

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Makandi L. A. Terry, # 353344

Applicant,

v.

State of South Carolina,

Respondent.

SOUTH CAROLINA COURT
OF APPEALS

2016-CP-08-2607

NOTICE OF APPEAL
WITH REQUIREMENTS
BY RULE 243 (c), SCACR

RECEIVED

JAN 04 2018

SC Court of Appeals

Notice is hereby given that, Makandi L.A. Terry (Applicant) in the aboved named case, hereby appeal; to secure appellate review of every progression of remedy with case # 2016-CP-08-2607; by way of, Rule 203, SCACR and direction to Rule 243 (c), SCACR for procedure:

EXPLANATION REQUIRED OF RULE 243(c), SCACR

Since the Lower Court has determined that the Applicant's post-conviction relief is barred as successive or being untimely under the statute of limitations, Applicant seeks to appeal by providing an explanation as to why the determination was

improper.

I.) INTRODUCTION OF SUFFICIENT FACTS

The lower court issued a Conditional Order of Dismissal signed and filed September 6, 2017, provisionally denying and dismissing Applicant's post-conviction relief action, while giving the Applicant 20 days from the date of service of the Order; in which to show why the dismissal should not become final. Applicant made the filing period in a timely manner of that Order.

Applicant filed a response to the Conditional Order of Dismissal captioned as "Response to Respondent's Conditional Order of Dismissal and Applicant's Memorandum to Support PCR Application Pursuant to S.C. Code Ann. § 17-27-45(c)" filed on the date of September 29, 2017; in which Applicant argued that the Application should be "summarily granted" since he complied with the filing procedure to S.C. Code Ann. § ~~17-27-45(c)~~. Applicant clearly showed PCR Counsel failed to file a Rule 59(e) motion, which violated Applicant's Fourteenth Amendment right to the United States Constitution of America. This claim makes the conviction a subject to collateral attack upon Original PCR action (2013-CP-08-2228); with that being the error under that available proceeding or remedy "is" grounds for relief as to a new hearing.

The Lower Court reviewed Applicant's responses to the Conditional Order of Dismissal and to the Final Order of Dismissal in their entirety; the Court also reviewed the Original pleadings and found a determination to sign the Final Order of Dismissal, which was filed December 13, 2017; even after Applicant showed to the Lower Court in each response made to State's Orders that South Carolina Courts will consider a successive application in situations when Applicant's claim relies on facts that Applicant could not have discovered earlier, even with "due diligence;" or complying with (S.C. Code Ann. §17-27-90) "that the Courts find grounds for relief when a claim in a Original PCR was inadequately raised;" in which an Applicant is entitled to a full and fair opportunity to present claim(s) in a post-conviction relief applications.

One-year statute limitations does not apply to Applicant's application for post-conviction relief, when its based on a denial of right to due process (14th Amendment U.S.C.A.). Especially, when the record established "clear and convincing" evidence that "but for" the constitution error that the Applicant is claiming was inadequately raised and if it was raised properly in all remedies of due process; no reasonable juror would have found Applicant guilty of the offense with which Applicant was charged.

II. ARGUMENTS

(A). The error of PCR Counsel failure to file a Rule 59(e) motion to bring to the PCR Courts attention that it did not rule on all issues' presented; especially the claim on record of Original PCR (2013-CP-08-2228) for ineffective assistance by not withdrawing the guilty plea when something in the plea allocution shows that Applicant did not understand what he was pleading guilty to. In which, made the guilty plea not knowing and not voluntary when the Applicant's remarks in Plea colloquy "cast significant doubt" on guilt. The produce of the error by PCR Counsel is a continuation cause of making the conviction a subject to collateral attack upon any ground for relief of a new hearing. (S.C. Code Ann. § 17-27-20) shows an Applicant may commence a post-conviction relief action on this ground. see Mangal v. State, 2017 WL 4583310. Gibbs v. State, (S.C. 2013) 403 S.C. 484 S.E. 2d 170

Since, PCR Counsel failed to file a Rule 59(e) motion to bring to the PCR Courts attention that it did not **RULE** on all issues' presented; especially the claim on record of Original PCR proceeding (2013-CP-08-2228) for ineffective assistance of counsel, by not withdrawing the guilty plea. Even when the claim was amended on record at

Original PCR proceeding. PCR Counsel was in error for not using obligation to REVIEW State's Order of Dismissal to correct the Order by the use of the remedy of a Rule 59(e) motion to bring to the Original PCR Courts attention that it did not Rule on all issues presented. This error violated Applicant's due process making it a violation of Applicant's Fourteenth Amendment U.S.C.A.; in which also made the PCR proceeding or remedy of Original PCR action unfair.

