

10  
AT  
AG  
SC  
CS

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )  
Curtis J. Lemon, #256984, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

2015-CP-10-1536

**FINAL ORDER OF DISMISSAL**

FILED  
2015 APR 20 PM 2:57  
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed March 13, 2015. The Respondent made its return on or about August 17, 2015, requesting the application be summarily dismissed based upon the expiration of the statute of limitations, the presumption against successive PCR applications, and failure to state a claim for which relief can be granted.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal signed August 24, 2015 and filed August 27, 2015, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is a Certificate of Service dated September 10, 2015, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document titled "Objection and Response to Conditional Order of Dismissal," dated September 14, 2015, Applicant "seeks an Evidentiary Hearing to determine whether he requested and was denied the opportunity to seek appellate review of denial of claims presented in his first original post-conviction relief application.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

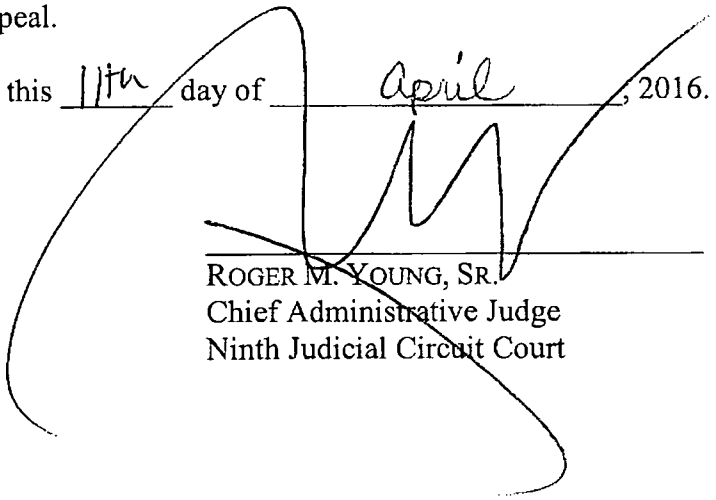
This Court notes that Applicant had a full adjudication on the merits of his original post-conviction relief application including an appeal of said application, which is evidenced in the Order dated October 30, 2007, in which the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari.

**IT IS THEREFORE ORDERED** that for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR., for the procedures following the filing and service of the notice of appeal.

**AND IT IS SO ORDERED** this 11<sup>th</sup> day of April, 2016.

Charleston, South Carolina.

  
\_\_\_\_\_  
ROGER M. YOUNG, SR.  
Chief Administrative Judge  
Ninth Judicial Circuit Court

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

\_\_\_\_\_

CURTIS J. LEMON, #256984,

Applicant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

\_\_\_\_\_

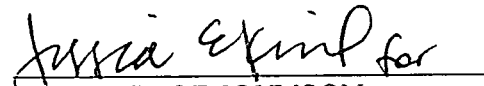
**CERTIFICATE OF SERVICE**

\_\_\_\_\_

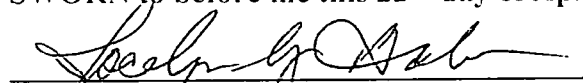
The undersigned hereby certifies that a true copy of the **Final Order of Dismissal** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

**Curtis J. Lemon, #256984  
MacDougall Correctional Institution  
1516 Old Gilliard Rd.  
Ridgeville, SC 29472-7408**

This 22<sup>nd</sup> day of April, 2016.

  
\_\_\_\_\_  
J. RUTLEDGE JOHNSON  
ATTORNEY FOR RESPONDENT

SWORN to before me this 22<sup>nd</sup> day of April, 2016.

  
\_\_\_\_\_  
Notary Public for South Carolina.  
My Commission Expires: 12/14/2024

Cc  
AG  
AT

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
Curtis J. Lemon, #256984 )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS FOR  
THE NINTH JUDICIAL CIRCUIT

2015-CP-10-1536

**CONDITIONAL  
ORDER OF DISMISSAL**

FILED  
2015 AUG 27 AM 10:15  
JULIE CLERK OF COURT

This matter is before the Court from an application for post-conviction relief filed March 13, 2015. The Respondent made its Return and Motion to Dismiss requesting the matter be dismissed because it is successive and was filed outside the time limit mandated by the applicable statute of limitations. This order follows.

**Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. Applicant was indicted at the March 1998 term of the Charleston County Grand Jury for murder (1998-GS-10-1815); and criminal sexual conduct, 1<sup>st</sup> degree (1998-GS-10-1814). He was represented by Juan W. Tolley, Esquire, and Melissa Gay, Esquire. On March 18, 1999, Applicant was convicted by a jury of voluntary manslaughter and criminal sexual conduct, 1<sup>st</sup> degree. He was sentenced by the Honorable Gerald C. Smoak, Jr., to confinement for a period thirty (30) years on each charge, to be served concurrently.

*[Handwritten signature]*

A timely Notice of Appeal and Anders<sup>1</sup> brief were filed on Applicant's behalf. On March 14, 2002, the Supreme Court of South Carolina denied Applicant's appeal in an unpublished opinion. State v. Curtis Jerome Lemon, No. 2002-UP-032 (S.C. Ct. App. filed April 5, 2002). The Remittitur was issued on April 26, 2002.

**First PCR Application: 2002-CP-10-3358**

Applicant subsequently filed an application for post-conviction relief on August 13, 2002, alleging the following grounds for relief:

1. Ineffective assistance of counsel.
  - a. Counsel failed to object to the submission of the voluntary manslaughter verdict;
  - b. Counsel failed to object to the court's charge upon the jury's request to be re-instructed on the law;
  - c. Counsel failed to request a more complete charge upon the jury's request to be re-instructed on the law;
  - d. Counsel failed to object to the trial court's Allen charge to the jury absent any indication that the charge was necessary;
  - e. Counsel failed to object to evidence of the Applicant's purchase and use of crack cocaine in order to preserve the issue for appeal of the court denial in limine to exclude such evidence;
  - f. Counsel was ineffective for failing to object to the solicitor's improper bolstering of the credibility of state witnesses;
  - g. Counsel was ineffective for failing to present favorable witnesses and evidence.

Respondent made its Return on January 13, 2003. An evidentiary hearing into the matter was convened on June 16, 2004, at the Charleston County Courthouse before the Honorable Doyet A. Early, III. Applicant was present and represented by Bob J. Conley, Esquire. Adrienne L. Turner, Esquire, of the South Carolina Attorney General's Office represented Respondent.

---

<sup>1</sup> Anders v. California, 386 U.S. 738 (1967).

emo/2

Applicant testified on his own behalf at the PCR hearing; also present to testify was Juan W. Tolly, Esquire. Following the hearing, Judge Early issued a written order denying and dismissing the application with prejudice dated September 7, 2004.

A timely Notice of Appeal was filed on Applicant's behalf. In an Order dated October 30, 2007, the South Carolina Court of Appeals denied Applicant's petition for writ of certiorari. The Remittitur was issued on November 15, 2007.

**Federal Habeas Petition: 5:15-cv-02241-JMC-KDW**

Applicant filed a petition for writ of habeas corpus in Federal District Court in the Federal District of South Carolina on March 24, 2008. The State made its Return and Memorandum in Support of Summary Judgement on August 15, 2008. On January 23, 2009, the Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued a Report and Recommendation, in which he recommended that the State's motion for summary judgment be granted and the habeas petition be dismissed with prejudice. In an Order dated March 19, 2009, the Honorable R. Bryan Harwell, United States District Judge, granted the State's motion for summary judgment and denied Applicant's habeas petition with prejudice.

The Fourth Circuit Court denied a certificate of appealability and dismissed Applicant's appeal on October 6, 2009.

**Application for DNA Testing**

Applicant subsequently filed an Application for Forensic DNA Testing on November 12, 2013. A hearing was convened on June 24, 2014. Applicant was represented by Michael A. Uricchio, Esquire. After careful consideration of the motion, supporting and opposing material and arguments, the Honorable Roger M. Young, Sr., denied the Application in an Order dated June 24, 2014.

*RMD/KS*

Applicant filed a *pro se* Notice of Appeal. In an Order filed November 24, 2014, the South Carolina Court of Appeals dismissed the appeal pursuant to Rule 207 of the South Carolina Appellate Court Rules, for failure to provide the Court with the transcript of the proceeding. The Remittitur was issued on January 28, 2015.

### **Current PCR Application**

In his current application for post-conviction relief, filed March 13, 2015, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of Counsel, specifically:
  - a. "Failure to protect my rights pursuant to S.C. Code Ann. § 17-27-100";
  - b. "Right to seek appellate review of the denial of my Application for Forensic DNA Testing PCR."

