

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
) )  
Marco D. Bates, SCDC #249552 )  
) )  
Applicant, )  
) )  
v. )  
) )  
State of South Carolina )  
) )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT  
  
Case No. 2020-Cp-42-02417  
  
**CONDITIONAL ORDER  
OF DISMISSAL**

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SPARTANBURG COUNTY  
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This matter comes before the Court pursuant to the application for post-conviction relief filed by Applicant Marco D. Bates on July 21, 2020. Respondent made its return and motion to dismiss, asking that the application be summarily dismissed pursuant to S.C. Code Ann. §17-27-70(b).

**I. PROCEDURAL HISTORY**

The records before the Court show that Applicant is currently incarcerated in the South Carolina Department of Corrections. The Spartanburg Grand Jury indicted Applicant during its June 1997 term for murder and possession of a firearm during the commission of a violent crime (97-GS-42-2599) and during its May 1998 term for discharging a firearm into a dwelling (98-GS-42-2419). J. Michael Bartosh, Esq., represented him on the charges.<sup>1</sup> On May 4-8, 1998, Applicant proceeded to a jury trial before the Honorable John C. Hayes, III, where he was convicted as indicted. Judge Hayes sentenced him to life imprisonment for murder, five years for possession of a firearm, and ten years for discharging a firearm, with the sentences to be served concurrently. Judge Hayes denied Applicant's subsequent Motion to Reconsider the sentences.

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<sup>1</sup> Mr. Bartosh is now deceased.

A timely notice of appeal was filed on Applicant's behalf, and Robert M. Dudek, Esq., of the South Carolina Office of Appellate Defense perfected the appeal. Senior Assistant Attorney General William Edgar Salter represented the State. Applicant raised the following issue on appeal:

Whether the judge erred by refusing to instruct the jury on voluntary manslaughter, where there was evidence the drug dealers robbed defendant Thomason by intimidation with a weapon, where the state's evidence also was that the three defendants were enraged by the robbery, acted in concert, proceeded a short distance to the drug dealer's trailer, and shot at it, since this was a shooting in a heat of passion upon a sufficient legal provocation?

The South Carolina Supreme Court affirmed Applicant's convictions and sentences. *State v. Bates*, Op. No. 2000-MO-141 (filed November 22, 2000). On January 10, 2001, the Supreme Court denied Applicant's Petition for Rehearing and issued the Remittitur.

**2002-CP-42-0055**

Applicant filed his first PCR application on December 26, 2001, and January 9, 2002.<sup>2</sup> On December 17, 2004, an evidentiary hearing was convened at the Spartanburg County Courthouse before the Honorable Roger L. Couch. Applicant was present at the hearing and represented by Scott D. Robinson, Esq. Assistant Attorney General Adrienne L. Turner represented the State at the hearing. Applicant testified on his own behalf while the State presented the testimony of trial Counsel Bartosh. Following the hearing, Judge Couch issued denied and dismissed the action by written order filed on November 17, 2006. In the Order of Dismissal, Judge Couch addressed Applicant's claims that trial counsel was ineffective because he failed to (1) move to suppress a co-defendant's statement; (2) move to sever; (3) object regarding the three possible witnesses'

<sup>2</sup> By Order of Merger dated September 18, 2002, the Honorable Gary E. Clary merged the first PCR application filed on December 21, 2001 (01-CP-42-3849) into the second application filed on January 9, 2002 (02-CP-42-0055). The first application (01-CP-42-3849) was dismissed upon the merger.

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statements and to investigate and call these witnesses; (4) hire and call an expert witness; (5) investigate the bullet found in a tree; (6) object to the alternate juror's participation in jury deliberations, (7) argue the trial court lacked subject matter jurisdiction based on the arrest warrant; and (8) move to quash the indictments. The Order of Dismissal also addressed Applicant's claim that he received ineffective assistance of appellate counsel because appellate counsel failed to include arguments that: (1) the trial court erred in denying the motion to sever; (2) the trial court erred in denying the motion for a directed verdict; (3) the trial court erred in instructing the jury on the theory of accomplice liability; (4) the trial court erred by denying the motion to instruct the jury regarding the credibility of witnesses who violated the sequester order; and (5) the trial court lacked subject matter jurisdiction based on the indictments.

Applicant subsequently filed a *pro se* Petition for Writ of Certiorari, as well as a *Johnson* Petition for Writ of Certiorari through Wanda H. Carter, of the South Carolina Commission on Indigent Defense, and requested that she be relieved as counsel. The Court of Appeals denied the Petition on May 2, 2008. The Court issued the Remittitur on May 20, 2008.