With the above being the factor, the attorney appointed by the State to pursue Applicant's post-conviction relief action is ineffective. The State prisoner (Applicant) has been denied fair process and the opportunity to comply with the State's procedure to obtain an adjudication on the merits of his claim; especially, when the State requires Applicants to raise an ineffective-assistance-of-trial-counsel claim in a collateral proceeding; where the claim should have been raised properly. Applicant has established cause for a default of an ineffective-assistance claim in the circumstance where appointed counsel in the initial-review collateral proceeding where the claim should have been raised properly was ineffective under the Standards of Strickland v. Washington, 466 U.S. 668 (1984); Marlar v. State, 653 S.E. 2d 266; Pruitt v. State, 423 S.E. 2d 172; Martinez v. Ryan, 566 U.S. 1 (2012); Alice v. State, 305 S.C. 448, 409 S.E. 2d 392 (1991). And show that the Lower Court determination

was improper.

(B) The Applicant's conviction is subject to collateral attack upon the ground that the State's error prevented the development of facts in Applicant's PCR action of Original post-conviction relief (2013-CP-08-2228) under S.C. Code Ann. § 17-27-90.

The State's factual determination in the State's Order of Dismissal to (2013-CP-08-2228) is not fairly supported by the record as a whole by State Court's fact-finding procedure; as to the post-conviction relief action did not adequately provide a full and fair hearing. The material facts were not adequately developed at the State's Order of Dismissal remedy, since the PCR Judge did not afford the Applicant a full and fair hearing for not RULING on all issues presented in Original PCR Court. Townsend v. Sain, 372 U.S. 293 (1963). Applicant took all steps possible ((2013-CP-08-2228 Original PCR; Pro se 59(e) Rule motion; Appellate Case No. 2015-002283 Appeal of Original PCR; 4:17-cv-00207-DCL-TER Habeas Corpus of Original PCR; No. 17-7246 United States Court of Appeals of Original PCR; 2016-CP-08-2607)) to develop a record of prejudice; indicate a "sufficient reason" why Original ground for relief was not properly raised in previous application proceeding remedies. By this showing, State violated Applicant's Fourteenth Amendment U.S.C.A.; which is the right to due

process, with a fair process and opportunity to comply with the State's procedure to obtain adjudication on the merits of Applicant's claim making the above explanation a proven fact the Lower Courts was improper for the determination it made in this post-conviction action and prejudice Applicant for not granting Applicant a new Evidentiary Hearing on the merits; since a question of fact is raised which can only be resolved by a hearing. Robertson v. State, (S.C. 2016) 418 S.C. 505, 795 S.E.2d 29.

12/27/17

Respectfully Submitted,

Makandi Terry

Makandi Terry #353344

Makandi L. A. Terry, # 353344

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

AND

SOUTH CAROLINA COURT OF
APPEALS

2016-CP-08-2607

RECEIVED
JAN 04 2018
SC Court of Appeals

CERTIFICATE OF SERVICE

I, Makandi L. Terry, do hereby certify that I have this date December 27, 2017; served Respondents' Acknowledgment of Service of the Notice of Appeal by depositing one copy for the address as follows:

S.C. Court of Appeals
Clerk of Court
P.O. Box 11629
Columbia, SC 29211

Clerk of Court, Berkeley County
Mary P. Brown
P.O. Box 219
Moncks Corner, SC 29461

OFFICE of the Attorney General
Rasheeda Cleveland, Esquire
PCR Division - 9th Circuit
P.O. Box 11549
Columbia, SC 29211

12/27/17

Respectfully Submitted,

Makandi Terry

Makandi Terry #353344

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Makandi L.A. Terry, #353344

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2016-CP-08-2607

FINAL ORDER OF DISMISSAL

17 DEC 13 PM 3:16
MARY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, S.C.

FILED
AD

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Makandi L.A. Terry (Applicant) on November 1, 2016. Respondent made its Return requesting the application be summarily dismissed.

