

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTH JUDICIAL CIRCUIT  
)  
)

Timothy Green, #324607

) 2020-CP-40-3207  
)

Applicant

v.

) **CONDITIONAL ORDER OF DISMISSAL**  
)

State of South Carolina,

Respondent

2021 OCT 20 AM 10:26  
RICHLAND COUNTY  
FILED

This matter comes before the Court by way of Applicant, Timothy Green's action for post conviction relief (PCR) filed July 17, 2020. Respondent made its Return and motion to dismiss on October 14, 2021. The Court hereby grants Respondent's motion to dismiss because the action is untimely, successive to Applicant's prior PCR actions, and fails to state a cognizable claim for relief.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2005 term, the Richland County Grand Jury indicted Applicant for murder (2005-GS-40-6547) and armed robbery (2005-GS-40-6546). Carolyn R. Gripp, Esquire, represented Applicant. Applicant pled guilty as indicted on October 17, 2007, before the Honorable Thomas Cooper Jr. Judge Cooper sentenced Applicant to thirty years' imprisonment for murder, and ten years for armed robbery, to be served concurrently. Applicant filed a timely Notice of Appeal and was represented by Deputy Chief Appellate Defender Wanda H. Carter of the South Carolina Office of Appellate Defense. On May 23, 2008, Counsel Carter filed an *Anders*<sup>1</sup>

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

brief on Applicant's behalf. Applicant thereafter withdrew his appeal. The South Carolina Court of Appeals dismissed Applicant's appeal by written Order on January 13, 2009. The Remittitur was issued on the same day.

i. First PCR Action and Subsequent Appeal (2009-CP-40-2144)

Applicant subsequently filed an application for PCR on March 23, 2009, in which he alleged the following grounds for relief:

1. "Trial court deprived Applicant of due process and equal protection when it did not rule upon the pro se motion to have trial counsel relieved due to a conflict of interest and the interruptions that the trial counsel placed into the attorney/client privileges, see attached documents for explanation;"
2. "Counsel ineffective for not exercising Applicant's trial rights when counsel failed to prepare for trial and investigate trial matters, trial counsel ineffective when it interfered with the adverse process when counsel did not assist Applicant with understanding the evidence process as in having it explained to him;"
3. "Counsel ineffective when failed to disclose the Brady motion materials to him as counsel found the excuses not to do so, whereas the counsel filled the position as the solicitor when she decided to waive all of Applicant's persona rights to a trial and statutory rights to an evaluation to trial issues to his criminal case matters;"
4. "Counsel ineffective when failed to have the Applicant's co-defendant statements authenticated pursuant to the rules of evidence and knowing that in order for the Applicant to present evidence to the trial court in his favor it must be accordingly to the rules of evidence as applicable;"
5. "Counsel failed to file pre-trial and post trial motions such: pre-trial motion according to S.C. Code Ann. §17-19-20, and 30, for the purposes of having the indictments quashed, dismissed, and or chares reduced in the situated effects accordingly to the mandates as: S.C. Const. Art. I, § 11, State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005); U.S. v. Cotton, 535 U.S. 625, 122 S. Ct. 1781 (2002) = challenges to its sufficiency must be made in accord. With §17-19-90 (2003);"
6. "Counsel ineffective when she failed to examine the forensic result reports, failed to investigate the finding of the police investigation as to what the actual findings was form handprints, etc., and counsel failed to examine the time of death that the solicitor testified to and without counsel cross examined on the records;"
7. "Counsel ineffective when she failed to get the applicant a competency examination due to the first hand expressed emotional stresses he displayed towards her and accordingly to the statements she was given prior the paperwork that was disclosed to her about the applicant, counsel ineffective

- when she failed to follow the McNaughten mandates in the regards to §17-24-10, 20, and 30, dictated by §44-17-510, and 530 U.S. Supreme Court;”
8. “Trial counsel ineffective when failed to advise applicant of his constitutional rights in re to Craig v. M.D., Supra. Rights;”
  9. “Trial counsel ineffective for failure to visit with the applicant on an appropriate basis/schedule due to the nature of the charges against him, the counsel was further ineffective when the counsel allowed the state to not assign a co-counsel to the Applicant’s case matters to be represented by;”
  10. “Trial counsel ineffective when she did unauthorized communication with the solicitor’s office as in how she continued to keep the solicitor’s office aware of all confidential filings that Applicant filed to the clerk up until the document that was filed by Applicant requesting for the clerk to contact the solicitor for him, and counsel violated the professional conduct rules in regards to having all pro se filed matters to the clerk of court exposed to the solicitor’s office without the authorizations of it.”
  11. “Trial counsel ineffective when she failed to expedite litigation accordingly to the criminal procedures and civil by exercising the applicant’s rights as applicable to his criminal case matters before the Fifth Circuit General Sessions court, See as explained in regards to the provisions of the rules of professional conduct, see Rule 407, SCACR.: Rule 3.2, and Rule 8.4:”

