ALAN WILSON
ATTORNEY GENERAL

July 30, 2012

The Honorable R. Knox McMahon
Judge, Eleventh Judicial Circuit
205 E. Main St.
Lexington, South Carolina 29072-3456

Re: *Gary Dubose Terry v. State of South Carolina*
2012-CP-32-02718

Dear Judge McMahon:

Enclosed herein please find the Respondent's Return and Motion to Dismiss, as well as a proposed Conditional Order of Dismissal with reference to the above matter. I am sending these to you in Your Honor's capacity as Chief Administrative Judge of the Eleventh Circuit because the Post-Conviction Relief Judge in the original action the Honorable John C. Few, is now Chief Judge of the Court of Appeals. Opposing counsel is copied with this letter and has been served with these pleadings today, via United States mail.

RECEIVED
AUG 02 2012
S.C. SUPREME COURT

Sincerely,

William Edgar Salter, III
Senior Assistant Attorney General

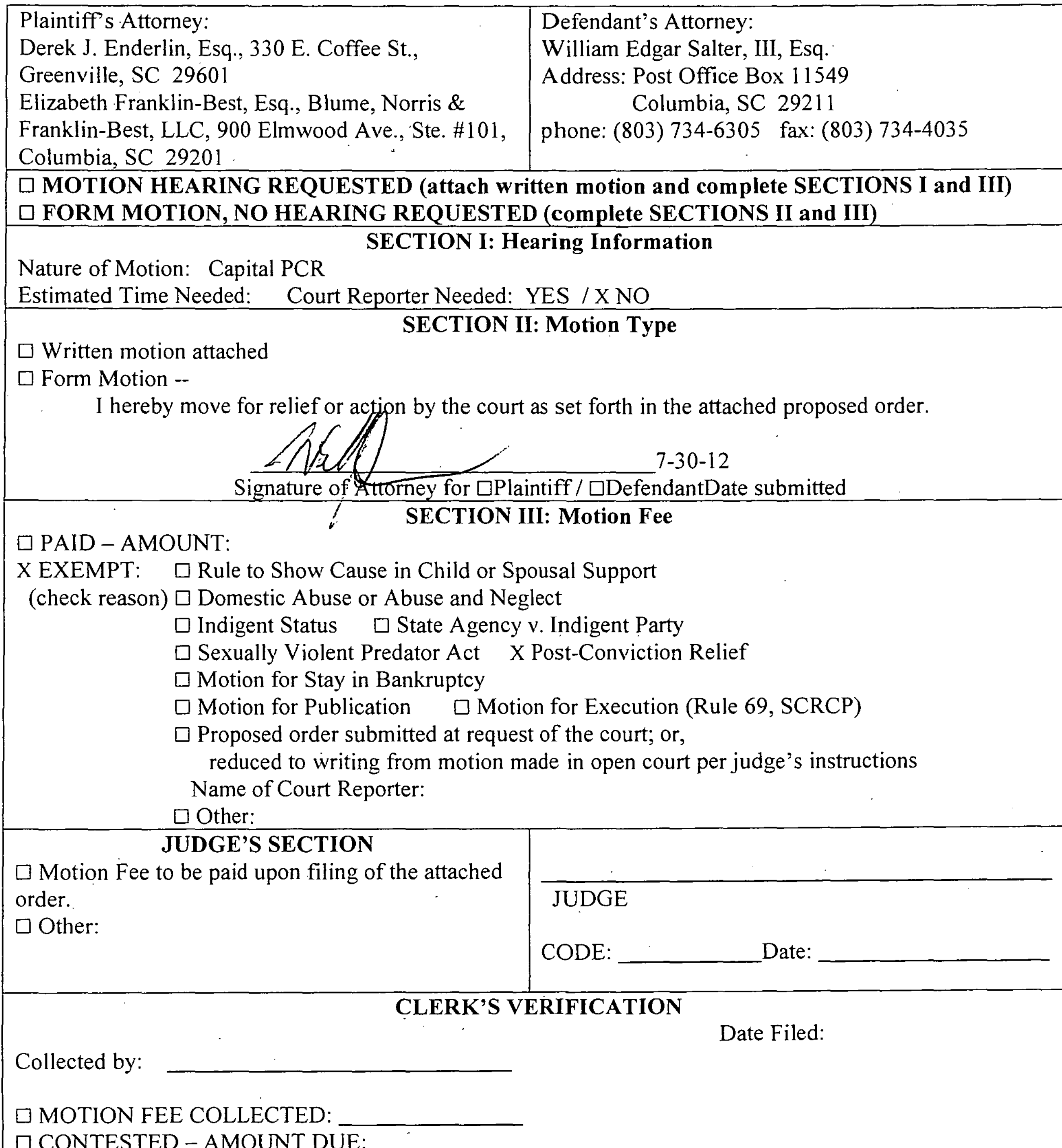
WES:dmd
Enclosures
cc: Elizabeth A. Franklin-Best, Esquire (w/encls.)
Derek J. Enderlin, Esquire (w/encls.)
Debbie Hopkins, South Carolina Supreme Court
Motte L. Talley, Esquire, South Carolina Court Administration
Sandi Wofford (victim services) (w/encls.)

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
GARY DUBOSE TERRY, #5054)
☐ Plaintiff)
v.)
STATE OF SOUTH CAROLINA,)
☐ Defendant.)

IN THE COURT OF COMMON PLEAS

CASE NO. 2012-CP-32-02718

MOTION INFORMATION FORM
AND COVER SHEET



Plaintiff's Attorney:	Defendant's Attorney:
Derek J. Enderlin, Esq., 330 E. Coffee St., Greenville, SC 29601 Elizabeth Franklin-Best, Esq., Blume, Norris & Franklin-Best, LLC, 900 Elmwood Ave., Ste. #101, Columbia, SC 29201	William Edgar Salter, III, Esq. Address: Post Office Box 11549 Columbia, SC 29211 phone: (803) 734-6305 fax: (803) 734-4035

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Capital PCR
Estimated Time Needed: Court Reporter Needed: YES / X NO

SECTION II: Motion Type

☐ Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

_______________ 7-30-12
Signature of Attorney for ☐Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
X EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act X Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	______________________ JUDGE CODE: __________ Date: __________

CLERK'S VERIFICATION

Collected by: ______________________ Date Filed:

☐ MOTION FEE COLLECTED: ____________
☐ CONTESTED – AMOUNT DUE: ____________

SCCA/233 (1/2003)

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	)	IN THE COURT OF COMMON PLEAS
Gary Dubose Terry, #5054, Applicant, v. State of South Carolina, Respondent.	)	2012-CP-32-02718 RETURN AND MOTION TO DISMISS

Applicant, Gary Dubose Terry, #5054 (Terry) has filed a successive Application for Post-Conviction Relief (PCR), through counsel, on June 29, 2012. Respondent hereby makes its Return and Motion to Dismiss.

I. PROCEDURAL HISTORY

A. Terry's trial and direct appeal.

Petitioner, Gary Dubose Terry (Terry), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), where he is currently under a death sentence for murdering Urai Jackson in Lexington County, South Carolina on or about May 30, 1994. The Lexington County Grand Jury indicted him at the July 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death Penalty as well as a Notice of Evidence in Aggravation of Punishment. Lexington County Public Defender Elizabeth C. Fullwood, and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

Following Motions hearings on May 28, August 22, September 3 and September 8, 1997, before the Honorable Gary E. Clary, Terry received a jury trial before Judge Clary on September

15-21, 1997. On September 18, 1997, the jury found him guilty of all charges. Following Terry's exercise of his statutory right to a twenty-four (24) hour waiting period, the sentencing phase was held on September 19-21, 1997. The State relied upon the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997). The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).[1]

The jury found the presence of both alleged statutory aggravating circumstances and recommended a sentence of death. Finding that the evidence presented warranted imposition of the death penalty, and that its imposition was not the result of prejudice, passion or any other arbitrary factor, Judge Clary imposed the sentence of death for murder. He also sentenced Terry to life imprisonment for burglary in the first degree, to thirty years imprisonment for criminal sexual conduct in the first degree and to ten years imprisonment for malicious injury to a telephone system. Each of these sentences was imposed consecutive to the sentence for murder. **R. pp. 2128-30**.

A timely Notice of Appeal was served and filed. Terry's direct appeal was consolidated with the South Carolina Supreme Court's review of his sentence pursuant to S.C. Code Ann. § 16-3-25(C)((1985). Terry filed a Final Brief of Appellant (**App. 2216-46**) and a Final Reply Brief of Appellant (**App. 2304-17**) on May 4, 1999.

Terry's "Statement of Issues on Appeal" presented the following grounds for relief:

1.

Whether the judge denied Due Process, as guaranteed by the Fourteenth Amendment to the United States Constitution, by refusing to admit appellant's statement against interest into

[1] With respect to the last mitigating circumstance, the trial judge did not charge the jury on Terry's age but he did charge the jury on his mentality.

evidence during cross-examination pursuant to Rule 804(B)(3), SCRE, since its exclusion denied appellant the right to present a complete defense?

2.

Whether the judge erred by ordering disclosure of appellant's Charter Rivers Behavioral Health Hospital records to the solicitor, since these records were confidential by statute, by this Court's precedents, and were effectively used by the state as evidence to have appellant executed?

3.