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 and filed September 6, 2017, provisionally denying and dismissing this action, while giving the Applicant 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 an Affidavit of Service dated October 12, 2017 serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant filed a document captioned¹ "Response to Respondent's Conditional Order of Dismissal and Applicant's Memorandum to Support PCR Application Pursuant to S.C. Code Ann. §17-27-45(c)" on September 29, 2017, in which he argues that the Application should be "summarily granted" because he complied with the filing procedure pursuant to S.C. Code Ann. § 17-27-45. Applicant also asserts that the Application should be "summarily granted" because

¹ Applicant also submitted a proposed final order of dismissal captioned "Reply in Opposition to Respondent's Final Order of Dismissal Order."

of the “successive hurdle to the previous application for post-conviction relief and for stating a claim upon which relief can be granted.” Applicant also re-alleges his claims of ineffective assistance of PCR Counsel for failing to file a Rule 59(e) motion and that such a claim “is” grounds for relief.

Applicant also filed a document captioned “Motion to Amend Post-Conviction Relief Application” on November 29, 2017² in which he argues:

1. “The alleged error of PCR Counsel failure to file a Rule 59(e) motion to bring to the PCR Courts attention that it did not rule on all issues presented; especially the claim on record of original PCR (2013-CP-08-2228)...”
2. “The conviction is subject to collateral attack upon the ground that the State’s error prevented development of facts in Applicant’s PCR case (2013-CP-08-2228) under S.C. Code Ann. § 17-27-90.”
3. “The State’s factual determination in the State’s Order of Dismissal to (2013-CP-08-2228) is not fairly supported by the record as a whole by State Court’s fact-finding procedure; as to the post-conviction relief action did not adequately provide a full and fair hearing. The material facts were not adequately developed at the State’s Order of Dismissal remedy; since the PCR Judge did not afford the Applicant a full and fair hearing for not ruling on all issues’ presented in original PCR Court. Towsend v. Sain, 372 U.S. 293 (1963).”

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 also reasserts its holding in the Conditional Order of Dismissal that this Application is untimely, successive, and fails to state a claim upon which relief can be granted.

This Court finds that The Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160 (“the Act”) requires as follows:

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

² The Court treats this motion as a response to its Conditional Order of Dismissal.

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was guilty to the offense he currently challenges on November 30, 2012. Accordingly, Applicant was required to file this Application on or before November 30, 2013. Applicant did not file this Application until November 1, 2016; after the statutory filing period had expired. Therefore, the Application is untimely.

Additionally, this Application is successive to Applicant's previous applications for post-conviction relief. This Court notes that successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Id. at 395.

Lastly, this Court notes that ineffective assistance of PCR counsel is not a ground for relief. S.C. Code Ann. § 17-27-20 (1976) states that 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;

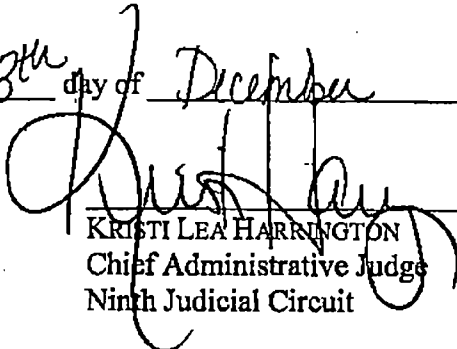
5. That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....

Furthermore, whether or not Applicant's post-conviction relief counsel performed adequately is not within the scope of the PCR Act. 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).

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 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 13th day of December, 2017.


KRISTI LEA HARRINGTON
Chief Administrative Judge
Ninth Judicial Circuit

Monday Canner, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Makandi L.A. Terry, #353344

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2016-CP-08-2607

CONDITIONAL ORDER OF DISMISSAL

17 SEP -6 PM 3: 33
FILED
CLERK OF COURT
BERKELEY COUNTY, S.C.

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Makandi L.A. Terry (Applicant) on November 1, 2016. Respondent made its Return requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Berkeley County Clerk of Court for murder (2009-GS-08-1912). Applicant was represented by William Thrower, Esquire. Bryan Alfaro, Esquire, prosecuted the case. On November 30, 2012, Applicant pled guilty to the lesser included offense of voluntary manslaughter. The Honorable R. Markley Dennis sentenced him to confinement for a period of eighteen years. Applicant did not appeal his conviction or sentence.

2013-CP-08-2228

In his first application for post-conviction relief Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.
 - a. Induced and coerced Applicant to plead guilty.
 - b. Failed to put a defense at the sentencing stage.
 - c. Failed to challenge the prosecution's presentation of evidence.
 - d. Failure to adequately develop and present evidence retrieved by prosecution.

