



ALAN WILSON
ATTORNEY GENERAL

October 15, 2021

The Honorable Grace G. Knie
Seventh Circuit Court Judge
180 Magnolia Street
Spartanburg, SC 29306

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SPARTANBURG COUNTY
AMY W. COX

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

Dear Judge Knie:

Enclosed please find the proposed **Final Order of Dismissal** in the above-captioned cases. If this Order meets your approval, please sign and forward to the Spartanburg County Clerk of Court to be filed and served. If you have any questions, please do not hesitate to contact me.

Sincerely,

Chelsey F. Marto
Assistant Attorney General

CFM/ec
Enclosure

cc: Gary L. Petty, #264235

verdict, failure to quash the indictment, failure to argue in closing that the state did not establish the elements of the crime were met, and failure to show lack of subject matter jurisdiction in burglary indictment because it lacked specific reference to aggravating circumstances. He also claims Counsel did not subject the prosecutor to meaningful adversarial testing, particularly during cross-examination of the State's witnesses. He also claims he was sentenced too strictly. Applicant attached multiple exhibits to this amendment, including portions of the trial transcript, the order of dismissal in his 2003 PCR action, news articles, and portions of his PCR transcript.

On January 12, 2021, Applicant filed "Applicant's Second Amendment to PCR Application." In this response, Applicant claims the allegation that trial counsel was ineffective for failing to state adequate ground for directed verdict when there was no evidence physical injury was incurred by the victim. He states this issue was inadequately raised in his first action and, accordingly, he is entitled to bring this allegation in the current action. He attached a portion of the PCR transcript as evidence of this allegation; namely that this issue was not adequately raised.

On January 20, 2021, Applicant filed "amendment to claim (A) of 2nd Amendment." In this response, Applicant claims the prior PCR Court failed to rule on a constitutional violation that was asserted at the PCR hearing on April 7, 2005. Applicant claims the court failed to rule on the issue that the State failed to prove the essential elements of first degree burglary beyond a reasonable doubt, violating Applicant's right to due process.

On March 29, 2021, Applicant filed an "amendment to claim (A) of application (4184)." In this amendment, Applicant claims the prior PCR Court found no probative evidence presented in reference to any claims not addressed in the order of dismissal, denying him relief. Applicant claims no 59(e) response was filed and, accordingly, the prior PCR Court abused its discretion

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because the finding was controlled by an error of law. Applicant claimed that probative evidence did exist on the allegations that counsel was ineffective for failing to object to the court error as an element to obtain a conviction of first degree burglary, where the State failed to prove the essential elements beyond a reasonable doubt. Applicant claims PCR Counsel's performance was subpar because he did not amend the claim to properly state that the directed verdict was inadequate, not the sentencing factor or closing argument. Applicant claims none of the elements of first degree burglary were proven beyond a reasonable doubt and if Counsel pointed this out, he would have been acquitted. Applicant attached his amendments to his 2003 application to this amendment.

Applicant filed "opposition to conditional order of dismissal" on April 21, 2021. In this response, Applicant states the State did not include updated clerk of court records, SCDC records, or prior PCR transcripts. Applicant claims his amendments were not properly incorporated in the conditional order. Applicant claims ineffective assistance of PCR Counsel for failure to raise all issues he wanted raised in his first action. Applicant claims the PCR Judge failed to make a ruling concerning counsel's alleged ineffectiveness in failing to state a specific basis for a directed verdict; namely that the State did not meet their burden of proof. Applicant states these claims could not have been raised in a prior action because they did not exist until after the resolution of the first PCR action. Applicant claims trial Counsel was ineffective in failing to investigate and raise a Fourth Amendment violation allegation. Applicant claims he received paperwork from his mother August of 2020 showing former Interim Direct Steve Ford, who gave the police Applicant's name as a potential suspect, was reprimanded for dishonestly and deception. Applicant claims this was not discoverable until within a year of filing this application. Applicant also claims that he has newly discovered evidence that his DNA evidence

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was not submitted for retesting. Applicant claims the doctrine of *res judicata*, the statute of limitations, and bars against successiveness do not apply to these amended allegations and, accordingly, he should be granted an evidentiary hearing on these new allegations.

On May 18, 2021, Applicant filed an “amendment to PCR application under 17-27-45(c)/17-27-20(a)(4).” In this application, Applicant claims he has newly discovered evidence that Counsel was ineffective for failing to object to or challenge the State’s chain of custody for the DNA evidence that was presented at trial, Counsel was ineffective for failing to challenge the State’s search warrant affidavit, and that Counsel was ineffective for failing to request a *Franks v. Delaware* hearing. Applicant requests a *Franks* evidentiary hearing concerning the search warrant. He claims that the search warrant was obtained under false pretenses. Applicant claims the semen sample was not a part of a rape kit and was not retested, which he claims means the search warrant affidavit was procured through deliberate falsehoods made by police officers on the search warrant affidavit. Applicant claims Counsel was ineffective for failing to properly investigate the DNA evidence and for allowing the State to present the DNA evidence at trial when no chain of custody was established. Applicant claims that Counsel should have consulted a DNA expert and ordered DNA retesting and, if he had, he would have known the suspected semen sample was attached to a false swab, which was misrepresented to make the evidence appear as if it had an established chain of custody when it did not. Applicant claimed the DNA evidence was substituted in through fraudulent means in order to incriminate him. Applicant requested a new trial on this basis. Applicant claims he meets the five-prong newly discovered evidence test on this claim and requests a new trial on this basis. Applicant attached multiple documents to this filing to substantiate his argument.

Applicant filed “motion to alter or amend judgment pursuant to 59(e)” on August 23, 2022.