Whether the judge impermissibly limited appellant's cross-examination of Investigator Frier when he refused to allow the defense to elicit from Frier that appellant had given the police a statement, since this was relevant evidence, and its exclusion unfairly prejudiced appellant?

4.

Whether the judge erred by admitting a gruesome photograph of the victim, State's Exhibit #55, since it was calculated to inflame the jury, and its probative value was substantially outweighed by its prejudicial effect?

Final Brief of Appellant at 1, App. 2420. The State also filed a Final Brief of Respondent on May 4, 1999. **App. 2447-2303**.

The South Carolina Supreme Court affirmed his conviction and sentence in a published Opinion filed on March 13, 2000. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). **App. 2318-27**. The Court denied Terry's timely Petition for Rehearing (**App. 2328-32**) on April 19, 2000. **App. 2333-34**. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry on direct appeal.

On June 28, 2000, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. His certiorari petition presented the following question for relief:

Did the exclusion of Petitioner's statement against penal interest, and cross-examination about it, violate due process where the court ruled it would not admit the statement unless Petitioner testified, and the State did not want the statement admitted until the penalty stage to prevent jury consideration of a lesser-included offense?

Petition for Writ of Certiorari, at 1, App. 2335-2410. The State filed a Brief in Opposition on July 31, 2000. **App. 2411-42**. The United States Supreme Court denied certiorari in an unpublished Order filed on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). **App. 2443**. Mr. Dudek again represented Terry before the United States Supreme Court.

B. Intervening action prior to PCR filing.

Mr. Dudek filed a Petition for Stay of Execution on Terry's behalf on October 6, 2000, and the State did not oppose this request. Therefore, on October 18, 2000, the South Carolina Supreme Court filed an Order staying Terry's execution pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could pursue state PCR remedies. In the stay Order, the South Carolina Supreme Court appointed the Hon. Marc H. Westbrook to preside over this case and gave him exclusive and statewide jurisdiction over the matter.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's October 18, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), Judge Westbrook convened a hearing at the Lexington County Courthouse on Thursday, November 9, 2000. Mr. Terry was present at this hearing as were H. Wayne Floyd, Esquire, and Melissa Reed Kimbrough, Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing. The Court ascertained that Terry wished for counsel to be appointed, so that he may pursue state PCR; and that Mr. Floyd and Ms. Kimbrough met qualifications set forth in S.C. Code Ann. § 12-27-160(B). An Order Appointing Counsel was filed on November 30, 2000, and Mr. Floyd and Ms. Kimbrough were appointed to represent Terry, with Mr. Floyd being lead counsel. The case was subsequently reassigned to the Honorable John C. Few, after Terry had filed his Post-Conviction Relief (PCR) Application.

C. Original State PCR proceedings.

Terry filed his original PCR Application (2000-CP-32-3470) on or about November 30, 2000. Terry raised the following grounds for relief in his PCR Application:

9(a) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately explore and present a defense of alibi.*

10(a) Counsel failed to present any defense during applicant's trial despite the existence of witnesses who observed applicant around the time of the victim's killing, and would have testified he was not at or near the place where she was killed. Counsel's failure to offer a defense of alibi was deficient and deprived him of due process, a full and fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws. Strickland v. Washington, 466 U.S. 668 (1984); Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). This ground entitles applicant to a new trial.

9(b) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitutions, and laws because trial counsel failed to establish sufficient evidence of criminal sexual conduct, first degree.*

10(b) After the State concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In order to survive a motion for directed verdict as to a charge of criminal sexual conduct, the state must prove beyond a reasonable doubt a lack of consent by the victim. See State v. Taylor, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900). During applicant's trial, the state adduced absolutely no evidence the victim had been forced into having sex with applicant. Thus, trial counsel's failure to make a more specific motion based on sufficiency of the state's evidence as to criminal sexual conduct, first degree, was ineffective and prejudiced the outcome of applicant's trial and sentencing proceeding. This ground entitles applicant to a new sentencing phase proceeding.

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because appellate counsel failed to raise the trial court's erroneous denial of trial counsel's motion for a directed verdict based on the state's failure to establish sufficient evidence of criminal sexual conduct, first degree.*

10(c) After the state concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, assuming this ground was adequately available for appellate review, appellate counsel was ineffective for failure to argue it on direct appeal, as it was a sufficient basis for overturning applicant's conviction on this count, as well as his sentence of death. Thus, applicant was prejudiced by appellate counsel's dereliction, and he is entitled to a new sentencing phase proceeding.

9(d) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to make a Batson v. Kentucky, 476 U.S. 79 (1986) motion in response to the state using all of its strikes against female jurors.*

10(d) During voir dire, the state used its strikes to eliminate six potential jurors, all of whom were female, and one of whom was African-American. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), the United States Supreme Court extended its earlier holding in Batson, ruling it violated due process, equal protection and the right to a fair trial for the state to peremptorily exclude jurors based on gender. Here, the state's strike pattern clearly established a prima facie violation under J.E.B., and trial counsel's failure to make a Batson challenge deprived applicant of the fair jury selection and trial to which he was entitled. Counsel's errors require vacation of applicant's convictions.

9(e) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately investigate and challenge the physical evidence adduced by the state.*

10(e) Despite the absence of any direct evidence of guilt, trial counsel presented no defense on applicant's behalf and failed to adequately investigate and challenge the physical evidence presented during the guilt phase of his trial. Counsel's failure to conduct an adequate investigation is inexplicable in light of the numerous items of fiber evidence, which did not "match" applicant. Counsel's omissions were unreasonable and prejudiced the outcome of applicant's trial, entitling him to a new trial. Strickland v. Washington, supra.

9(f) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to investigate possible defenses.*

10(f) As detailed in 10(e), the state's evidence of guilt against applicant was paltry. At most, the state's evidence indicated applicant knew the victim and had had sex with her sometime prior to her death. However, applicant renounced his alleged confessions, and there was no direct evidence of his guilt. Under these circumstances, counsel acted unreasonably in failing to investigate and explore potential defenses, and there is a reasonable likelihood that the result of the proceeding would have been different had counsel adequately researched and presented possible defenses. Strickland v. Washington, supra.

9(g) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel erroneously told the jury applicant "confessed" to the crimes charged when in fact applicant's alleged confession amounted to, at most, an admission of manslaughter.*

10(g) During his opening statement to the jury, trial counsel told the jury applicant had "confessed" to the victim's murder. However, because applicant's alleged confession amounted, at most, to manslaughter, this statement was neither a "confession" to the charges against him nor an admission against interest. State v. Terry, 2000 WL 282450. Consequently, when trial counsel sought to have this statement admitted, which would have allowed the jury to hear evidence applicant was guilty of manslaughter rather than murder, trial court refused. Trial counsel's unreasonable action in informing the jury applicant "confessed" was extremely prejudicial, denied applicant the effective assistance of counsel, and entitles him to a new trial. Strickland v. Washington, supra; State v. Terry, supra.

9(h) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" when this statement had not been ruled admissible by either the trial court or applicant's jury.*

10(h) During his guilt phase opening statement, trial counsel told applicant's jury he confessed to the crimes charged. Not only was this statement inaccurate, as detailed in ground 9(f), but it also resulted in the withholding of the statement from evidence, which denied applicant a determination of its admissibility by the trial court and by his jurors, who would have been required to determine its voluntariness prior to accepting the statement as evidence. Counsel's actions served no strategic purpose, and clearly worked to applicant's disadvantage, as the jurors were left with the erroneous impression that applicant had voluntarily acknowledged guilt to capital murder. Counsel's unreasonable actions were extremely prejudicial and require that applicant's convictions be vacated a new trial granted. Strickland v. Washington, supra.

9(i) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, the*

South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" based on his erroneous assumption that the state would seek to introduce the statement during trial.

10(i) As detailed more fully in 10(g) and (h), trial counsel's statement to law enforcement was not an admission of guilt to murder, rape, and burglary. In fact, the statement was exculpatory as to capital murder in that, at a minimum, it negated the aggravating circumstances of criminal sexual conduct, first degree, and burglary, first degree. Nonetheless, trial counsel told the jury applicant confessed to the crimes for which he was then on trial. Counsel not only prejudicially misconstrued the contents of applicant's statement, thereby casting it in the worst possible light, but - - in an apparent attempt to lessen the impact of its later admission--also prevented the jury from being able to hear and consider its actual contents. Counsel's decision to tell the jury applicant confessed was based purely on his assumption the statement would be admitted, which was not sound trial strategy. But for this unreasonable assumption, there is a reasonable probability that the jury would have come back with a more favorable guilt verdict of less than murder, criminal sexual conduct, first-degree, and burglary, first-degree. For these reasons, applicant's convictions should be vacated. Strickland v. Washington, supra.

9(j) *Applicant was denied his right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws when the state improperly misrepresented its intention to rely on his alleged confession, which was deemed voluntary and admissible during a Jackson v. Denno hearing.*

10(j) Prior to applicant's trial, a Jackson v. Denno hearing was held during which the state contested applicant's attempt to have his alleged confession excluded as evidence at trial. During opening statements, trial counsel told the jury that applicant "confessed." The offering of the confession by the state at applicant's Jackson v. Denno hearing constituted a representation by the state that the confession would be admitted into evidence at trial. This representation caused defense counsel to advise the jury of the confession in an apparent attempt to soften the blow of this evidence. Because the jury had already been informed of the existence of the confession, which was in fact exculpatory as to the charges of rape, murder and burglary, the state then chose not to enter it into evidence. And, because of its exculpatory nature, applicant could not introduce it. Trial counsel's statement to the jury was clearly made in reliance on the state's representations. Accordingly, applicant was denied essential exculpatory evidence because of defense counsel's reliance. In light of the position taken during the Jackson v. Denno hearing, the state acted improperly in withholding this evidence through courtroom chicanery at trial. The state's actions constitute prosecutorial misconduct and is the type of conduct historically condemned by our State Supreme Court. Torrence, supra; Terry, supra.