- e. Failed to make an independent investigation of the facts and circumstances of the case.
 - f. Failed to file an appeal.
 - g. Failed to call co-defendant's as eyewitnesses.
 - h. Counsel operated under a conflict of interest by working with an attorney hat was discharged/fired from the same case and did not advise the Applicant that they were working with that attorney.
2. Involuntary guilty plea.
 - a. Would not have pled guilty if counsel had not misinformed him that the Judge would give less time due to the facts of the case.

An evidentiary hearing into the matter was convened on July 12, 2015 at the Charleston County Courthouse. Applicant was present and represented by Rodney Davis, Esquire. Respondent was represented by J. Rutledge Johnson, Esquire, of the South Carolina Attorney General's Office. On August 28, 2015, by written Order, the Honorable Roger E. Henderson denied and dismissed the application with prejudice. Applicant subsequently filed a pro se Rule 59e Motion, the South Carolina Supreme Court refused to accept the motion because Applicant was represented by counsel.

On January 25, 2016, Benjamin John Tripp, Esquire, Appellate Defender for the South Carolina Commission on Indigent Defense, filed a Johnson Petition for Writ of Certiorari on Applicant's behalf. On December 16, 2016, the Supreme Court of South Carolina by written Order denied the petition and granted counsel's request to withdraw. The Remittitur was issued on January 4, 2017.¹

CURRENT APPLICATION

In his second and current post-conviction relief application, Applicant is alleging he is being held in custody unlawfully on the following grounds:

1. "PCR Counsel failed to file a 59(e) to bring to the PCR Court's attention that it did not Rule on all issues presented."

¹ Applicant also has a Petition for Federal Habeas Corpus currently pending before the United States District Court For the District of South Carolina (C/A No. 4:17-207-DCN-TER).

Also, before the Court are the records of the Berkeley County Clerk of Court, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's prior post-conviction relief action, Applicant's appellate records, and the records from this post-conviction relief action.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Statute of limitations

The application 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 Act"). Specifically, the Act requires as follows:

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

S.C. Code Ann. § 17-27-45(A).

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was guilty to the offense he currently challenges on November 30, 2012. Accordingly, Applicant was required to file this Application on or before November 30, 2013. Applicant did not file this Application until November 1, 2016; after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). Summary dismissal of a PCR application is appropriate when the application is filed after the statutory filing period. Leamon v. State, 363 S.C. 432, 611 S.E.2d 494 (2003). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ...that there

is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, this application is dismissed for failure to file within the time mandated by the Act.

Successive

This application for post-conviction relief should be summarily dismissed because it is successive to the previous application for post-conviction relief and fails to state a claim upon which relief can be granted. S.C. Code Ann. § 17-27-90 (1985) states:

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

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). “All applicants are entitled to a full and fair opportunity to present claims in one PCR application.” Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999). “Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than ‘one bite at the apple’ as it were.” Id. The “burden is on the applicant to establish that any new ground raised in a subsequent application could not have been raised in a previous application.” Id.

Applicant alleges he received ineffective assistance of counsel on his prior post-conviction relief application. Such a claim is not a ground for relief and not a sufficient reason to warrant a successive application. 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 post-conviction relief counsel performed adequately is not within the scope of the PCR Act. 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 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." 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 Applicant's Rule 59(e) motion, even if true, is not a sufficient reason warranting a successive PCR application. Accordingly, he has failed to meet the burden imposed upon him, and the Court summarily dismisses the application as successive to Applicant's previous PCR application, and for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), SCRCP.

CONCLUSION

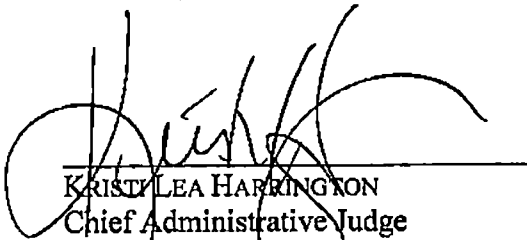
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Berkeley County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Judah VanSyckel, Esquire
Rasheeda Cleveland, Esquire
PCR Division – 9th Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Berkeley County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this _____ day of _____, 2017.

March 2011 South Carolina


KRISTY LEA HARRINGTON
Chief Administrative Judge
Ninth Judicial Circuit

Malcandi Terry SCDC 353344
L.C.I. (B) 5-23 B
P.O. Box 580
Una, SC 29378



S.C. Court of Appeals
Clerk of Court
P.O. Box 11629
Columbia, SC 29211

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