

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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Oct 27 2022

S.C. SUPREME COURT

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
R. Lawton McIntosh Circuit Court Judge

Case No. 2020-CP-37-00319
(*Austin v. State* Appeal of Case No. 2015-CP- CP-37-00316)

Marcus Daniel Allison Petitioner,

v.

State of South Carolina, Respondent.

NOTICE OF APPEAL

Marcus Daniel Allison appeals the judgement of the Honorable R. Lawton McIntosh dated October 6, 2021 (Conditional Order of Dismissal) and September 26, 2022 (Consent Order Vacating the Conditional order of Dismissal and Granting Relief Pursuant to *Austin v. State*¹), copies of which are attached. This appeal is taken from the order dated September 26, 2022, filed on October 3, 2022. Petitioner received written notice of entry of this order, though undersigned counsel, on October 6, 2022.

Respectfully Submitted,

By s/E. Charles Grose, Jr

E. Charles Grose, Jr.
S.C. Bar Number 66063
The Grose Law Firm, LLC
404 Main Street
Greenwood, SC 29646
(864) 538-4466
(864) 538-4405 (fax)
Email: charles@groselawfirm.com

¹ *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991).

October 27, 2022
Greenwood, South Carolina

Other Counsel of Record:

Lillian Loch Meadows, Esquire
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211
lillymeadows@scag.gov
(803) 734-3737

allow an applicant to receive more than 'one bite at the apple.' ” *Id.* at 261, 523 S.E.2d at 755; *see generally Graham v. State*, 378 S.C. 1, 3, 661 S.E.2d 337, 338 (2008) (“A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings.”).

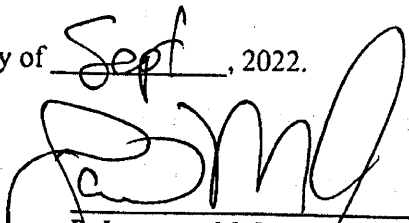
However, our Supreme Court has allowed successive PCR applications where the applicant has been denied complete access to the appellate process. *Odom*, 337 S.C. at 261, 523 S.E.2d at 755; *cf.* S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). *Austin* provides for belated appellate review of the denial of a prior PCR action after the statute of limitations has expired where PCR counsel’s failure to timely appeal prevented the applicant from seeking appellate review. 305 S.C. 453, 409 S.E.2d 395; *see, e.g., Hope v. State*, 328 S.C. 78 n.1, 492 S.E.2d 76 n.1 (1997) (permitting an *Austin* appeal where original PCR counsel failed to appeal from the first denial of PCR); *but see Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) (limiting the reach of *Austin* and holding that 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 prior PCR counsel).

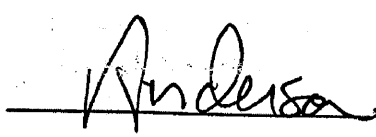
A PCR applicant is entitled to an *Austin* appeal if the PCR judge affirmatively finds either: (1) the applicant requested and was denied an opportunity to seek appellate review; or (2) the right to appellate review of a previous PCR order was not knowingly and intelligently waived. *Odom*, 337 S.C. at 262, 523 S.E.2d at 756 (citing *King v. State*, 308 S.C. 348, 348–49, 417 S.E.2d 868 (1992)). If the PCR court finds the applicant was denied his or her right to appeal, the applicant can petition for certiorari and the Supreme Court will review whether he or she was prejudiced by the failure to obtain appellate review. *Austin*, 305 S.C. at 454, 409 S.E.2d at 396. Alternatively, if the PCR court finds the applicant never in fact sought discretionary review, the applicant may

appeal that finding, and the Supreme Court will review the appeal based on the normal "any evidence" standard. *Id.* at 455, 409 S.E.2d at 396 (citing *Cherry v. State*, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989) (highlighting that "any evidence" of probative value contained in the record is sufficient to uphold the PCR judge's factual findings on appeal)); *see generally* *Drayton v. Evatt*, 312 S.C. 4, 11, 430 S.E.2d 517, 521 (1993) (explaining that this Court "give[s] great deference to a judge's findings where matters of credibility are involved since we lack the opportunity to directly observe the witnesses").

Based on the foregoing, this Court finds Applicant did not knowingly and intelligently waive his right to appeal his initial post-conviction relief action and, as such, he may petition the Supreme Court of South Carolina pursuant to *Austin v. State*. Accordingly, this Court hereby **GRANTS** Applicant's request for belated appellate review of his initial post-conviction relief action and **VACATES** its October 6, 2021, order of dismissal.

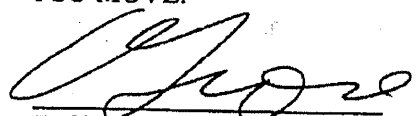
AND IT IS SO ORDERED this 26 day of Sept, 2022.


