



ALAN WILSON  
ATTORNEY GENERAL

September 7, 2021

The Honorable Amy W. Cox  
Spartanburg County Clerk of Court  
Post Office Box 3483  
Spartanburg, South Carolina 29304

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SPARTANBURG COUNTY  
AMY W. COX

Re: **Kenneth J. Craig, #310521 v. State of South Carolina**  
**2020-CP-42-01791**

Dear Ms. Cox:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable J. Derham Cole, in the above-captioned case, for filing in your office.

Should you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,

Chelsey F. Marto  
Assistant Attorney General

CFM/ec

Enclosure

Cc: Kenneth J. Craig, #310521

STATE OF SOUTH CAROLINA )  
 COUNTY OF SPARTANBURG )  
 )  
 )  
 Kenneth J. Craig, #310521 )  
    Applicant, )  
 )  
    v. )  
 )  
 State of South Carolina, )  
    Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 IN THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2020-CP-42-01791

**CONDITIONAL ORDER OF DISMISSAL**

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This matter comes before the Court by way of a post-conviction relief application filed by Applicant Kenneth J. Craig on June 1, 2020. 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 December 2012, the Spartanburg County Grand Jury indicted Applicant for armed robbery (count one) and possession of a firearm during the commission of a violent crime (county two) (2012-GS-42-2199), which was amended in June 2013. In June 2013, the Spartanburg County Grand Jury indicted Applicant for attempted armed robbery (2013-GS-42-2844, -2845, -2846, -2847, -2848, -2849, -2850, -2851, -2852, -2853, -2854), armed robbery (2013-GS-42-2855). Richard Whelchel, Esquire represented Applicant. Assistant Solicitors Jennifer Jordan and Susan Reese, Esquires, prosecuted the case. On July 22-25, 2013, Applicant proceeded to trial before the Honorable Roger L. Couch, and a jury. The jury found Applicant guilty as indicted on all charges and Judge Couch sentenced Applicant to twenty years' imprisonment on the armed robbery charges, ten years' imprisonment on all attempted armed robbery charges, and five years' imprisonment on the weapons possession charge. The first armed robbery sentence ran

consecutively to the first attempted armed robbery sentence, with the remaining sentences running concurrently to the first armed robbery sentence.

Applicant filed a timely notice of appeal on August 8, 2013, that was perfected by D. Gregory Placone, Esquire, through filing a brief on December 23, 2013. Briefing was completed on June 10, 2014. Oral argument was held on November 6, 2014. The South Carolina Court of Appeals affirmed the lower court's finding by unpublished opinion. *State v. Craig*, 2014-UP-431 (filed Nov. 26, 2014). The remittitur was issued on December 12, 2014.

***First PCR Action: (2015-CP-42-00937)***

Applicant subsequently filed his first PCR application on March 6, 2015, alleging

1. "Ineffective Assistance of Counsel"
  - a. "failed to object to 'invalid warrant.'"
  - b. "failed to instruct the jury on a lesser-included offense of 'strong arm robbery.'"
  - c. Counsel never argued that no gun or weapon was presented as evidence.
  - d. Counsel failed to request photo lineup.
  - e. "Counsel failed to present G.S.R. expert."
  - f. "[Counsel] failed to file a motion to suppress."
2. 6<sup>th</sup> and 14<sup>th</sup> Amendment violations
  - a. "Due Process rights were violated."
3. "Conflict of Interest."
  - a. "Judge that signed my arrest warrant(s) was the mother of one the victim/witness."

Respondent made its return on or about December 18, 2015. An evidentiary hearing into the matter was convened on June 13, 2016, at the Spartanburg County Courthouse. Applicant was present at the hearing and was represented by J. Brandt Rucker, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent. On June 16, 2017, the Honorable R. Ferrell Cothran, Jr. issued the order of dismissal denying Applicant's PCR application.

A notice of appeal was filed on July 31, 2017. On March 19, 2018, David Alexander,

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Esquire filed a petition for writ of certiorari and petition to be relieved as counsel in the Supreme Court of South Carolina, pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988). On January 15, 2019, by written order the Supreme Court of South Carolina denied the petition for writ of certiorari and granted the petition to be relieved as counsel. The remittitur was issued on February 4, 2019.