**C/A No. 9:08-2273-HMH-MCIV**

Applicant filed a *pro se* Petition for Writ of Habeas Court with the United States District Court for the District of South Carolina on July 18, 2008. Applicant raised the following issues:

1. Whether the Court erred in charging the jury with voluntary manslaughter.
  - a. There was evidence of sufficient provocation to support the lesser included offense, this was a question to be decided by the jury, and in denying the charge I was denied a fair trial.
2. Ineffective assistance of counsel
  - a. Counsel was ineffective for failing to move to suppress co-defendant Jarvis Thomason's statement. Counsel should have objected to the statement being entered into evidence. Although counsel did get petitioner's name redacted, it still did not remove the prejudice in such that it raises a *Bruton* issue, simply because the redaction prejudiced petitioner. Surely the jury knew who's name was redacted and the appearance of the redacted "name and

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involvement” surely prejudiced petitioner in that resulted in an unfair trial.

- b. Counsel was ineffective for failing to object regarding the three possible witnesses’ statements and to investigate and call these witnesses. Trial counsel at PCR testified that the witnesses’ statements contained hearsay, which he did not believe would be admissible. Yet this would be an issue for the court and an in-camera hearing to determine. By counsel failing to investigate a plausible defense, it clearly denied Petitioner his constitutional guarantee to effective assistance of counsel and his constitutional right to a fair trial. The PCR Judge ruled that Petitioner did not present these witnesses at the PCR hearing. Again, the State has appointed PCR counsel, in which Petitioner has no control over. Petitioner should not be penalized because appointed PCR counsel did not subpoena these witnesses. The PCR court simply ruled arbitrarily and capriciously in such that the PCR court’s Order of denial supplied counsel with reasonable reasons.
  - c. Counsel was ineffective for failing to hire and call an expert witness. At PCR, counsel testified that he did consult with an expert witness, and that he hired Don Gurnt. According to trial counsel, Gurnt determined the fatal bullet came from outside the trailer, so counsel said he did not call Gurnt as a witness. Now in looking at this issue, counsel’s testimony about what Gurnt (allegedly) said or would have testified to carry (NO) weight because Gurnt did (NOT) testify at the PCR hearing, so counsel’s cover-up testimony about what Gurnt supposedly said is without merit and should not be given any weight. Surely this cannot be considered strategic.
3. Ineffective PCR counsel
    - a. Post-conviction relief counsel failed to follow procedure mandated by law, and in doing so violated petitioner’s constitutional right by denying petitioner due process.
  4. Indictment defective and unconstitutional jury instruction
    - a. PCR counsel failed to address trial counsel’s failure to address these two issues. Therefore petitioner addressed them through State Habeas Corpus.

Respondent made its return to the Petition on October 10, 2008 and moved for summary judgment, arguing that he had not properly presented federal questions, the facts did not support Applicant’s assertions, and his claims were barred because they had not been properly raised before the South Carolina Supreme Court. On August 5, 2009, United States District Judge Henry M. Herlong, Jr., granted Respondent’s Motion for Summary Judgment. Applicant filed a *pro se*

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notice of appeal on August 17, 2009. The certificate of appealability was denied and the appeal was dismissed on March 1, 2010, via unpublished per curiam opinion (No. 09-7549). Applicant filed a Petition for Rehearing on March 19, 2010, which was denied via written order on April 13, 2010.

**2008-CP-42-4735**

Applicant filed his second PCR application on September 10, 2008. He alleged the following:

1. Newly discovered evidence regarding the expert hired by trial counsel and the failure of prior post-conviction relief counsel to secure the testimony of that expert.

When asked about supporting grounds for the allegation, Applicant stated, "as soon as funds are secured for the expert's services, an Affidavit will be submitted to the Court." The Honorable J. Derham Cole dismissed the application by Written Order dated 6, 2009.

**2012-CP-42-3506**

Applicant filed his third PCR application on August 17, 2012. In this application he alleged ineffective assistance of counsel. Judge J. Mark Hayes<sup>3</sup> issued Conditional Order of Dismissal on October 4, 2013 due to the application's successiveness, *res judicata*, and the failure to comply with the Uniform-Post Conviction Procedure Act's one-year statute of limitations. S.C. Code Ann. §17-27-45(a). Applicant was given twenty (20) days to show why the dismissal should not become final.

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<sup>3</sup> Judge Hayes is currently the Chief Administrative Judge for Common Pleas in the Seventh Circuit, but because both Judge Hayes and Seventh Circuit Chief Administrative Judge for General Sessions R. Keith Kelly have ruled upon Applicant's previous PCR applications, the motion to dismiss and proposed conditional order of dismissal are being sent to the Honorable Grace Gilchrist Knie, Seventh Circuit Court Judge.

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Applicant responded by submitting pages from his first post-conviction relief hearing transcript, a motion for discovery based upon an allegation of *Brady* violations, and an amendment to his application where he alleged ineffective assistance of trial counsel and PCR counsel, and a lack of subject matter jurisdiction. The Court rejected Applicant's reasoning and entered a Final Order of Dismissal with Prejudice on May 13, 2015.