App. 2444-56.[2]

The Honorable John C. Few held a hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Terry was present at this hearing and Mr. Floyd and Ms. Kimbrough represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented the State.

At the hearing, Terry presented testimony from his trial attorneys, J. McDuffie Stone, III, Esquire, and Elizabeth C. Fullwood, Esquire. He also presented testimony from Francis A. Humphries, Esquire; Dr. John Carter; Steve Derrick; Nancy Skraba; Lilly S. Gallman; Diane Gibson Smith; Louanne R. Smith; and Patricia R. Terry. Respondent presented testimony from G. Thomas Chase, Esquire; Thomas J. Davis; and Scottie R. Frier.[3]

Judge Few allowed Terry to amend his PCR Application during the hearing.[4] "Applicant's Final Amendments" were that:

[A.] Ineffective assistance of trial counsel:

1. Opening statement contained prejudicial error to the extent that the defense conceded guilt of murder, criminal sexual conduct and burglary, first-degree, based on applicant's statement that admitted neither burglary nor criminal sexual conduct, and contained a confession only as to manslaughter;

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[2] Terry lists thirty-three allegations that he asserts were raised in the original Application. Respondent has listed the actual allegations prepared by collateral counsel. These were the actual claims that were raised, *verbatim*.

[3] In addition to the testimony of these witnesses, the exhibits introduced at trial and the exhibits introduced at the hearing, the PCR judge also had before him: (1) the Record on Appeal from the direct appeal; (2) the Final Brief of Appellant; (3) the Final Reply Brief of Appellant; (4) the Final Brief of Respondent; (5) the March 13, 2000 Opinion of the South Carolina Supreme Court from the direct appeal; (6) the Petition for Rehearing; (7) the Order filed on April 19, 2000 denying rehearing; (8) the Petition for Writ of Certiorari to the South Carolina Supreme Court; (9) the Brief in Opposition to the Petition for Writ of Certiorari to the South Carolina Supreme Court; and (10) the unpublished decision of the United States Supreme Court denying Certiorari. **Order, p. 1, App. p. 3014**.

[4] He had previously notified Respondent of most of these allegations and Respondent did not object to most of the amendments. The Court overruled the objection to the allegation to which there was an objection.

2. For failure to raise a Batson/J.E.B. challenge to the solicitors use of all strikes against all female and one black juror;

3. For failure to move to strike for cause juror Georgia Miller, whose statement that her punishment would be death for any intentional killing was a basis for disqualification;

4. For failure to object to the judge's jury charge on implied malice;

5. For failure to object to the portion of the trial judge's jury charge on the facts surrounding the death of Ms. Jackson;

6. For failure to object to or move *in limine* [to] prevent the introduction of excessive and uncorroborated character evidence used by the state in the penalty phase;

7. For failure to object to hearsay evidence from Lt. Brown detailing the applicant's alleged theft of items from a construction site;

8. For failure to object to hearsay testimony by Officer Wilkerson regarding the statement of Ann Lomax, who was not present to testify;

9. For opening the door in cross-examination of Officer Wilkerson as to the statement of Ann Lomax who was not present to testify;

10. For failure to request a charge on provocation by the victim as a mitigating circumstances as set forth in 16-3-20[(C)(b)](8);

11. For failure to develop and present corroborating testimony that would have allowed introduction of defendant's statement during the guilt phase;

12. For failure to present any evidence or argument to the jury in support of defendant's statement that the killing was manslaughter rather than murder;

13. For failure to present any evidence or argument to the jury in support of defendant's statement that sex with the victim was consensual;

14. For failure to present any evidence or argument to the jury in support of defendant's statement that he did not burglarize the victim's residence;

15. For failure to make any argument at the directed verdict stage even though the evidence failed to establish criminal sexual conduct or burglary first-degree;

16. For failing to object to "character" evidence in the penalty stage that was far more prejudicial than probative;

17. In arguing to the jury during closing that defendant was a "rapist," "murderer," "invader of homes" and "thief;"

18. In failing to present evidence to the jury that defendant was left-handed even though the state's forensic evidence established that the killer was right-handed;.

19. For failure to object and move for a curative instruction when Louanne Terry testified Gary could get out in thirty years, and, in the alternative, for not advising this witness not to mention parole eligibility;

20. For failure to object to officer Phillips testimony that the defendant had an appointment with the Sheriff's Department, but failed to show up;

21. For failure to present any argument or evidence to the Court or the jury that the defendant was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that the defendant's fingerprint was placed on the victim's telephone box based on innocent conduct;

[B]. Ineffective assistance of appellate counsel.

22. For failing to argue that the trial court erred in denying defendant's motion for a directed verdict as to all charges.

[C. *Brady* violation.

23. The State failed to disclose photograph of Diane Gibson and Applicant].

App. 2481-82; 2513-15; 2736-38.

Terry filed a Post-Hearing Memorandum of Law In Support of His Application For Post Conviction Relief on February 20, 2007. **App. 2804-74.** The State filed a Proposed Order of Dismissal on September 11, 2008. **App. 2875-2988.** Terry then filed objections to the proposed

Order (**App. 2989-3013**); but Judge Few denied relief in an Order of Dismissal filed on February 18, 2009. **App. 3014-3125**. Terry filed Applicant's Motion for Reconsideration In Re: Final Order of Dismissal on March 11, 2009. **App. 3126**. Judge Few denied Terry's motion for reconsideration on March 12, 2009. **App. 3127**.

Terry served and filed a timely notice of appeal, and Teresa L. Norris, Esquire, was appointed to represent him. Terry filed a Petition for Writ of Certiorari, in which he raised the following claim:

> Was Petitioner denied the effective assistance of counsel during trial due to (1) counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging;" and (2) counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing?

The State made its Return to Petition for Writ of Certiorari on January 13, 2010.

On November 5, 2010, the South Carolina Supreme Court granted the Petition, and directed the parties to brief the issues raised. Terry filed a Brief of Petitioner on January 5, 2011, and the State filed the Brief of Respondent on April 5, 2011. The South Carolina Supreme Court filed its published decision affirming the denial of relief on August 29, 2011. *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011) (*Terry II*).

On November 28, 2011, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. He presented two questions for review:

> I. Whether it is prosecutorial misconduct and a violation of due process for a prosecutor to deliberately mislead capital defense counsel to believe that the defendant's partially inculpatory and partially exculpatory statement will be presented during trial, leading defense counsel to detrimentally rely on this belief, when the prosecution then deliberately excludes the statement from the jury's consideration after defense counsel has informed the jury that the evidence will be presented?
>
> II. Whether prejudice in the Sixth Amendment analysis of counsel's ineffectiveness in a capital sentencing can be established solely by

showing the loss of credibility to the defendant and the defense as a result of counsel's actions?

The State made its Brief in Opposition on December 29, 2011. The United States Supreme Court denied certiorari in a letter Order filed on February 21, 2012. *Terry v. South Carolina*, 132 S.Ct. 1548 (2012).

D. The Petition for Writ of Habeas Corpus.

On March 26, 2012, the South Carolina Supreme Court filed an Order setting Terry's execution date for the fourth Friday following the date of service, and Terry was scheduled for execution on Friday, April 20, 2012. Terry filed a Motion for Stay of Execution and Appointment of Counsel, in this Court, on March 29, 2012. [**PACER Doc. No. 1**]. In his petition, Terry asserted - through proposed counsel Teresa L. Norris, Derek J. Enderlin and Elizabeth Franklin Best - that he would have until June 30, 2012 to file a timely petition for a writ of habeas corpus under 28 U.S.C. § 2254 and 2244(d). **Motion for Stay, p. 3 n. 1**. On April 2, 2012, the State made its Response to the stay request and did not oppose it. [**PACER Doc. No. 2**].The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution and appointed Teresa L. Norris, Derek J. Enderlin and Elizabeth Franklin Best, Esquires, to represent Terry, on April 5, 2012. [**PACER Doc. No. 3**].

Terry filed his Petition for Writ of Habeas Corpus on June 29, 2012. [**PACER Doc. No. 16**]. He also filed A motion for a stay and abeyance on the same day, so that he can pursue this PCR Application. [**PACER Doc. No. 17**]. Respondent filed a Response Opposing his stay request on July 16, 2012. [**PACER Doc. No. 25**]. On July 25, 2012, Terry filed a Reply to Respondent's response to his motion. [**PACER Doc. No. 28**].

