29, 2015 (C.A. No. 0:15-4192-RBH-PJG). In his petition, Applicant set forth the following grounds for relief:

1. Newly-Discovered Evidence, in that:
  - a. "[T]he DNA analysis used to convict Applicant was based on faulty and risk-prone procedures, the results of which are questionable at best and

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inconsistent with normal expectations of DNA analysis, as well as concluding that the results' corresponding statistical findings were greatly mistaken and exaggerated."

On October 29, 2015, the Honorable Paige J. Gossett, United States Magistrate Judge, issued a report and recommendation that the petition be dismissed without requiring Respondent to file a return. Applicant, by and through counsel, thereafter filed on November 2, 2015, a "motion to withdraw petition for writ of habeas corpus and *stay* timely filing limit" (emphasis original), seeking time to properly file a motion seeking authorization for a successive application. On November 3, 2015, the Honorable R. Bryan Harwell, United States District Judge, granted Applicant's motion to withdraw, but denied Applicant's motion to stay time limits, citing the Court's lack of jurisdiction.

***28 U.S.C. § 2244 Motion: No. 15-349***

On November 5, 2015, Applicant, by and through retained counsel William G. Yarborough, III, Esquire, filed a motion pursuant to 28 United States Code Section 2244 in the Fourth Circuit Court of Appeals, seeking authorization for district court consideration of a successive application. The Court denied that motion by order filed November 18, 2015.

***Fifth PCR Action: (2015-CP-42-4889)***

Applicant, through Counsel William Yarborough, III, subsequently filed his fifth PCR application on November 24, 2015, alleging:

1. "There is newly discovered evidence that would exonerate Applicant. Pursuant to the framework in *Clark v. State* for the grant of a new trial based on new evidence, the newly discovered evidence for Applicant's case would change the result if there was a new trial, the evidence has been discovered since trial, it could not have been discovered before trial, is material to the issue of guilt or innocence, and is not merely cumulative or impeaching."
  - a. "On December 2, 2014, Forensic DNA expert, Dr. Brian Meehan, PhD produced a report about the DNA analysis that was presented at trial. (See Exhibit A, initial report Dec. 2, 2014). Dr. Meehan is a highly trained expert on the matter as he was educated at Bridgeport University, Wagner College

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and at College of William and Mary where he obtained his doctorate degree. His experience includes Professorships of Biology, Forensic Biology, and Genetics at various universities throughout the United States. Dr. Meehan's experience as includes high level positions at private entities which conduct DNA, forensic and genetic analysis such as IntelliGenetics LLC, DNA Security Inc., Lab Corp's Paternity and Laboratory Automation System Departments, National Legal Laboratories, and Genetic Design, Inc. He also served on various educational, research, and advisory committees pertaining to biology and genetics. His findings have also been published in various publications and he has also conducting numerous seminars in the field of genetics and biology. (See Exhibit B. Dr. Brian Meehan's professional resume.)"

- b. "In Dr. Meehan's supplemental report (Exhibit C), he concluded that the DNA analysis used to convict Applicant was based on faulty and risk-prone procedures, the results of which are questionable at best and inconsistent with normal expectations of DNA analysis, as well as concluding that the results' corresponding statistical findings were greatly mistaken and exaggerated. For example, Dr. Meehan concluding Nancy Skraba, forensic serologist and DNA analyst for law enforcement, had likely only conducted a presumptive test for the presence of semen on the vaginal swab taken from the victim. Presumptive tests' results are vulnerable to false positives, rather than if she had conducted a confirmatory test based on immunochemistry; tests that are definitive indicators for the presence of semen without the risk of false positives. In light of the danger of a false positive result, the presumptive test likely did result in a false positive for semen if Nancy Skraba did not identify semen on the rectal swab taken from the victim (Trial Transcript, p. 303), or the suspected semen sample on the cloth of the shorts taken from the crime scene. (Nancy Skraba at trial did not testify that she compared either of these samples with the DNA collected from Applicant). Additionally, the DNA profile obtained from the vaginal swab is inconsistent with the report stating that the specimen contained spermatozoa. Because a nurse at the hospital testified that the visual Wood Light test showed positive for spermatozoa (Trial Transcript p. 208, 213), a DNA analyst would expect such a sample with a visually confirmed presence of spermatozoa to yield a good-quality male DNA profile. However, to the contrary, the vaginal swab yielded a very weak and only partial DNA profile. Furthermore, the DNA profile obtained from the vaginal swab is not sufficient to determine that it matches Applicant. Only two of the loci, D4S139 and D5S110, are consistent with the DNA profile of the Applicant and a match of only two loci is absolutely insufficient to determine a DNA match between the vaginal swab and the Applicant. (See Exhibit D, SLED DNA Report). Thus, the conclusion in law enforcement's forensic report and testified to at trial that the DNA profile developed from semen on item 1.7 (the vaginal swab) also matched Gary Petty is erroneous. Moreover, Nancy Skraba's testimony that the probability of selecting an unrelated individual randomly from the population who has a DNA profile matching item 1.19 is approximately one in 1.3 trillion is incorrect, false and misleading. (See

Exhibit E, SLED DNA Laboratory Statistical Database Report: Trial Transcript 303). This testimony is a gross misapplication of the analysis and statistics because such likelihood is actually 1 in 11,372 blacks, which is hardly conclusive as an individual evidence item.”