Applicant included an additional three pages of explanation for the above allegations. Respondent made its return on April 29, 2009. An evidentiary hearing into the matter was convened on November 18, 2011, at the Richland County Courthouse before the Honorable L. Casey Manning. Applicant was present at the hearing and was represented by Tristan M. Shaffer, Esquire. On January 20, 2012, Judge Manning, issued the Order of Dismissal denying Applicant’s application for post-conviction relief with prejudice. On November 13, 2012, Appellate Defender Dayne C. Phillips filed a *Johnson*<sup>2</sup> petition for writ of certiorari in the Supreme Court of South Carolina on behalf of Applicant. Applicant additionally submitted a *pro se* brief. On March 1, 2014, by written order the South Carolina Court of Appeals denied the petition. The Remittitur was issued on March 27, 2014.

ii. Habeas Corpus Action (2:14-2405-MGL-WWD)

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<sup>2</sup> *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

Applicant thereafter filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on Jun 18, 2014. In his petition, Applicant set forth the following grounds for relief:

**Ground One:** Ineffective assistance of trial counsel

Supporting facts: Trial counsel was ineffective for advising petitioner to plead guilty based off of the threat of a trial tax and the assumption that petitioner was looking at a recommendation of forty-five years [*sic*] a life sentence if he went to trial. Counsel advised Petitioner to plead guilty to avoid lengthy sentence if he go to trial.”

**Ground Two:** Ineffective assistance of trial counsel

Supporting facts: Counsel failed to adequately put up a meaningful defense by conducting an investigation on the case, in order for the petitioner to make an informed decision to plead guilty.

**Ground Three:** Ineffective assistance of trial counsel

Supporting facts: Trial counsel was ineffective for a conflict of interest trial counsel placed into the attorney/client privileges when counsel met with Petitioner, his mother at the solicitor’s office for two hours and not in the public defender’s office where she worked, trying to get petitioner to plead guilty. Abusing attorney/client privileges.

**Ground Four:** Ineffective assistance of P.C.R Counsel

Supporting facts: P.C.R. counsel failed to raise all petitioner’s issues on P.C.R from application, P.C.R counsel was ineffective and prejudice petitioner by not raising all available issues for P.C.R. P.C.R Counsel also failed to filed rule 59e motion to alter and amend judgement to properly preserve Petitioner’s issues.

**Ground Five:** Ineffective assistance of counsel

Supporting facts: Trail counsel was ineffective for failing to investigate and advising petitioner to plead guilty. When the record clearly show that petitioner’s co-defendant, Curtis Harris, gave a sworn affidavit claiming all responsibility for the the crime exhornerating petition of any wrong doing. Counsel could have cross –examin co-defendant at trail.

**Ground Six:** The lower court erred in denying appellant’s motion to relieve counsel.

Supporting facts: Prior to entering the plea, appellant voiced his motion to relieve counsel since counsel had not advised as to why a plea appeared to be more beneficial than a trail.

Respondent filed its return and motion for summary judgment on October 2, 2014. The Honorable Wallace W. Dixon, United States Magistrate Judge, issued the Report and

Recommendation on November 21, 2014, recommending Respondent's motion for summary judgment be granted and Applicant's petition dismissed with prejudice. On December 10, 2014, the Honorable Mary G. Lewis, United States District Judge, accepted the Report and Recommendation, dismissing Applicant's petition with prejudice and denying a certificate of appealability. *Green v. Bush*, No. 2:14-2405-MGL (D.S.C. Dec. 10, 2014) Applicant appealed the Court's decision. On May 6, 2015, the United States Court of Appeals for the Fourth Circuit dismissed the appeal and denied a certificate of appealability. *Green v. Bush*, 601 F. App'x 235 (4th Cir. 2015). Applicant thereafter petitioned for writ of certiorari to the United States Supreme Court. The petition was denied January 11, 2016. *Green v. Bush*, 577 U.S. 1079 (2016).

iii. Second PCR Action and Appeal (2016-CP-40-0847)

Applicant filed a second application for PCR on February 9, 2016, in which he alleged the following grounds for relief:

1. "Newly Discovered Evidence. Applicant co-defendant sent on the day of Sept 1, 2015 his P.C.R. transcript. Which shows that counsel was ineffective under Rule 407 Rule of Professional Conduct."
  - a. "On Sept 1 2015 Applicant received in the mail co-defendants P.C.R. transcript. In his P.C.R. co-defendant Mr. Harris was questioned by the State Attorney Mr. Patrano. Mr. Patrano ask Mr. Harris were he prepared to testify against the applicate, but was prepared to say that he Mr. Harris was responsible for killing the victim. and that the applicate was not responsible for the murder which he was charge."