II. ALLEGATIONS

Terry raises the following grounds for relief in the current PCR Application:

10(a): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's undisclosed actual conflict of interest in representing petitioner and simultaneously representing the State of South Carolina and numerous law enforcement agencies involved in petitioner's prosecution and capital sentencing.**

11(a): Trial counsel, Issac McDuffie Stone, III, was appointed to represent the applicant, Gary Dubose Terry on April I, 1996. Based on testimony in another PCR case, Mr. Stone was a parttime solicitor starting July I, 1997. Based on that testimony, as well as public records, Mr. Stone, as a lawyer for the Insurance Reserve Fund, also represented the State of South Carolina, and multiple state agencies, including SLED, the Department of Corrections, and various law enforcement agencies and detention centers, including Richland County, all of which had employees testify in Terry's sentencing. Mr. Stone had an actual conflict of interest by simultaneously representing both Mr. Terry and the State of South Carolina that adversely affected his performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Mickens v. Taylor*, 535 U.S. 162 (2002).

10(b): **Applicant's rights to the effective assistance of counsel and to a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to conduct adequate and appropriate voir dire or to adequately establish a record and appropriately object in order to preserve the issue for appellate review.**

11(b): Trial counsel failed to conduct adequate voir dire by failing to determine whether any jurors could give meaningful consideration to mitigating circumstances, and in failing to determine that at least three jurors were unqualified under *Morgan v. Illinois*, 504 U.S. 719, 735-36 (1992). In the alternative, trial counsel were ineffective in failing to preserve this issue for appellate review.

10(c): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to develop evidence supporting a defense of guilty but mentally ill and failing to adequately investigate and present mitigation evidence during the trial and sentencing when trial counsel failed to present substantial and highly mitigating evidence of Gary Terry's childhood abuse.**

11(c): Trial counsel failed to conduct an adequate investigation into Gary Terry's significant childhood abuse, and furthermore, failed to submit that information to Terry's experts or the jury. Counsel's conduct was deficient

and prejudicial in failing to adequately investigate, failing to present the significant evidence of physical abuse, failing to provide this information to the forensic psychiatrist, which would have allowed for expert testimony concerning the affects of the abuse, and failing to investigate and present evidence that Terry met the standard of guilty but mentally ill. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005)..

10(d): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to object to aggravation testimony from Terry's ex-wife that he had raped her during their marriage when the State had provided no notice of this alleged incident and counsel's failure to impeach this testimony**

11(d): Trial counsel failed to object to testimony from Applicant's ex-wife that Applicant allegedly raped her during the marriage on the basis that the State had provided no notice of this incident. Trial counsel also failed to impeach this witness with available information

III. DISCUSSION

Respondent submits that Terry's 2012 Application should be summarily dismissed for several reasons. Initially, Respondent submits that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. *See* S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that

> [a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As shown above, the United States Supreme Court filed an Order denying certiorari in on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). **App. 2443**. Therefore, Terry had

one year from October 2, 2000, within which to file the current Application. He did not file the current Application until June 29 7, 2012. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is eleven years, eight months and twenty-seven days after the United States Supreme Court's Order denying certiorari and over ten years after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by § 17-27-45(A).

Likewise, the Application must be dismissed because it is impermissibly successive to the previous Application (2000-CP-32-3470), as amended, upon which Terry has had a hearing and an appeal. The Uniform Post Conviction Procedure Act provides that:

> 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, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (Supp. 2011). "This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" *Id.*

While the Court in *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as Aice urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." *Id* at 451, 409 S.E.2d at 394. Thus, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under § 17-27-90." *Id.* at 451, 409 S.E.2d at 394.

The Court further explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under § 17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980) (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in *Aice* indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95. The Court concluded as follows:

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id at 452, 409 S.E.2d at 395.[5]

Thus, Terry could have raised his current allegations in his previous PCR Application. As a result, he cannot raise this or any other allegation now in a successive Application. *Aice*. *See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

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[5] In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. Clearly, Terry's case does not involve that scenario. Also, the Supreme Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Terry's current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily concede that the allegations raised in that action were raised with the assistance of counsel and that he had a hearing on the issues raised by counsel.

Terry's current attorneys have raised four grounds that could have been, but were not, raised in the original PCR proceedings. However, simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to Terry. *See Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time;" *see also id* ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").

At best, they can only point out that they would have handled the first PCR application differently; and, with the unerring vision of hindsight and with the knowledge that those allegations raised by Terry's original PCR attorneys were unsuccessful, that they would have alleged four additional grounds in which they contend that trial counsel rendered ineffective assistance and had a conflict of interest. If the Court allowed a hearing on merits of the claims in this Application and Terry was not successful, other counsel would undoubtedly allege that his present counsel were ineffective because they would have raised other grounds and would have handled it differently.

Indeed, the only way for Terry to demonstrate that his original trial counsel were ineffective would be for this Court to hold an evidentiary hearing on both the underlying claims of ineffectiveness and conflict of interest, as well as to the ineffective assistance of his original collateral counsel. At such a hearing, prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing. Only then could this Court determine whether their investigation and their subsequent

presentation of claims at the PCR hearing was objectively reasonable, and whether Terry could meet his burden of establishing prejudice under *Strickland*.

However, a hearing on the competency of collateral counsel's representation is not required by state court precedent, statute or the Sixth Amendment. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings"); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that "the right to appointed counsel extends to the first appeal of right, and no further" and holding that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying the rule to capital cases).[6] There is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated. Further, it would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process. Again, to create the exception now urged by Terry would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. This type of needless delay is contrary to *Aice*'s recognition of the need for finality of litigation. 305 S.C. at 451, 409 S.E.2d at 394.

III.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

[6] Even in *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012), the Court declined to hold that there is constitutional right to effective assistance of counsel in PCR. Rather, it held that, as a matter of equity, a federal habeas court may address a claim of ineffective assistance of trial counsel when collateral counsel's ineffectiveness caused a procedural default in an initial-review collateral proceeding and the petitioner demonstrates that the claim has some merit. *See also Gore v. State*, 2012 WL 1149320, 8 (Fla., Apr. 9, 2012) (refusing to read *Martinez* as requiring state courts to entertain successive application where inmate claimed ineffective assistance of original collateral counsel); *Ex parte Hernandez*, 2012 WL 1060079, 2 (Tex.Crim.App. Mar. 21, 2012) (Price, J., concurring) (unpublished) ("Having endeavored to avoid the federal constitutional issue, the Supreme Court said nothing in its *Martinez* opinion that would serve to undermine this Court's holding in *Ex parte Graves*. In *Graves*, the Court refused to construe Section 5 of Article 11.071 in such a way as to allow a subsequent habeas applicant to invoke the ineffectiveness of initial state habeas counsel as a reason to permit a claim to be raised for the first time in his subsequent habeas application. In other words, ineffective performance by initial state habeas counsel cannot overcome our statutory abuse of the writ doctrine") (footnotes omitted).

WHEREFORE, having made its Return and Motion to Dismiss, Respondent prays that the Court summarily dismiss the 2012 PCR Application for the above-stated reasons.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

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(803) 734-6305

By:
ATTORNEYS FOR RESPONDENT

July 30, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS

Gary Dubose Terry, #5054,

Applicant,

v.

State of South Carolina,

Respondent.

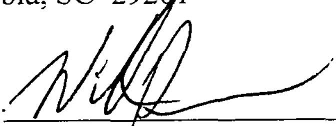
2012-CP-32-02718

CERTIFICATE OF SERVICE

The undersigned certifies that on the 30th day of July, 2012, he served Respondent's Return and Motion to Dismiss on counsel for Applicant by depositing same in the United States Mail, first class, postage prepaid, and addressed as follows:

Derek J. Enderlin, Esq.
330 East Coffee Street
Greenville, SC 29601

Elizabeth Franklin-Best, Esq.
Blume, Norris & Franklin-Best, LLC
900 Elmwood Avenue, Suite #101
Columbia, SC 29201



WILLIAM EDGAR SALTER, III
Attorney for Respondent

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)
)
GARY DUBOSE TERRY, #5054) CASE NO. 2012-CP-32-02718
☐ Plaintiff)
)
v.) MOTION INFORMATION FORM
) AND COVER SHEET
STATE OF SOUTH CAROLINA,)
☒ Defendant.)

Plaintiff's Attorney: Derek J. Enderlin, Esq., 330 E. Coffee St., Greenville, SC 29601 Elizabeth Franklin-Best, Esq., Blume, Norris & Franklin-Best, LLC, 900 Elmwood Ave., Ste. #101, Columbia, SC 29201	Defendant's Attorney: William Edgar Salter, III, Esq. Address: Post Office Box 11549 Columbia, SC 29211 phone: (803) 734-6305 fax: (803) 734-4035

☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion: Capital PCR
Estimated Time Needed: Court Reporter Needed: YES / X NO

SECTION II: Motion Type

☐ Written motion attached
☐ Form Motion --
I hereby move for relief or action by the court as set forth in the attached proposed order.

______________________________ 7-30-12
Signature of Attorney for ☐Plaintiff / ☐Defendant Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
X EXEMPT: ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act X Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	______________________ JUDGE CODE: __________ Date: __________

CLERK'S VERIFICATION

Date Filed:

Collected by: ______________________

☐ MOTION FEE COLLECTED: __________
☐ CONTESTED – AMOUNT DUE: __________

RECEIVED
AUG 02 2012
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	))	IN THE COURT OF COMMON PLEAS
Gary Dubose Terry, #5054, Applicant, v. State of South Carolina, Respondent.	))))))))))	2012-CP-32-02718 CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of a successive Application for Post-Conviction Relief (PCR) filed by Applicant, Gary Dubose Terry, #5054 (Terry) through counsel, on June 29, 2012. Respondent made its Return and Motion to Dismiss on June 30, 2012, , requesting that the 2011 Application be summarily dismissed because (1) it is barred by the one year statute of limitations governing PCR applications, S.C. Code Ann. § 17-27-45(A) (Supp. 2011); and (2) it is impermissibly successive to a previously filed application and this Court cannot grant a new PCR hearing based upon the ineffective assistance of former PCR counsel. The Court agrees and hereby enters a Conditional Order of Dismissal.