## II. ALLEGATIONS RAISED IN THE CURRENT ACTION

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Exhibit (A) – After-Discovered Evidence; Dated: February 5, 2020; letter to Spartanburg Co. Clerk of Court, Ms. Tanya Camp, Court Supervisor and response of that letter dated: March 5, 2020. This letter shows that there were no documentation in my file that authorized funds for an expert.
2. Exhibit (B) – 2004 PCR Hearing for Applicant where his court-appointed trial attorney gave testimony that he hired a forensic expert Don Gurnt because 'there's a expert witness fund and that's where the money came from to hire Mr. Gurnt.' Exhibit (B) shows where court-appointed trial attorney Mike Bartosh is committing fraud upon the court.
3. Exhibit (C) – shows trial attorney testimony admitting to having no investigation; he testified that he 'did not have a investigation that would establish that that bullet either did or did not kill (victim).'
4. Exhibit (D) – shows trial attorney testimony of him admitting he had no independent testing.

In the pages attached to Applicant's application he alleges that he has recently received a letter from the Spartanburg County Clerk of Court stating that he had no funds on file for the retention of expert witness testimony at trial. Applicant attaches several excerpts from an earlier PCR hearing where his trial counsel was questioned on direct and cross-examination about his trial decisions regarding hiring an expert witness. Applicant also includes a memorandum arguing that this letter and testimony constitute newly discovered evidence entitling him to an evidentiary hearing and post-conviction relief.

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Before this Court are the Spartanburg County Clerk of Court's records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the present application for post-conviction relief, the trial transcript, and the transcript and records from Applicant's prior PCR and federal habeas corpus actions.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

#### *Newly Discovered Evidence*

This Court finds Applicant's assertion that his recent discovery of a letter from the Spartanburg Clerk of Courts, stating that it had no record of funds for expert witnesses in Applicant's file, necessitating an evidentiary hearing and ultimately a grant of post-conviction relief is without merit. The Uniform Post-Conviction Relief Act states that a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of material fact not previously presented, the post-conviction relief application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been discovered through exercising reasonable diligence. S.C. Code Ann. § 17-27-45 (C). An applicant requesting a new trial based on after-discovered evidence post-conviction must show the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

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*Hayden v. State*, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Here, Applicant alleges his recent discovery that the Clerk of Court's records did not contain information about funds for expert witnesses at trial amounts to newly discovered evidence necessitating an evidentiary hearing and ultimately a grant of post-conviction relief. However, Applicant has failed to make a *prima facie* showing that he is entitled to an evidentiary hearing on this ground. The evidence itself is immaterial to Applicant's guilt and Applicant's explanation of its purpose would be to impeach his trial counsel. Furthermore, this evidence could have been discovered before trial and Applicant has not adequately explained why it would likely change the result of his trial if it had been discovered at that time. Thus, this Court finds that Applicant has not met his burden of establishing newly discovered evidence, is not entitled to an evidentiary hearing on these grounds, and the allegations are summarily dismissed.

#### *Statute of Limitations*

This Court also finds this application should be summarily dismissed as barred by the statute of limitations as set forth in the Uniform Post-Conviction Procedure Act.

Specifically, the Act requires as follows:

- (a) 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.
- (b) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

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- (c) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

The South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consolidated School District of Aiken*, 315 S.C. 487, 445 S.e.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

In the present case, Applicant pursued a direct appeal following his 1998 conviction and the remittitur was returned to the circuit court on January 10, 2001. Applicant subsequently filed multiple applications for post-conviction relief, the most recent of which was denied and dismissed with prejudice on May 13, 2015. Therefore, he had until January 11, 2002, to timely pursue post-conviction relief pursuant to S.C. Code Ann. § 17-27-45(A). Applicant instituted the current action on July 21, 2020, more than eighteen years after the tolling of the statute of limitations. He has failed to set forth any proper ground for equitable tolling of the statute of limitations and has not established a *prima facie* case for newly discovered evidence. Therefore, his application is untimely pursuant to S.C. Code Ann. § 17-27-45. Therefore, this Court finds this application must be summarily dismissed for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

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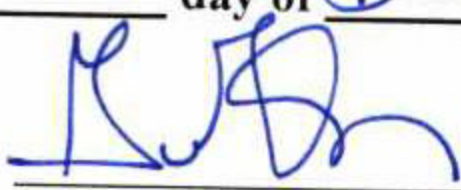
IV. CONCLUSION

Pursuant to S.C. Code Ann. §17-27-70(b), this 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
PCR Division – 7<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, SC 29211

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

AND IT IS SO ORDERED this 10<sup>th</sup> day of December, 2020.



Grace Gilchrist Knie  
Circuit Court Judge  
Seventh Judicial Circuit

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ALAN WILSON  
ATTORNEY GENERAL

November 12, 2020

The Honorable Grace G. Knie  
Circuit Court Judge  
180 Magnolia Street  
Spartanburg, South Carolina 29306

**Re: Marco D. Bates, #249552 v. State of South Carolina**  
**2020-CP-42-02417**

Dear Judge Knie:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. Respondent's return and motion to dismiss has also been sent to your chambers for your consideration. If this proposed order meets your approval, please sign and forward to the Spartanburg County Clerk of Court for filing with the enclosed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,

/s/ William H. Ray  
William H. Ray  
Assistant Attorney General

WHR/ec  
Enclosure(s)

cc: Marco D. Bates, #249552

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