- c. “In Dr. Meehan’s report, he stated that the DNA testing used, restriction fragment length polymorphism, has been supplanted by more precise and reliable DNA analysis procedures and equipment. Dr. Meehan asserts that there are more exact methods of biochemical analysis of fluid for semen, and these methods are more definitive with respect to DNA analysis of evidence items. Upon retrieval of DNA from Applicant, as well as the items originally tested for trial, Dr. Meehan will be retained to conduct new DNA analysis and will testify to the results at a new trial. Pursuant to *Clark v. State*, a new trial is warranted for new testing of the DNA based on recent technological and scientific innovations, and in light of the faulty testing originally used and their erroneous results. Because the ultimate issue at trial was to ascertain the identity of the victim’s rapist, the new testing and subsequent DNA evidence would change the outcome of the new trial because the new DNA results would demonstrate that Applicant was not the victim’s attacker. Also pursuant to *Clark*, the evidence has been discovered since trial and was not available at trial because the field of genetic and forensic testing is more innovative, precise and reliable than it was at the time of trial in 2000. Moreover, the evidence is material to the innocence of Applicant rather than impeaching or cumulative because the ultimate issue at trial was whether Applicant was the victim’s attacker, and the State presented Nancy Skraba’s testimony and findings in an effort to prove that Applicant was guilty by the ‘match’ of his DNA to the sample taken from the victim. The DNA findings were the utmost probative evidence presented by the State because Applicant has always maintained his innocence, and his confession given to police was falsified, forced and fabricated. Therefore, DNA would be the only piece of evidence connecting him to the crime.”

Respondent made its return and motion to dismiss on March 24, 2017, arguing the application was successive, moot, untimely, and failed to state a cognizable claim. On March 30, 2017, the Honorable J. Derham Cole issued a conditional order of dismissal. Judge Cole issued a final order on May 19, 2017, dismissing the matter with prejudice.

A notice of appeal was made on May 30, 2017. On June 6, 2017, by written order the Supreme Court of South Carolina dismissed the appeal because Applicant did not file a response to the conditional order of dismissal. The remittitur was issued on June 23, 2017.

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## II. Current Action before this Court

In his sixth and current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Due process violation; the State failed to prove every element beyond a reasonable doubt."
2. "Trial counsel rendered ineffective assistance for failing to state with specificity the basis for a directed verdict."
3. "Trial counsel rendered ineffective assistance for failing to make a 4<sup>th</sup> Amendment suppression motion."

Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the PCR application, and prior direct appeal, PCR, PCR appeals and habeas corpus 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:

### *Res Judicata*

The application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth 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. In fact, Applicant raised claims relating to the State's due process violations and alleged failure to meet its burden of proof or establish sufficient enough evidence to secure a conviction in his first

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second, and third PCR actions. Applicant raised questions concerning ineffective assistance of counsel in nearly all of his prior actions, including failure to move for a directed verdict in his third PCR action and failure to raise a Fourth Amendment violation was also raised in his second PCR 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*.

### ***Statute of Limitations***

The 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). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, South Carolina Code Annotated Section 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was found guilty at trial on February 10, 2000 and the remittitur from his direct appeal was issued on June 6, 2002. The application was therefore due on June 7, 2003. This application was filed on November 26, 2019, well beyond the statutory filing period. Therefore,



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the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

### *Successiveness*

The application shall 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 any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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

Under this statute, successive 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, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

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



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under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant's previous PCR application.


**IV. Conclusion**


Pursuant to South Carolina Code Annotated Section 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  
Attn: Chelsey F. Marto, 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 Spartanburg County Clerk of Court and opposing counsel within twenty days, 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 30 day of July, 2021.

  
R. KEITH KELLY  
Chief Administrative Judge  
Seventh Judicial Circuit

, South Carolina

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ALAN WILSON  
ATTORNEY GENERAL

August 4, 2021

The Honorable Amy W. Cox  
Spartanburg County Clerk of Court  
Post Office Box 3483  
Spartanburg, South Carolina 29304

Re: Gary L. Petty, #264235 v. State of South Carolina  
2019-CP-42-04184

Dear Ms. Cox:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable R. Keith Kelly in the above-captioned case, for filing in your office.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Chelsey F. Marto  
Assistant Attorney General

CFM/ec

Enclosure

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