I. PROCEDURAL HISTORY

A. Terry's trial and direct appeal.

Petitioner, Gary Dubose Terry (Terry), is confined in the Lieber Correctional Institution of the South Carolina Department of Corrections (SCDC), where he is currently under a death sentence for murdering Urai Jackson in Lexington County, South Carolina on or about May 30, 1994. The Lexington County Grand Jury indicted him at the July 1995 term of court for murder, burglary in the first degree, criminal sexual conduct in the first degree and malicious injury to telephone system. The State thereafter timely served a Notice of Intent to Seek the Death

Penalty as well as a Notice of Evidence in Aggravation of Punishment. Lexington County Public Defender Elizabeth C. Fullwood, and Isaac McDuffie Stone, III, Esquire, represented Terry at trial.

Following Motions hearings on May 28, August 22, September 3 and September 8, 1997, before the Honorable Gary E. Clary, Terry received a jury trial before Judge Clary on September 15-21, 1997. On September 18, 1997, the jury found him guilty of all charges. Following Terry's exercise of his statutory right to a twenty-four (24) hour waiting period, the sentencing phase was held on September 19-21, 1997. The State relied upon the statutory aggravating circumstances that the murder was committed while in the commission of burglary in any degree and criminal sexual conduct in any degree. S.C. Code Ann. § 16-3-20(C)(a)(1)(a) & (c) (Supp. 1997). The trial judge charged the jury on the statutory mitigating circumstances found in § 16-3-20(C)(b)(2), (6) & (7).[1]

The jury found the presence of both alleged statutory aggravating circumstances and recommended a sentence of death. Finding that the evidence presented warranted imposition of the death penalty, and that its imposition was not the result of prejudice, passion or any other arbitrary factor, Judge Clary imposed the sentence of death for murder. He also sentenced Terry to life imprisonment for burglary in the first degree, to thirty years imprisonment for criminal sexual conduct in the first degree and to ten years imprisonment for malicious injury to a telephone system. Each of these sentences was imposed consecutive to the sentence for murder. **R. pp. 2128-30**.

A timely Notice of Appeal was served and filed. Terry's direct appeal was consolidated with the South Carolina Supreme Court's review of his sentence pursuant to S.C. Code Ann. § 16-

[1] With respect to the last mitigating circumstance, the trial judge did not charge the jury on Terry's age but he did charge the jury on his mentality.

3-25(C)((1985). Terry filed a Final Brief of Appellant (**App. 2216-46**) and a Final Reply Brief of Appellant (**App. 2304-17**) on May 4, 1999.

Terry's "Statement of Issues on Appeal" presented the following grounds for relief:

1.

Whether the judge denied Due Process, as guaranteed by the Fourteenth Amendment to the United States Constitution, by refusing to admit appellant's statement against interest into evidence during cross-examination pursuant to Rule 804(B)(3), SCRE, since its exclusion denied appellant the right to present a complete defense?

2.

Whether the judge erred by ordering disclosure of appellant's Charter Rivers Behavioral Health Hospital records to the solicitor, since these records were confidential by statute, by this Court's precedents, and were effectively used by the state as evidence to have appellant executed?

3.

Whether the judge impermissibly limited appellant's cross-examination of Investigator Frier when he refused to allow the defense to elicit from Frier that appellant had given the police a statement, since this was relevant evidence, and its exclusion unfairly prejudiced appellant?

4.

Whether the judge erred by admitting a gruesome photograph of the victim, State's Exhibit #55, since it was calculated to inflame the jury, and its probative value was substantially outweighed by its prejudicial effect?

Final Brief of Appellant at 1, App. 2420. The State also filed a Final Brief of Respondent on May 4, 1999. **App. 2447-2303**.

The South Carolina Supreme Court affirmed his conviction and sentence in a published Opinion filed on March 13, 2000. *State v. Terry*, 339 S.C. 352, 529 S.E.2d 274 (2000), *cert denied*, 531 U.S. 882 (2000). **App. 2318-27**. The Court denied Terry's timely Petition for Rehearing (**App. 2328-32**) on April 19, 2000. **App. 2333-34**. Assistant Appellate Defender Robert M. Dudek, of the South Carolina Office of Appellate Defense, represented Terry on direct appeal.

On June 28, 2000, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. His certiorari petition presented the following question for relief:

Did the exclusion of Petitioner's statement against penal interest, and cross-examination about it, violate due process where the court ruled it would not admit the statement unless Petitioner testified, and the State did not want the statement admitted until the penalty stage to prevent jury consideration of a lesser-included offense?

Petition for Writ of Certiorari, at 1, App. 2335-2410. The State filed a Brief in Opposition on July 31, 2000. **App. 2411-42**. The United States Supreme Court denied certiorari in an unpublished Order filed on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). **App. 2443**. Mr. Dudek again represented Terry before the United States Supreme Court.

B. Intervening action prior to PCR filing.

Mr. Dudek filed a Petition for Stay of Execution on Terry's behalf on October 6, 2000, and the State did not oppose this request. Therefore, on October 18, 2000, the South Carolina Supreme Court filed an Order staying Terry's execution pursuant to *In Re Stays of Execution in Capital Cases*, 321 S.C. 544, 471 S.E.2d 140 (1996), so that he could pursue state PCR remedies. In the stay Order, the South Carolina Supreme Court appointed the Hon. Marc H. Westbrook to preside over this case and gave him exclusive and statewide jurisdiction over the matter.

In accordance with *In Re: Stays of Execution*, the South Carolina Supreme Court's October 18, 2000, Order and S.C. Code Ann. § 17-27-160 (Supp. 1999), Judge Westbrook convened a hearing at the Lexington County Courthouse on Thursday, November 9, 2000. Mr. Terry was present at this hearing as were H. Wayne Floyd, Esquire, and Melissa Reed Kimbrough, Esquire. Senior Assistant Attorney General William Edgar Salter, III, represented the State at the hearing. The Court ascertained that Terry wished for counsel to be appointed, so that he may pursue state PCR; and that Mr. Floyd and Ms. Kimbrough met qualifications set

forth in S.C. Code Ann.§12-27-160(B). An Order Appointing Counsel was filed on November 30, 2000, and Mr. Floyd and Ms. Kimbrough were appointed to represent Terry, with Mr. Floyd being lead counsel. The case was subsequently reassigned to the Honorable John C. Few, after Terry had filed his Post-Conviction Relief (PCR) Application.

C. Original State PCR proceedings.

Terry filed his original PCR Application (2000-CP-32-3470) on or about November 30, 2000. Terry raised the following grounds for relief in his PCR Application:

> 9(a) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately explore and present a defense of alibi.*
>
> 10(a) Counsel failed to present any defense during applicant's trial despite the existence of witnesses who observed applicant around the time of the victim's killing, and would have testified he was not at or near the place where she was killed. Counsel's failure to offer a defense of alibi was deficient and deprived him of due process, a full and fair trial, and the effective assistance of counsel in violation of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws. Strickland v. Washington, 466 U.S. 668 (1984); Riddle v. State, 308 S.C. 361, 418 S.E.2d 308 (1992). This ground entitles applicant to a new trial.
>
> 9(b) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitutions, and laws because trial counsel failed to establish sufficient evidence of criminal sexual conduct, first degree.*
>
> 10(b) After the State concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). In order to survive a motion for directed verdict as to a charge of criminal sexual conduct, the state must prove beyond a reasonable doubt a lack of consent by the victim. See State v. Taylor, 57 S.C. 483, 488-89, 35 S.E.2d 729, 731 (1900). During applicant's trial, the state adduced absolutely no evidence the victim had been forced into having sex with applicant. Thus, trial counsel's failure to make a more specific motion based on sufficiency of the state's evidence as to criminal sexual conduct, first degree, was ineffective and prejudiced the outcome of

applicant's trial and sentencing proceeding. This ground entitles applicant to a new sentencing phase proceeding.

9(c) *Applicant was denied the effective assistance of counsel guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution, and laws because appellate counsel failed to raise the trial court's erroneous denial of trial counsel's motion for a directed verdict based on the state's failure to establish sufficient evidence of criminal sexual conduct, first degree.*

10(c) After the state concluded its guilt phase presentation of evidence, trial counsel made a general motion for a directed verdict as to all counts based on insufficiency of the state's evidence. R. at 1537, lines 10-16. Arguably, this motion failed to preserve applicant's objection to the sufficiency of the state's evidence against him. State v. Torrence, 305 S.C. 45, 406 S.E.2d 315 (1991). However, assuming this ground was adequately available for appellate review, appellate counsel was ineffective for failure to argue it on direct appeal, as it was a sufficient basis for overturning applicant's conviction on this count, as well as his sentence of death. Thus, applicant was prejudiced by appellate counsel's dereliction, and he is entitled to a new sentencing phase proceeding.