Respondent made its Return and motion to dismiss on September 6, 2016. On September 20, 2016, the Honorable DeAndrea G. Benjamin, issued a Conditional Order of Dismissal, provisionally denying and dismissing the action, while giving Applicant twenty days to show why the dismissal should not become final. Applicant filed a response to the Order. On April 24, 2017, Judge Benjamin, issued the Final Order of Dismissal denying and dismissing the PCR action with prejudice. Applicant appealed the denial of his PCR action. On August 18, 2017, the South

Carolina Supreme Court dismissed Applicant's appeal for failing to show an arguable basis for asserting the lower court determination was improper pursuant to Rule 243(c), SCACR. The Remittitur was issued September 6, 2017.

### **CURRENT APPLICATION**

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

1. "Forensic DNA testing"
2. "Brady Violation"
  - a. "Prosecutor withheld favorable evidence from the applicant when counsel requested for DNA forensic on the murder weapon (see transcript pg 13 lines 13-21) that the state allegedly held in indictment. Murder was committed by striking the victim with a brick which resulted in his death. Applicant explains that the victims DNA would be on the murder weapon that was allegedly used. According to Richland County Sheriff's Department blood was indicated on items listed in the Examinations and results: (See Exhibit A-C). None of the listing listed the murder weapon (brick) with DNA or blood on it. Only had the vevidence been disclosed to the defense the result of the proceeding would have been different. Failure to disclosed the requested documents constitution a Rule 5 violation where the applicant suffered prejudice from the violation."

For purposes of this Conditional Order of Dismissal, the Court incorporates the Richland County Clerk of Court records, Applicant's SCDC records, the plea transcript, Applicant's appellate records, the records from Applicant's prior PCR actions and subsequent appeal, the records from Applicant's prior habeas corpus actions, and the records of this PCR action.

### **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 as there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See* S.C. Code Ann. § 17-27-70(b)

(establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief). Respondent moved for summary dismissal, and this Court finds summary dismissal is appropriate for the following reasons:

### **Statute of Limitations**

The Court finds that this PCR shall 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:

(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.

(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). Additionally, 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 is alleging he is entitled to post-conviction relief based on allegations of prosecutorial misconduct. However, Applicant failed to comply with the filing requirements under S.C. Code Ann. § 17-27-45. Applicant pled guilty on October 17, 2007, and pursue a direct appeal. Applicant withdrew his appeal and the Remittitur issued January 13, 2009. Pursuant to section 17-27-4(A), Applicant needed to file his application for post-conviction relief on or before January 14, 2010. Applicant did not file his application until July 17, 2020, well beyond the statute of limitations. Moreover, sections 17-27-45(B) and 17-27-45(C) are inapplicable to Applicant’s current PCR application as he alleges no new rights to be applied retroactively, and raised no allegations of newly discovered evidence. Accordingly, this application is untimely pursuant to section 17-27-45 and shall be dismissed for failure to file within the time mandated by Uniform Post-Conviction Procedure Act.

### **Successive Applications**

The Court further finds the application must be summarily dismissed because it is successive to Applicant’s previous PCR applications. 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:

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.

Pursuant to section 17-27-90, successive PCR actions are barred 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). The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” *Id.* 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. 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).

Here, Applicant’s current allegations were or could have been raised in the proceedings based on Applicant’s prior application for post-conviction relief; thus, the current application is successive and barred under section 17-27-90 of the South Carolina Code. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, Applicant has failed to meet the burden imposed

upon him, and the Court shall summarily dismiss the application as successive to Applicant's previous PCR applications.

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

This Court finds the application shall be summarily dismissed for failure to state a claim cognizable under the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160.

Pursuant to the 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.

Applicant's action contains allegations that fail to raise a cognizable claim for relief, specifically; Applicant alleges prosecutorial misconduct for a Brady violation. Prosecutorial misconduct is not an issue for post-conviction relief. Rather, this allegation is a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for an appeal. *Simmons v. State*, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. *Drayton v. Evatt*, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as grounds for relief. Regardless, it is applicant's burden to prove actual prosecutorial misconduct. *Alabama v. Smith*,

490 U.S. 794, 109 S. Ct. 2201 (1989). Respondent submits Applicant has not carried his burden of proving actual prosecutorial misconduct.. For these reasons and pursuant to Rule 12(b)(6), SCRPC, this Court shall dismiss the application for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

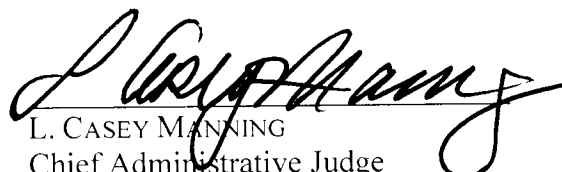
**CONCLUSION**

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 Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Yasmeen E. Klein, Assistant Attorney General  
PCR Division – Fifth Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Richland County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, 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 18 day of October, 2021.

  
L. CASEY MANNING  
Chief Administrative Judge  
Fifth Judicial Circuit

Columbia, South Carolina