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2021. In this document, Applicant stated he is now raising a newly discovered evidence claim that has not previously been raised and ruled upon and was discovered March 29, 2021 and April 4, 2021. Applicant requested the court appoint counsel on this case. He claims that the Court's decision to summarily dismiss the case denied Applicant of having the opportunity to adjudicate his PCR claims. Applicant claims this Court failed to make specific findings of fact and conclusions of law, opting to delegate this task to the State, which he claims is a separation of powers violation. Applicant claims the order was insufficient because it ruled on procedural bars, not the merits of the case. Applicant claims he received a DNA submission form for DNA retesting on April 4, 2021, showing his DNA was not submitted for retesting. Applicant lists of several ineffective assistance of counsel claims not ruled upon on the merits in the conditional order and states that he is now requesting a new trial based on the new DNA evidence submission form. He states this application was filed under section 17-27-45(c) and states he was denied his first bite at the apple because of errors made by the first PCR Court. Applicant claims his application cannot be barred based on *res judicata* because his current claim could not be raised in a prior action. He claims the application is not untimely because his current claim is based on newly discovered evidence. He claims the application cannot be dismissed for successiveness because he is not trying to procure a PCR hearing based on already raised and ruled upon claims, but upon new allegations recently discovered. In conclusion, Applicant requests the Court alter or amend the judgment set forth in the conditional order of dismissal.

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On August 23, 2021, Applicant filed "motion for post-conviction relief hearing." In this document, Applicant requested a PCR hearing based upon Sixth Amendment allegations. Additionally, Applicant filed a "notice for appointment of counsel" also on August 23, 2021, in which he requested counsel be appointed because he has limited knowledge of the law, his case

is complex, he cannot afford his own attorney, and does not already have an attorney on the case. Also on August 23, 2021, Applicant filed a document entitled “affidavit in support of 59(e) motion for the appointment of counsel.” In this document, applicant claims is case contains “several legal claims that have merit” and that the facts in the 59(e) motion along with legal proceedings have merit and support his request for appointment of counsel.

Applicant filed “opposition to conditional order of dismissal becoming final” on September 7, 2021. In this response, Applicant stated that he did not receive return attachments from the State, including his clerk records and SCDC records. He states that his claim is not barred based upon *res judicata* because his most recent amendments were not incorporated into the conditional order and could not have been raised in a prior action. Applicant claims his application raised a newly discovered evidence issue that was not discovered until within a year of filing the application and, accordingly, his application was not barred for untimeliness. Applicant claims his amended facts were not conclusively refuted in the conditional order and, accordingly, he is entitled to an evidentiary hearing on this matter. Applicant claims this application is not successive because his claims were not and could not have been raised in a prior action. Applicant stated his first PCR application was not properly adjudicated because all his grounds were not raised and ruled upon and, accordingly, he was not given his one bite at the apple. He stated that prior PCR counsel did not file a 59(e), which constituted a denial of his one bite at the apple. Applicant claims the last PCR court issued a final order of dismissal based on procedural grounds, not the merits of the allegations. Accordingly, Applicant claims these were inadequately raised and ruled upon. He then restated these grounds and claims he is entitled to relief on these allegations. In conclusion, he requests this Court not finalize the conditional order of dismissal, he be appointed counsel, and that an evidentiary hearing be held.

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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.

Applicant has not adequately shown why he is entitled to relief based upon newly discovered evidence. A person may institute a PCR action if “there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice.” S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, 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). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant’s newly discovered evidence claims fall within two main categories: one, that PCR Counsel did not adequately pursue his initial allegations in the first PCR action and; two, that his DNA was not retested. Allegations concerning PCR Counsel had no bearing on the trajectory or outcome of Applicant’s trial and is not material to the case. Further, Applicant’s allegations concerning lack of DNA retesting could have been discovered prior to trial in exercising due diligence and there has been no showing it would have changed the results of the

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trial. Applicant has failed to show the DNA retesting would have been granted or that the results of the initial test were fraudulent. Applicant's only backing to this serious allegation are his own words, which are insufficient to establish a *prima facie* case of newly discovered evidence. Accordingly, this Court finds the application shall remain dismissed for failure to establish a *prima facie* case of newly discovered evidence.

Additionally, Applicant's allegations concerning ineffective assistance of PCR Counsel are not cognizable under the PCR Act. Applicant has already pursued five other PCR actions, two PCR appeals, and two habeas corpus actions. It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel). Therefore Applicant's allegations of ineffective assistance of PCR counsel do not fall within any exception to the rule barring such claims, and the allegations should be dismissed for failing to state a claim cognizable under the Uniform Post-Conviction Procedure Act.

This application remains barred by the doctrine of *res judicata*. 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, 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

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dismissed as barred by the doctrine of *res judicata*.

Additionally, this Court finds that the application is barred for untimeliness. 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. 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 failure to establish a *prima facie* case of newly discovered evidence, and because it is untimely, successive, barred by the doctrine of *res judicata*, and because the ineffective assistance of PCR Counsel claims are not cognizable under the PCR Act. 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

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directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 25th day of October, 2021.



GRACE GILCHRIST KNIE¹
Seventh Circuit Court Judge
Seventh Judicial Circuit

Spartanburg, South Carolina

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¹ The Honorable J. Derham Cole is currently the Chief Administrative Judge for Common Pleas for the Seventh Judicial Circuit, and the Honorable J. Mark Hayes, II, is Chief Administrative Judge for General Sessions for the Seventh Judicial Circuit. However, because both Judge Hayes and Judge Cole presided over Applicant's prior PCR actions, the proposed final order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Seventh Circuit Court Judge.