9(d) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to make a Batson v. Kentucky, 476 U.S. 79 (1986) motion in response to the state using all of its strikes against female jurors.*

10(d) During voir dire, the state used its strikes to eliminate six potential jurors, all of whom were female, and one of whom was African-American. In J.E.B. v. Alabama ex rel. T.B., 114 S.Ct. 1419 (1994), the United States Supreme Court extended its earlier holding in Batson, ruling it violated due process, equal protection and the right to a fair trial for the state to peremptorily exclude jurors based on gender. Here, the state's strike pattern clearly established a prima facie violation under J.E.B., and trial counsel's failure to make a Batson challenge deprived applicant of the fair jury selection and trial to which he was entitled. Counsel's errors require vacation of applicant's convictions.

9(e) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to adequately investigate and challenge the physical evidence adduced by the state.*

10(e) Despite the absence of any direct evidence of guilt, trial counsel presented no defense on applicant's behalf and failed to adequately investigate and challenge the physical evidence presented during the guilt phase of his trial. Counsel's failure to conduct an adequate investigation is inexplicable in light of

the numerous items of fiber evidence, which did not "match" applicant. Counsel's omissions were unreasonable and prejudiced the outcome of applicant's trial, entitling him to a new trial. Strickland v. Washington, supra.

9(f) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel failed to investigate possible defenses.*

10(f) As detailed in 10(e), the state's evidence of guilt against applicant was paltry. At most, the state's evidence indicated applicant knew the victim and had had sex with her sometime prior to her death. However, applicant renounced his alleged confessions, and there was no direct evidence of his guilt. Under these circumstances, counsel acted unreasonably in failing to investigate and explore potential defenses, and there is a reasonable likelihood that the result of the proceeding would have been different had counsel adequately researched and presented possible defenses. Strickland v. Washington, supra.

9(g) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel erroneously told the jury applicant "confessed" to the crimes charged when in fact applicant's alleged confession amounted to, at most, an admission of manslaughter.*

10(g) During his opening statement to the jury, trial counsel told the jury applicant had "confessed" to the victim's murder. However, because applicant's alleged confession amounted, at most, to manslaughter, this statement was neither a "confession" to the charges against him nor an admission against interest. State v. Terry, 2000 WL 282450. Consequently, when trial counsel sought to have this statement admitted, which would have allowed the jury to hear evidence applicant was guilty of manslaughter rather than murder, trial court refused. Trial counsel's unreasonable action in informing the jury applicant "confessed" was extremely prejudicial, denied applicant the effective assistance of counsel, and entitles him to a new trial. Strickland v. Washington, supra; State v. Terry, supra.

9(h) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" when this statement had not been ruled admissible by either the trial court or applicant's jury.*

10(h) During his guilt phase opening statement, trial counsel told applicant's jury he confessed to the crimes charged. Not only was this statement inaccurate, as detailed in ground 9(f), but it also resulted in the withholding of the statement from evidence, which denied applicant a determination of its admissibility by the trial court and by his jurors, who would have been required to determine its

voluntariness prior to accepting the statement as evidence. Counsel's actions served no strategic purpose, and clearly worked to applicant's disadvantage, as the jurors were left with the erroneous impression that applicant had voluntarily acknowledged guilt to capital murder. Counsel's unreasonable actions were extremely prejudicial and require that applicant's convictions be vacated a new trial granted. Strickland v. Washington, supra.

9(i) *Applicant was denied the effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth amendments to the United States Constitution, the South Carolina Constitution and laws because trial counsel informed the jury applicant "confessed" based on his erroneous assumption that the state would seek to introduce the statement during trial.*

10(i) As detailed more fully in 10(g) and (h), trial counsel's statement to law enforcement was not an admission of guilt to murder, rape, and burglary. In fact, the statement was exculpatory as to capital murder in that, at a minimum, it negated the aggravating circumstances of criminal sexual conduct, first degree, and burglary, first degree. Nonetheless, trial counsel told the jury applicant confessed to the crimes for which he was then on trial. Counsel not only prejudicially misconstrued the contents of applicant's statement, thereby casting it in the worst possible light, but - - in an apparent attempt to lessen the impact of its later admission--also prevented the jury from being able to hear and consider its actual contents. Counsel's decision to tell the jury applicant confessed was based purely on his assumption the statement would be admitted, which was not sound trial strategy. But for this unreasonable assumption, there is a reasonable probability that the jury would have come back with a more favorable guilt verdict of less than murder, criminal sexual conduct, first-degree, and burglary, first-degree. For these reasons, applicant's convictions should be vacated. Strickland v. Washington, supra.

9(j) *Applicant was denied his right to due process and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution, the South Carolina Constitution and laws when the state improperly misrepresented its intention to rely on his alleged confession, which was deemed voluntary and admissible during a Jackson v. Denno hearing.*

10(j) Prior to applicant's trial, a Jackson v. Denno hearing was held during which the state contested applicant's attempt to have his alleged confession excluded as evidence at trial. During opening statements, trial counsel told the jury that applicant "confessed." The offering of the confession by the state at applicant's Jackson v. Denno hearing constituted a representation by the state that the confession would be admitted into evidence at trial. This representation caused defense counsel to advise the jury of the confession in an apparent attempt to soften the blow of this evidence. Because the jury had already been informed of the existence of the confession, which was in fact exculpatory as to the charges of rape, murder and burglary, the state then chose not to enter it into evidence.

> And, because of its exculpatory nature, applicant could not introduce it. Trial counsel's statement to the jury was clearly made in reliance on the state's representations. Accordingly, applicant was denied essential exculpatory evidence because of defense counsel's reliance. In light of the position taken during the Jackson v. Denno hearing, the state acted improperly in withholding this evidence through courtroom chicanery at trial. The state's actions constitute prosecutorial misconduct and is the type of conduct historically condemned by our State Supreme Court. Torrence, supra; Terry, supra.

App. 2444-56.[2]

The Honorable John C. Few held a hearing into the matter on July 10-12, 2006, at the Lexington County Courthouse. Terry was present at this hearing and Mr. Floyd and Ms. Kimbrough represented him. Senior Assistant Attorney General William Edgar Salter, III, and Assistant Attorney General Melody J. Brown represented the State.

At the hearing, Terry presented testimony from his trial attorneys, J. McDuffie Stone, III, Esquire, and Elizabeth C. Fullwood, Esquire. He also presented testimony from Francis A. Humphries, Esquire; Dr. John Carter; Steve Derrick; Nancy Skraba; Lilly S. Gallman; Diane Gibson Smith; Louanne R. Smith; and Patricia R. Terry. Respondent presented testimony from G. Thomas Chase, Esquire; Thomas J. Davis; and Scottie R. Frier.[3]

Judge Few allowed Terry to amend his PCR Application during the hearing.[4] "Applicant's Final Amendments" were that:

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[2] Terry lists thirty-three allegations that he asserts were raised in the original Application. Respondent has listed the actual allegations prepared by collateral counsel. The Court finds that these were the actual claims that were raised, *verbatim*.

[3] In addition to the testimony of these witnesses, the exhibits introduced at trial and the exhibits introduced at the hearing, the PCR judge also had before him: (1) the Record on Appeal from the direct appeal; (2) the Final Brief of Appellant; (3) the Final Reply Brief of Appellant; (4) the Final Brief of Respondent; (5) the March 13, 2000 Opinion of the South Carolina Supreme Court from the direct appeal; (6) the Petition for Rehearing; (7) the Order filed on April 19, 2000 denying rehearing; (8) the Petition for Writ of Certiorari to the South Carolina Supreme Court; (9) the Brief in Opposition to the Petition for Writ of Certiorari to the South Carolina Supreme Court; and (10) the unpublished decision of the United States Supreme Court denying Certiorari. **Order, p. 1, App. p. 3014.**

[4] He had previously notified Respondent of most of these allegations and Respondent did not object to most of the amendments. The Court overruled the objection to the allegation to which there was an objection.

[A.] Ineffective assistance of trial counsel:

1. Opening statement contained prejudicial error to the extent that the defense conceded guilt of murder, criminal sexual conduct and burglary, first-degree, based on applicant's statement that admitted neither burglary nor criminal sexual conduct, and contained a confession only as to manslaughter;

2. For failure to raise a Batson/J.E.B. challenge to the solicitors use of all strikes against all female and one black juror;

3. For failure to move to strike for cause juror Georgia Miller, whose statement that her punishment would be death for any intentional killing was a basis for disqualification;

4. For failure to object to the judge's jury charge on implied malice;

5. For failure to object to the portion of the trial judge's jury charge on the facts surrounding the death of Ms. Jackson;

6. For failure to object to or move *in limine* [to] prevent the introduction of excessive and uncorroborated character evidence used by the state in the penalty phase;

7. For failure to object to hearsay evidence from Lt. Brown detailing the applicant's alleged theft of items from a construction site;

8. For failure to object to hearsay testimony by Officer Wilkerson regarding the statement of Ann Lomax, who was not present to testify;

9. For opening the door in cross-examination of Officer Wilkerson as to the statement of Ann Lomax who was not present to testify;

10. For failure to request a charge on provocation by the victim as a mitigating circumstances as set forth in 16-3-20[(C)(b)](8);

11. For failure to develop and present corroborating testimony that would have allowed introduction of defendant's statement during the guilt phase;

12. For failure to present any evidence or argument to the jury in support of defendant's statement that the killing was manslaughter rather than murder;

13. For failure to present any evidence or argument to the jury in support of defendant's statement that sex with the victim was consensual;

14. For failure to present any evidence or argument to the jury in support of defendant's statement that he did not burglarize the victim's residence;

15. For failure to make any argument at the directed verdict stage even though the evidence failed to establish criminal sexual conduct or burglary first-degree;

16. For failing to object to "character" evidence in the penalty stage that was far more prejudicial than probative;

17. In arguing to the jury during closing that defendant was a "rapist," "murderer," "invader of homes" and "thief;"

18. In failing to present evidence to the jury that defendant was left-handed even though the state's forensic evidence established that the killer was right-handed;.