Applicant filed an amended PCR application on April 13, 2015, alleging the following additional grounds for relief:

1. Ineffective assistance of Counsel;
  - a. "Failure to protect my rights pursuant to S.C. Code Ann. § 17-27-100";
  - b. "Right to seek appellate review of the denial of my PCR application."

Before this Court are the Charleston County Clerk of Court records regarding the subject convictions, appellate records, records from the South Carolina Department of Corrections, records from Applicant's prior PCR actions, records from Applicant's DNA Testing application, and Respondent's Return and Motion to Dismiss

### **FINDINGS OF FACT AND CONCLUSION OF LAW**

#### **Successiveness**

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. Successive

applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). The relevant statute provides

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

S.C. Code Ann. § 17-27-90 (2014). Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. at 450, 409 S.E.2d at 394. If an allegation could have been raised in a previous application, then the applicant may not raise it in successive applications. Id. Courts "will not engage in an exploration of why the grounds were not raised." Id. ("[I]t is sufficient that they could have been raised, but were not."). The applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

To the extent Applicant is alleging he received ineffective assistance of counsel on his prior post-conviction relief application, this Court finds that such a claim is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR

RMD 8/5

applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court has held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “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 452, 409 S.E.2d at 394. Applicant’s contention that prior PCR counsel was ineffective in failing to file a Rule 59(e) motion, even if true, is not a sufficient reason warranting a successive PCR application. Thus, Applicant has failed to show that a successive application is appropriate. Moreover, while failure to appeal the PCR judge’s order denying post-conviction relief may, in some circumstances, be a sufficient reason to warrant relief even where the application is successive,<sup>2</sup> Applicant’s PCR Counsel filed a Notice of Appeal in this case and submitted a petition for writ of certiorari.

This Court accordingly finds summary dismissal is appropriate.

#### **Statute of Limitations**

This Court further finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (the PCR Act). Section 17-27-45(a) reads as follows:

---

<sup>2</sup> See Odom v. State, 337 S.C. 256, 262, 523 S.E.2d 753, 756 (1999) (“A PCR applicant is entitled to an Austin appeal if the PCR judge affirmatively finds ... the right to appellate review of a previous PCR order was not knowingly and intelligently waived.”).

RMD/6

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

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offense he currently challenges on March 18, 1999. Following an unsuccessful direct appeal, the Remittitur was issued on April 26, 2002. Therefore, Applicant was required to file this application on or before April 27, 2003. This Application was filed on March 13, 2015, which was over *eleven years* after the statutory filing period had expired.

Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon, 363 S.C. 432, 611 S.E.2d 494. In addition, Courts are authorized to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings...that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." § 17-27-70(c). Therefore, this Court finds that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute and for being successive.

#### **Failure to State a Claim**

To the extent that this application is attempting to attack the validity of proceedings under the S.C. Code §§ 17-28-10 through 360 (the Post-Conviction DNA Testing Act), this Court finds Applicant has failed to state a claim upon which relief may be granted. First, ineffective assistance of DNA counsel is not a cognizable claim under PCR act. An applicant may commence a post-conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

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

S.C. Code Ann. § 17-27-20 (1976). Whether or not Applicant's "DNA counsel" performed adequately is not within the scope of the PCR Act.

Second, the Post-Conviction DNA Testing and Preservation Act (the DNA Testing Act) contemplated the type of claim Applicant is raising and *explicitly rejected it*. S.C. Code § 17-28-60 (2014). The same provision mandating appointment of counsel for indigent applicants also provides that the performance of such counsel "shall not form the basis for relief *in any post-conviction relief proceeding.*" *Id.* (emphasis added). For these reasons, this Court finds this claim be dismissed pursuant to Rule 12(b)(6), SCRPC.

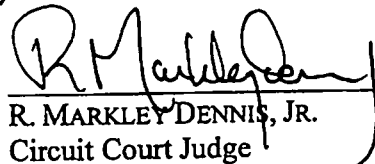
[Signature block on following page]

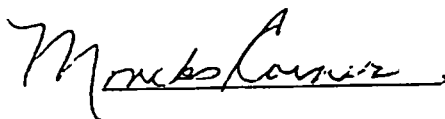
**CONCLUSION**

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this Application 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 upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Patrick L. Schmeckpeper, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 24<sup>th</sup> day of August, 2015

  
R. MARKLEY DENNIS, JR.  
Circuit Court Judge  
Ninth Judicial Circuit Court

, South Carolina

*RMJ/9*