

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
)  
)  
Tyrone B. Perry, #307793, )  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-42-01661

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of a post-conviction relief application filed by Tyrone B. Perry (hereafter "Applicant") on May 7, 2019. Respondent made its return, requesting the application be summarily dismissed.

**I. Procedural History**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2005, the Spartanburg County Grand Jury indicted Applicant for murder (2005-GS-42-0836). James Hatcher, Esquire represented Applicant. Assistant Solicitor Jennifer Wells, Esquire prosecuted the case. On February 1, 2006, Applicant pleaded guilty as indicted before the Honorable J. Cordell Maddox, circuit court judge. Judge Cordell sentenced Applicant to fifty years' imprisonment.

Applicant timely notice of appeal. Robert M. Dudek, Esquire, filed a brief on Applicant's behalf, pursuant to *Anders v. California*, 386 U.S. 738 (1967), and a petition to be relieved as counsel. The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Perry*, Op. No. 2008-UP-217 (S.C. Ct. App. filed April 7, 2008). The remittitur was issued on April 24, 2008.

***First PCR Action: (2008-CP-42-0898)***

Applicant subsequently filed his first PCR application on February 19, 2008, alleging:

1. "Ineffective Assistance [of] Counsel."
  - a. "Failure to investigate witnesses."
  - b. "Failure to investigate medical records."
  - c. "Failure to file motion for coerced statements to be suppressed."
2. "Involuntary Guilty Plea."

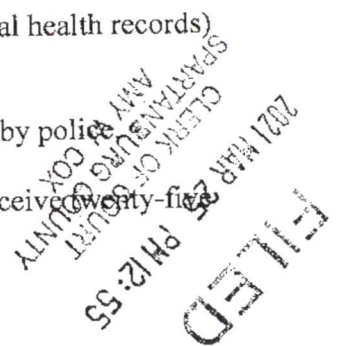
Respondent made its return on May 13, 2008. An evidentiary hearing into the matter was convened on July 28, 2009, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by Kenneth P. Shabel, Esquire. Matthew J. Friedman, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On October 13, 2009, the Honorable J. Mark Hayes II, issued the order of dismissal denying Applicant's PCR application.

On March 15, 2010, Wanda H. Carter, Esquire filed a petition for writ of certiorari on behalf of Applicant in the South Carolina Supreme Court, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), and a petition to be relieved as counsel. On July 2, 2011, by written order the South Carolina Supreme Court denied the petition for writ of certiorari and granted the petitioner to be relieved as counsel. The remittitur was issued on August 9, 2011.

***First Habeas Corpus Action: (1:11-2334-MBS-SVH)***

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on August 25, 2011. Applicant set forth the following grounds for relief:

1. Failure to call witnesses (investigate).
  - a. Crime scene witnesses, alibi witnesses. Failure to investigate witnesses before advising to plead.
2. Failure to investigate medical records.
  - a. Ineffective for failing to investigate medical records (mental health records) and psychiatrists of petitioner.
3. Failure to suppress statements.
  - a. Failed to file motion to suppress coerced statements made by police.
4. Government breached plea agreement.
  - a. Plea counsel coerced petitioner by telling him he would receive county file



years with two witnesses present. Petitioner actually got fifty years.

Respondent filed its return and motion for summary judgment, dated December 19, 2011. On May 17, 2012, Magistrate Judge Shiva V. Hodges issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Perry v. McCall*, 1:11-2334-MBS-SVH, 2012 WL 3749484 (D.S.C. 2012). On August 28, 2012, the Court Judge adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Perry v. McCall*, 1:11-2334-MBS-SVH, 2012 WL 3751568 (D.S.C. 2012).

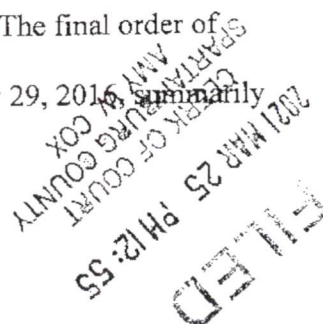
Applicant gave notice of his appeal to the Fourth Circuit Court of Appeals on September 12, 2012. The Fourth Circuit Court of Appeals dismissed Applicant's appeal on March 12, 2013 for want of a certificate of appealability. *Perry v. McCall*, 513 Fed. Appx. 363 (4th Cir. 2013). Applicant thereafter filed a petition for writ of certiorari to the United States Supreme Court on July 16, 2013. Respondent made its brief in opposition on January 21, 2014. The Supreme Court denied the petition on February 24, 2014. *Perry v. McCall*, 134 S.Ct. 1276 (2014).

***Second PCR Action: (2014-CP-42-2164)***

Applicant filed his second PCR application on May 30, 2014, in which he alleged the following:

1. "Austin violation pursuant to *Austin v. State*, 409 S.E.2d 395 (1992)."
2. "Unkept plea agreement."
3. "Marlar violation pursuant to *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007)."

Respondent made its return and motion to dismiss on April 9, 2015, requesting the case be summarily dismissed for successiveness, and untimeliness. The conditional order of dismissal was issued by the Honorable R. Keith Kelly and filed on April 16, 2015. The final order of dismissal, issued by the Honorable Roger L. Couch, was filed on January 29, 2016, summarily



dismissing the case.

***Second Habeas Corpus Action: (1:14-4472-BHH-SVH)***

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on November 25, 2014. Applicant set forth the following grounds for relief:

1. Plaintiff's procedural due process by the Fourteenth amendment was violated and equal protection of law to a fair hearing.
2. The Court of Appeals erred in dismissing the appeal for failing to pay filing fee.
3. The State impeded on Plaintiff's ability to comply with State rules.