19. For failure to object and move for a curative instruction when Louanne Terry testified Gary could get out in thirty years, and, in the alternative, for not advising this witness not to mention parole eligibility;

20. For failure to object to officer Phillips testimony that the defendant had an appointment with the Sheriff's Department, but failed to show up;

21. For failure to present any argument or evidence to the Court or the jury that the defendant was not guilty of tampering with the victim's telephone system and/or wiring when evidence was available that would have established that the defendant's fingerprint was placed on the victim's telephone box based on innocent conduct;

[B]. Ineffective assistance of appellate counsel.

22. For failing to argue that the trial court erred in denying defendant's motion for a directed verdict as to all charges.

[C. *Brady* violation.

23. The State failed to disclose photograph of Diane Gibson and Applicant].

App. 2481-82; 2513-15; 2736-38.

Terry filed a Post-Hearing Memorandum of Law In Support of His Application For Post Conviction Relief on February 20, 2007. **App. 2804-74**. The State filed a Proposed Order of Dismissal on September 11, 2008. **App. 2875-2988**. Terry then filed objections to the proposed Order (**App. 2989-3013**); but Judge Few denied relief in an Order of Dismissal filed on February 18, 2009. **App. 3014-3125**. Terry filed Applicant's Motion for Reconsideration In Re: Final Order of Dismissal on March 11, 2009. **App. 3126**. Judge Few denied Terry's motion for reconsideration on March 12, 2009. **App. 3127**.

Terry served and filed a timely notice of appeal, and Teresa L. Norris, Esquire, was appointed to represent him. Terry filed a Petition for Writ of Certiorari, in which he raised the following claim:

> Was Petitioner denied the effective assistance of counsel during trial due to (1) counsel's failure to object to exclusion of his inculpatory statement to police based on prosecutorial misconduct in "sandbagging;" and (2) counsel's failure to adjust their defense strategy in order to maintain credibility with the jury in sentencing?

The State made its Return to Petition for Writ of Certiorari on January 13, 2010.

On November 5, 2010, the South Carolina Supreme Court granted the Petition, and directed the parties to brief the issues raised. Terry filed a Brief of Petitioner on January 5, 2011, and the State filed the Brief of Respondent on April 5, 2011. The South Carolina Supreme Court filed its published decision affirming the denial of relief on August 29, 2011. *Terry v. State*, 394 S.C. 62, 714 S.E.2d 326 (2011) (*Terry II*).

On November 28, 2011, Terry filed a Petition for Writ of Certiorari to the South Carolina Supreme Court, in the United States Supreme Court. He presented two questions for review:

I. Whether it is prosecutorial misconduct and a violation of due process for a prosecutor to deliberately mislead capital defense counsel to believe that the defendant's partially inculpatory and partially exculpatory statement will be presented during trial, leading defense counsel to detrimentally rely on this belief, when the prosecution then deliberately excludes the statement from the jury's consideration after defense counsel has informed the jury that the evidence will be presented?

II. Whether prejudice in the Sixth Amendment analysis of counsel's ineffectiveness in a capital sentencing can be established solely by showing the loss of credibility to the defendant and the defense as a result of counsel's actions?

The State made its Brief in Opposition on December 29, 2011. The United States Supreme Court denied certiorari in a letter Order filed on February 21, 2012. *Terry v. South Carolina*, 132 S.Ct. 1548 (2012).

D. The Petition for Writ of Habeas Corpus.

On March 26, 2012, the South Carolina Supreme Court filed an Order setting Terry's execution date for the fourth Friday following the date of service, and Terry was scheduled for execution on Friday, April 20, 2012. Terry filed a Motion for Stay of Execution and Appointment of Counsel, in this Court, on March 29, 2012. [**PACER Doc. No. 1**]. In his petition, Terry asserted - through proposed counsel Teresa L. Norris, Derek J. Enderlin and Elizabeth Franklin Best - that he would have until June 30, 2012 to file a timely petition for a writ of habeas corpus under 28 U.S.C.§2254 and 2244(d). **Motion for Stay, p. 3 n. 1**. On April 2, 2012, the State made its Response to the stay request and did not oppose it. [**PACER Doc. No. 2**].The Honorable Sol Blatt, Jr., United States District Judge, entered an Order granting Petitioner's Motion for Stay of Execution and appointed Teresa L. Norris, Derek J. Enderlin and Elizabeth Franklin Best, Esquires, to represent Terry, on April 5, 2012. [**PACER Doc. No. 3**].

Terry filed his Petition for Writ of Habeas Corpus on June 29, 2012. [**PACER Doc. No. 16**]. He also filed A motion for a stay and abeyance on the same day, so that he can pursue this

PCR Application. [**PACER Doc. No. 17**]. Respondent filed a Response Opposing his stay request on July 16, 2012. [**PACER Doc. No. 25**]. On July 25, 2012, Terry filed a Reply to Respondent's response to his motion. [**PACER Doc. No. 28**].

II. ALLEGATIONS

Terry raises the following grounds for relief in the current PCR Application:

10(a): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's undisclosed actual conflict of interest in representing petitioner and simultaneously representing the State of South Carolina and numerous law enforcement agencies involved in petitioner's prosecution and capital sentencing.**

11(a): Trial counsel, Issac McDuffie Stone, III, was appointed to represent the applicant, Gary Dubose Terry on April I, 1996. Based on testimony in another PCR case, Mr. Stone was a parttime solicitor starting July I, 1997. Based on that testimony, as well as public records, Mr. Stone, as a lawyer for the Insurance Reserve Fund, also represented the State of South Carolina, and multiple state agencies, including SLED, the Department of Corrections, and various law enforcement agencies and detention centers, including Richland County, all of which had employees testify in Terry's sentencing. Mr. Stone had an actual conflict of interest by simultaneously representing both Mr. Terry and the State of South Carolina that adversely affected his performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *Mickens v. Taylor*, 535 U.S. 162 (2002).

10(b): **Applicant's rights to the effective assistance of counsel and to a fair and impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to conduct adequate and appropriate voir dire or to adequately establish a record and appropriately object in order to preserve the issue for appellate review.**

11(b): Trial counsel failed to conduct adequate voir dire by failing to determine whether any jurors could give meaningful consideration to mitigating circumstances, and in failing to determine that at least three jurors were unqualified under *Morgan v. Illinois*, 504 U.S. 719, 735-36 (1992). In the alternative, trial counsel were ineffective in failing to preserve this issue for appellate review.

10(c): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to develop evidence supporting a defense of guilty but mentally ill and failing to adequately investigate and present mitigation evidence during the trial and sentencing when trial counsel failed to present substantial and highly mitigating evidence of Gary Terry's childhood abuse.**

11(c): Trial counsel failed to conduct an adequate investigation into Gary Terry's significant childhood abuse, and furthermore, failed to submit that information to Terry's experts or the jury. Counsel's conduct was deficient and prejudicial in failing to adequately investigate, failing to present the significant evidence of physical abuse, failing to provide this information to the forensic psychiatrist, which would have allowed for expert testimony concerning the affects of the abuse, and failing to investigate and present evidence that Terry met the standard of guilty but mentally ill. *Strickland v. Washington*, 466 U.S. 668 (1984); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005)..

10(d): **Applicant's right to the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution was violated by trial counsel's failure to object to aggravation testimony from Terry's ex-wife that he had raped her during their marriage when the State had provided no notice of this alleged incident and counsel's failure to impeach this testimony**

11(d): Trial counsel failed to object to testimony from Applicant's ex-wife that Applicant allegedly raped her during the marriage on the basis that the State had provided no notice of this incident. Trial counsel also failed to impeach this witness with available information

III. DISCUSSION

This Court finds that Terry's 2012 Application should be summarily dismissed for several reasons. Initially, the Court finds that the statute of limitations applicable to Post-Conviction Relief actions bars the entire Application. *See* S.C. Code Ann. § 17-27-45(A) (Supp. 2011). Section 17-27-45(A) specifically provides that

> [a]n application for relief pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

See also Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996) (allowing one-year grace period after effective date of § 17-27-45(A) for inmates whose convictions became final before effective date of statute).

As shown above, the United States Supreme Court filed an Order denying certiorari in on October 2, 2000. *Terry v. South Carolina*, 531 U.S. 882 (2000). **App. 2443**. Therefore, the Court finds that Terry had one year from October 2, 2000, within which to file the current Application. He did not file the current Application until June 29 7, 2012. *See Gary v. State*, 347 S.C. 627, 557 S.E.2d 662 (2001) (mailing of a PCR application does not constitute filing, for statute of limitations purposes. Rather, the application is filed when received by the Clerk of Court). This is eleven years, eight months and twenty-seven days after the United States Supreme Court's Order denying certiorari and over ten years after the expiration of the one year time limit for filing the PCR Application. As a result, the Application is barred by§ 17-27-45(A).