***Prior Habeas Corpus Action: (6:19-cv-00624-JFA-KFM)***

Applicant filed a *pro se* petition for writ of habeas corpus under 28 United States Code Section 2254 on March 4, 2019. Applicant set forth the following grounds for relief

1. "Ineffective Assistance of Trial Counsel."
  - a. "Trial Counsel failed to challenge warrant(s)/indictment(s) prior to jury being sworn in.:"
  - b. "Trial Counsel failed to properly [preserve] the 'lack of a neutral and detached magistrate' issue for direct appeal."
  - c. "Trial Counsel failed to challenge the 'hand of one, hand of all' jury charge."
  - d. "Trial Counsel failed to present gunshot residue expert at trial."
2. "Lack of a neutral and detached magistrate."
  - a. "The Magistrate Judge 'Nancy Atkins' issued the arrest warrant(s) for Petitioner's arrest knowing that he son 'Brent Atkins' was a victim in the January 21, 2012 waffle house robbery that the Petitioner is currently incarcerated for."
3. "Lack of subject matter jurisdiction."
  - a. "Prior to and during trial I was indicted and arrested for being the principle committer of said crime(s). During trial, the State broadened the charge(s) contained in my indictments by requesting the trial judge to give the jurors the jury charge, of 'hand of one, hand of all.' By doing so, the state constructively amended my indictment(s) which allowed me to be convicted for a charge I was never indicted on, I was not indicted within 90 days."
4. "Fourteenth Amendment violation"
  - a. "Prior to my trial I was never placed in a photo line-up, prior to my trial I was never identified as a suspect by neither a witness, nor victim. The State failed to obtain an identification in accord with 'Neil v. Biggers' 5 prongs. The warrants for my arrest are supported by 'bare bones' affidavits, and lack 'indicia.' The Magistrate Judge, Nancy Atkins, that signed my arrest warrants, was the mother of victim 'Brent Atkins.'"

Respondent filed its return and motion for summary judgment on or around June 20, 2019. On September 30, 2019, the Magistrate Judge issued the report and recommendation that

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Respondent's motion for summary judgment be granted and Applicant's petition be denied. *Craig v. Warden Lieber Correctional Institution*, 6:19-cv-00624-JFA-KFM (D.S.C. filed Sept. 30, 2019). Applicant's filed his objections to the report on October 18, 2019, and the State filed a response to the objection on October 31, 2019. On March 23, 2020, the Honorable Joseph F. Anderson, Jr., United States District Judge, adopted the Magistrate Judge's report and recommendation granting Respondent's motion for summary judgement and dismissed Applicant's petition. *Craig v. Warden Lieber Correctional Institution*, 6:19-cv-00624-JFA-KFM (D.S.C. filed Mar. 23, 2020).

**II. Statement of Facts**

On January 21, 2012, two men entered a Waffle House and ordered everyone to get down or they would die. (Tr. 155.) The first person, Dante Williams, was carrying a pistol and the second person had a black trash bag. (Tr. 156). Justin Harrison, a customer in the restaurant who was carrying a gun, shot and killed Williams when he came toward him. (Tr. 159). Harrison initially backed the second robber into a corner, but the robber was able to get away and run from the Waffle House. (Tr. 160). Officers obtained a warrant for Applicant, arrested him, and charged him with fourteen counts all stemming from the Waffle House incident. (Tr. 181-82).

At trial, the State called Brittany McSwain and Adisa Norman, who both testified they were at McSwain's home on the night of January 20, 2012. (Tr. 116, 141). McSwain testified she heard Applicant and Dante Williams discuss going on a mission that night. (Tr. 117). She recounted Williams leaving with Applicant around midnight. (Tr. 118). She specifically recalled Applicant taking off a brown and white jacket, and saying, "I'm in all black. Let's go." (Tr. 119). McSwain testified Applicant had gloves when he left and that Williams came back to retrieve his own gloves. (Tr. 120). She testified Applicant returned alone around 3:30 a.m. and was acting

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nervous and shaken up. (Tr. 120-21). Applicant told McSwain he dropped Williams off in Pineview Hills. (Tr. 121). Norman also testified that Applicant returned alone, was acting nervous, and said he dropped off Williams in Pineview Hills. (Tr. 144).