On November 25, 2014, Magistrate Judge Shiva V. Hodges issued the report and recommendation that Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Perry v. Cartledge*, 1:14-4472-BHH-SVH (D.S.C. 2014). Applicant's objection to the report and recommendation was filed on December 11, 2014. On August 27, 2015, the Honorable Bruce Howe Hendricks, United States District Judge, adopted the Magistrate's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Perry v. Cartledge*, 1:14-4472-BHH-SVH (D.S.C. 2014).

***Third PCR Action: (2015-CP-42-4338)***

Applicant subsequently filed his third PCR application on October 19, 2015, alleging:

1. "Incompetent at the time of the guilty plea.
2. "Ineffective assistance of Counsel."
  - a. "Counsel fail[ed] to get a second opinion [concerning Applicant's mental health issues]."

Respondent made its return and motion to dismiss on March 23, 2017, for successiveness, untimeliness, and as barred by the doctrine of *res judicata*. On March 30, 2017, the Honorable J. Derham Cole issued the conditional order of dismissal, filed on April 3, 2017.

Applicant filed a *pro se* notice of appeal on April 25, 2017 from the conditional order of dismissal. The court issued a written order dismissing the notice of appeal, without prejudice.

FILED  
2021 MAR 25 PM 12:55  
CLERK OF COURT  
SPRINGFIELD COUNTY

because the order was not an appealable order. The final order of dismissal was filed August 15, 2017. The remittitur was issued on May 17, 2017.

On August 28, 2017, the South Carolina Supreme Court filed a letter, sent to Applicant, requesting he provide an explanation regarding why the circuit court's determination that the action was barred for successiveness and untimeliness as required by 243(c) SCACR. Applicant sent a letter dated September 22, 2017 to the court, which was treated as a motion for reinstatement under Rule 260(a) SCACR. By letter dated September 26, 2017, the Court requested Applicant provide a copy of a Rule 243(c) explanation within ten days of the date of the letter. The Rule 243 explanation was filed on October 3, 2017, which was reject by the court, by written order filed November 14, 2017. Applicant filed a petitioner for rehearing on December 15, 2017, which was denied, by written order, filed February 1, 2018. The remittitur was filed on February 2, 2018.

## II. Current Action before this Court

In his fourth and current PCR application, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Ineffective assistance of counsel for:
  - a. "Under 17-27-45(b) Goss v. State violation."
  - b. "Under 17-27-45(b) Rodriguez –Penton v. U.S. violation"
    - i. "Addition now."
    - ii. "Brain Disorder."
  - c. "Under 17-27-45(b) McCoy v. Louisiana violation."
  - d. "testimony of several witnesses credibility but didn't testify live."
  - e. "no constitutional right to plea bargaining. I have right to EC in that process."
  - f. "Counsel not permitted to act contrary to client's decision even if they believe it is in their client's best interest."

Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, this PCR application, and prior appellate PCR and habeas action records.

SPARTANBURG COUNTY  
CLERK OF COURT  
2021 MAR 25 PM 12:55  
FILED

### III. Findings of Fact and Conclusions of Law

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to South Carolina Code Annotated Sections 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

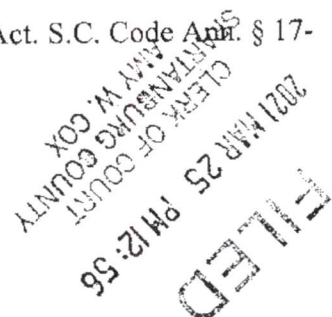
#### *Res Judicata*

The application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Casualty Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. In fact, Applicant raised ineffective assistance of counsel claims in all prior action, including claims about alleged ineffectiveness for failing to assess and raise mental health concerns, concerns about plea bargaining, and claims concerning witnesses and witness testimony and credibility; claims he now seeks to raise again. The finality of the previous Court rulings should be respected, and the application shall be summarily dismissed as barred by the doctrine of *res judicata*.

#### *Statute of Limitations*

The Court finds that this application must 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. 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 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 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). 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, South Carolina Code Annotated Section 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.”

Applicant pled guilty to all charges on February 1, 2006 and the remittitur from the direct appeal was issued on April 24, 2008. The application was therefore due on April 25, 2009. This application was filed on May 7, 2019, well beyond the statutory filing period. Therefore, the application should be summarily dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

#### *Successiveness*

The application shall be summarily dismissed because it is successive to Applicant’s previous PCR application. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

FILED  
2021 MAR 25 PM 12:56  
CLERK OF COURT  
Spartanburg County  
Spartanburg, SC

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 PCR 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). 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 the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s prior PCR application; thus, the current application is successive and barred under South Carolina Code Annotated Section 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous PCR application. Therefore, he has failed to meet the burden imposed upon him, and the application shall be dismissed as successive to Applicant’s previous PCR application.

#### IV. Conclusion

Pursuant to South Carolina Code Annotated Section 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 days from the date of service of this order upon him to show why this order should not become

FILED  
2021 MAR 25 PM 12:56  
CLERK OF COURT  
SPARTANBURG COUNTY  
Spartanburg, SC

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  
Attn: Chelsey F. Marto, Esquire  
PCR Division – Seventh Circuit  
P.O. Box 11549  
Columbia, South Carolina 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 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 25<sup>th</sup> day of March, 2021.



GRACE GILCHRIST KNIE  
Chief Administrative Judge  
Seventh Judicial Circuit

Spartanburg, South Carolina



FILED  
2021 MAR 25 PM 12:56  
CLERK OF COURT  
SPARTANBURG COUNTY  
AMY W. COX