Likewise, the Court finds that the Application must be dismissed because it is impermissibly successive to the previous Application (2000-CP-32-3470), as amended, upon which Terry has had a hearing and an appeal. The Uniform Post Conviction Procedure Act provides that:

> 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, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

S.C. Code Ann. § 17-27-90 (Supp. 2011). "This statute forbids a successive PCR application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts

were not raised, or were not raised properly." *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). The Court in *Aice* expressly declined to interpret the term "sufficient reason" to include the ineffectiveness of original PCR counsel. Rather, the Court noted that it had defined this phrase "very narrowly" by Court Rule, and it held that "as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. . . . We will not engage in an exploration of why the grounds were not raised, it is sufficient that they could have been raised, but were not" *Id.*

While the Supreme Court in *Aice* recognized that there have been exceptions to this narrow construction, it observed that an exception based upon the ineffectiveness of prior PCR counsel, as Aice urged, "well may swallow Rule 50(3). It is a troubling prospect indeed to us that the number of successive PCR applications to be entertained by our judicial system in a given case be limited only by the imagination and creativity of skilled attorneys. As long as a given convict's counsel could craft new arguments not raised by prior PCR counsel, a successive application could be heard, under Aice's view." *Id* at 451, 409 S.E.2d at 394. Thus, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' allowing for a successive PCR application under§17-27-90." *Id.* at 451, 409 S.E.2d at 394.

The Court further explained that:

> Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C.1990). We can envision successive PCR applications filed for the purpose of delaying a just execution in a capital case, as well as other abuses of the reviewing system Aice urges that we establish. For these reasons, we hold the contention that prior PCR counsel was ineffective is not *per se* a "sufficient reason" allowing for a successive PCR application under§17-27-90. This Court has implied such a holding in the past. *See Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980)

> (applicant pointed to his attorney's "inadequate" performance; held not a "sufficient reason" warranting a successive application).

Id at 451, 409 S.E.2d at 394. (Emphasis added).

Additionally, the Court in *Aice* indicated that a successive PCR application is not allowed on the ground that first complete PCR application was insufficient due to ineffective PCR counsel, apart from the scenario covered by *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Aice*, 305 S.C. at 450-52, 409 S.E.2d at 394-95. The Court concluded as follows:

> We have held that the PCR rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989). This phrase aptly delineates the distinction between the *Austin* and *Aice* cases. Austin never received a full "bite" at the apple, as he was prevented from seeking any review of the denial of his PCR application. We therefore provided him with a remedy in order to effectuate the purposes of the Uniform Act and of the PCR rules. Conversely, Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules. While Austin could rely on Rule 50(6) for support of his claim, Aice's request directly conflicts with the language of Rule 50(3). Hence, *Austin* stands harmonized with the instant case.

Id at 452, 409 S.E.2d at 395.[5]

Thus, the Court finds that Terry could have raised his current allegations in his previous PCR Application. As a result, he cannot raise this or any other allegation now in a successive Application. *Id. See also Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834, 843 (1992), *cert. denied*, 507 U.S. 927 (1993); *Hunter v. State*, 271 S.C. 48, 244 S.E.2d 530, 533 (1978) (successive application barred where applicant was aware of claim at the time of the filing of

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[5] In *Carter v. State*, 293 S.C. 528, 362 S.E.2d 20 (1987), the Court permitted a successive application raising the issue of ineffective assistance of trial counsel, where trial counsel had represented the applicant in the first PCR matter. Clearly, Terry's case does not involve that scenario. Also, the Supreme Court permitted a successive application in *Case v. State*, 277 S.C. 474, 289 S.E.2d 413 (1982), where the applicant's first PCR application was filed without the benefit of counsel and it was dismissed without a hearing. Whatever Terry's current PCR attorneys may say as to the quality of representation provided in the original PCR action, they must necessarily concede that the allegations raised in that action were raised with the assistance of counsel and that he had a hearing on the issues raised by counsel.

prior applications but did not raise it); *Land v. State*, 274 S.C. 243, 262 S.E.2d 735, 737 (1980) (applicant's conclusory assertion that PCR counsel was "inadequate" held not a "sufficient reason" warranting a successive application); *Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008); *Ivey v. Catoe*, 36 Fed.Appx. 718, 730-31, 2002 WL 459004 (4th Cir., Mar. 26, 2002). Therefore, this Application must be dismissed as impermissibly successive.

Terry's current attorneys have raised four grounds that could have been, but were not, raised in the original PCR proceedings. However, the Court finds that simply stating that they would have handled the case differently does not establish that PCR counsel were deficient, nor any prejudice to Terry. *See Strickland*, 466 U.S. at 689 ("Judicial scrutiny of counsel's performance must be highly deferential," and "every effort [must] be made to eliminate the distorting effects of hindsight . . . and to evaluate the [challenged] conduct from counsel's perspective as the time;" *see also id* ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way").

At best, they can only point out that they would have handled the first PCR application differently; and, with the unerring vision of hindsight and with the knowledge that those allegations raised by Terry's original PCR attorneys were unsuccessful, that they would have alleged four additional grounds in which they contend that trial counsel rendered ineffective assistance and had a conflict of interest. If the Court allowed a hearing on merits of the claims in this Application and Terry was not successful, other counsel could undoubtedly allege that his present counsel were ineffective because they would have raised other grounds and would have handled it differently.

Indeed, the only way for Terry to demonstrate that his original trial counsel were ineffective would be for the this Court to hold an evidentiary hearing on both the underlying claims of ineffectiveness and conflict of interest, as well as to the ineffective assistance of his original collateral counsel. At such a hearing, prior collateral counsel could testify as to their investigation and what issue(s) they may have investigated but did not pursue at the evidentiary hearing. Only then could this Court determine whether their investigation and their subsequent presentation of claims at the PCR hearing was objectively reasonable, and whether Terry could meet his burden of establishing prejudice under *Strickland*.

However, the Court finds that a hearing on the competency of collateral counsel's representation is not required by state court precedent, statute or the Sixth Amendment. *See Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings"); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987) (observing that "the right to appointed counsel extends to the first appeal of right, and no further" and holding that prisoners have no constitutional right to counsel in mounting collateral attacks on convictions); *Murray v. Giarratano*, 492 U.S. 1, 10, 13 (1989) (applying the rule to capital cases).[6] There is no reason to tax an already overburdened judicial system with wasteful litigation that is not constitutionally mandated. The Court further finds that it would reward a dilatory filing in this case that is designed to delay the proper course of the appeals process.

[6] Even in *Martinez v. Ryan*, 132 S.Ct. 1309, 1318-19 (2012), the Court declined to hold that there is constitutional right to effective assistance of counsel in PCR. Rather, it held that, as a matter of equity, a federal habeas court may address a claim of ineffective assistance of trial counsel when collateral counsel's ineffectiveness caused a procedural default in an initial-review collateral proceeding and the petitioner demonstrates that the claim has some merit. *See also Gore v. State*, 2012 WL 1149320, 8 (Fla., Apr. 9, 2012) (refusing to read *Martinez* as requiring state courts to entertain successive application where inmate claimed ineffective assistance of original collateral counsel); *Ex parte Hernandez*, 2012 WL 1060079, 2 (Tex.Crim.App. Mar. 21, 2012) (Price, J., concurring) (unpublished) ("Having endeavored to avoid the federal constitutional issue, the Supreme Court said nothing in its *Martinez* opinion that would serve to undermine this Court's holding in *Ex parte Graves*. In *Graves*, the Court refused to construe Section 5 of Article 11.071 in such a way as to allow a subsequent habeas applicant to invoke the ineffectiveness of initial state habeas counsel as a reason to permit a claim to be raised for the first time in his subsequent habeas application. In other words, ineffective performance by initial state habeas counsel cannot overcome our statutory abuse of the writ doctrine") (footnotes omitted).

Again, to create the exception now urged by Terry would create an exception that would swallow the rule against successive applications, since it would mandate a second PCR hearing in every case in which the applicant did not prevail in his first hearing. This type of needless delay is contrary to *Aice*'s recognition of the need for finality of litigation. 305 S.C. at 451, 409 S.E.2d at 394. Therefore, this Court finds that the Application for post-conviction relief should be summarily dismissed for the reasons set forth above.

CONCLUSION

Pursuant to S.C. Code Ann.§17-27-70(b), the Court intends to **DISMISS** this Application for post-conviction relief **WITH PREJUDICE** unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted **TWENTY (20) DAYS** from the date of service of this Order to show why the conditional dismissal should not become final. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve the State using the following address:

Office of the Attorney General
Attn: Sen. Assist. Att. Gen. William Edgar Salter, III
Post Office Box 11549
Columbia, South Carolina 29211

AND, IT IS SO ORDERED, this __ day of _____, 2012.

R. KNOX MCMAHON
Resident Judge, Eleventh Judicial Circuit

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON)

Gary Dubose Terry, #5054,) 2012-CP-32-02718
Applicant,)
v.) **CERTIFICATE OF SERVICE**
State of South Carolina,)
Respondent.)

The undersigned certifies that on the 30th day of July, 2012, he served Respondent's Conditional Order of Dismissal on counsel for Applicant by depositing same in the United States Mail, first class, postage prepaid, and addressed as follows:

Derek J. Enderlin, Esq.
330 East Coffee Street
Greenville, SC 29601

Elizabeth Franklin-Best, Esq.
Blume, Norris & Franklin-Best, LLC
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