Justin Harrison, the Waffle House customer who shot and killed Williams, testified that two men entered the Waffle House shouting for everyone to get down or they would die. (Tr. 155). He testified both men were wearing all black, including black gloves. (Tr. 159). Harrison recalled Williams had something shielding his face from view but Applicant did not when Harrison initiated contact. (Tr. 159). He explained how he backed Applicant into a corner and held his gun on him but that Appellant started crawling toward Williams and eventually wrestled Harrison out the interior door. (Tr. 160-61). Harrison testified Applicant put his hands on Harrison's gun, when Harrison pulled the trigger. (Tr. 161). Applicant ran out of the Waffle House. (Tr. 161). SLED agent Michael Moskal testified testified that he found gunshot residue on Applicant's clothing. (Tr. 400-22).

### III. Current Action before this Court

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

1. 6<sup>th</sup> Amendment violations.”
  - a. “Trial Counsel prejudice[d] Applicant for failure [to] investigate Applicant[’s] mental health background whereby Applicant was diagnose[d] with bipolar, and post-traumatic stress syndrome while been in the custody of department of correction Wasco institution in the state of California, 2003.”
2. “14<sup>th</sup> Amendment violations.”
3. “S.C. Code Law § 17-27-45(c)”
  - a. “Applicant contends pursuant to S.C. Code of Law Ann. 17-27-45(c), the applicant made discovery on April 6, 2020, letter from [Spartanburg] County Sheriff’s office records division; stated to the applicant letter address to [Spartanburg] County sheriff’s office record division for a copy of officer’s supplement record for GSR residue result and the [Spartanburg] County Sheriff’s Office reply was. Responds was not able to locate a request for a copy of the officer’s supplement report.”

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- b. "Applicant contends pursuant to S.C. Code of Law Ann. 17-27-45(c), the Applicant wrote Spartanburg County Sheriff's Office on 4-9-2020, request for chain of custody report."

Applicant filed an amended application on September 22, 2020. In the amended application, he alleges:

1. Newly discovered evidence:
  - a. Counsel stated at the trial that there was no expert on the case concerning the gun shot residue but, after obtaining his case file on March 27, 2020, he found out that there was a gunshot residue expert on the case.

Before this Court are Applicant's Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the PCR application, the amended PCR application, and prior direct appeal, PCR, PCR appeals, and federal habeas corpus records.

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#### IV. 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:

##### *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). Additionally, 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 was found guilty at trial on July 25, 2013 and the remittitur from his direct appeal was issued on December 12, 2014. The application was therefore due on December 13, 2015. This application was filed on June 1, 2020, 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:

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

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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 application for post-conviction relief. 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.

#### *Newly Discovered Evidence*

This Court finds Applicant's claim of newly discovered evidence must be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. 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 a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the

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date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(C). To prevail, Applicant must show the newly-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

*State v. Spann*, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant claims he is entitled to relief based upon newly discovered evidence based upon an allegedly missing copy of a supplemental record concerning the GSR residue and a chain of custody report as well as newly discovered evidence that an expert witness was involved in the case at one point. However, no case has been made indicating that this information would change the result of the proceeding if a new trial was conducted, why it could not have been discovered prior to trial through the exercise of due diligence, how it is material, or why it is not cumulative or impeaching. Thus, Applicant has failed to make a *prima facie* case for why he is entitled to relief on this claim and, as such, this court dismisses this claim for failure to make a *prima facie* case of newly discovered evidence.

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V. 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 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

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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 30 day of August, 2021.

  
\_\_\_\_\_  
J. DERHAM CODE  
Chief Administrative Judge  
Seventh Judicial Circuit

\_\_\_\_\_, South Carolina