R. LAWTON MCINTOSH
Chief Administrative Judge
Tenth Judicial Circuit

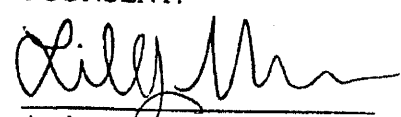

South Carolina

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MELISSA C. BURTON
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I SO MOVE:


E. Charles Grose, Jr., Esquire
Counsel for Applicant

I CONSENT:


Assistant Attorney General Lillian L. Meadows
Counsel for the State

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CLERK OF COURT
OCONEE COUNTY, SC



ALAN WILSON
ATTORNEY GENERAL

October 20, 2021

E. Charles Grose, Jr., Esquire
Grose Law Firm
404 Main Street
Greenwood, SC 29646

Re: Marcus Daniel Allison, #350669 v. State of South Carolina
2020-CP-37-00319

Dear Mr. Grose:

Enclosed please find a copy of the signed and filed Conditional Order of Dismissal issued by the Honorable R. Lawton McIntosh in the above-captioned post-conviction relief case.

Sincerely,

s/LillianMeadows

LILLIAN L. MEADOWS
Assistant Attorney General

LLM/hb
Enclosures

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

7/11/21 12:57 3-20

Marcus Daniel Allison, SCDC #350669,

Case No. 2020-CP-37-00319

Applicant,

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed by Marcus Daniel Allison (Applicant) on May 20, 2020. The State made its Return on August 12, 2021, requesting the application be summarily dismissed.¹

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. Applicant was arrested on August 2, 2010, following an investigation into an incident involving a break-in to the dwelling of Bruce Kelley. During its August 2010 term, the Oconee County Grand Jury indicted Applicant for

¹ The State's return was originally due on August 31, 2020. *See* Rule 12(a), SCRCPP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State's request to accept its return as timely filed. *See* S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); *Guinyard v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court).

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first-degree burglary (2010-GS-37-0745A) and grand larceny—\$1,000 to \$5,000 (2010-GS-37-0746A).

A. Trial

On April 23–25, 2012, Applicant proceeded to a jury trial before the Honorable Benjamin H. Culbertson. Keith Denny, Esquire and Wilson Burr, Esquire (collectively, Counsel) represented Applicant. Assistant Solicitor David Wagner prosecuted the case. On April 25, 2012, the jury convicted Applicant as indicted. Judge Culbertson sentenced Applicant to concurrent terms of twenty-five years' imprisonment for first-degree burglary and five years' imprisonment for grand larceny.

B. Direct Appeal

Applicant filed a timely notice of appeal. Appellate Defender Carmen V. Ganjchsani perfected Applicant's appeal by filing a brief with the Court of Appeals on the following issues:

- I. Whether the trial judge properly gave the jury an instruction regarding "the hand of one is the hand of all" where there was evidence supporting that Appellant and his friend acted together to burglarize the victim's home and steal from him.
- II. Whether the trial court properly denied Appellant's motion to suppress evidence regarding the freshly-glued false drawer and the crowbar pry marks where Appellant failed to show the lost photographs possessed exculpatory value apparent before they were lost and failed to show he could not have obtained evidence of comparable value by other means.

Following briefing and oral argument, the Court affirmed Applicant's convictions and sentences. *State v. Allison*, 2014-UP-473 (S.C. Ct. App. filed Dec. 17, 2014). The case was remitted back to the circuit court on January 5, 2015. Applicant commenced this PCR action on May 20, 2020.

C. Initial Post-Conviction Relief Action and Subsequent Appeal: 2015-CP-37-0316

On April 13, 2015, Applicant filed his first PCR action, alleging he was being held in unlawful custody for the following reasons (verbatim):

1. "No consent was given for the search of the trailer/house. My lawyer failed to object to this search"
 - a. "There has been evidence discovered that could have only come from my house or had been stolen by someone else"
2. "No evidence was presented that showed that I broke into a residence. My lawyer failed to object at trial."
 - a. "My lawyer did not object to information that showed I had not broken into a residence"
3. "The State did not provide, or my attorney did not obtain information that was pertinent to my defense. Specifically, pictures in the possession of the Oconee County Sheriff's office"
 - a. "There are now pictures which were not provided in Discovery that show I was innocent"
4. "The pictures that were lost show that the house was not broken into as alleged"
 - a. "Should have had expert testimony to show no break in from the information concerning the tool marks that had been provided in Discovery."
5. "These pictures were after discovered evidence that was withheld pursuant to Brady"
 - a. "My lawyer failed to subpoena a witness who would have stated that I was not present during the alleged break in."

The State requested an evidentiary hearing through its return on February 8, 2016. On February 23, 2018, the PCR court convened an evidentiary hearing before the Honorable J. Cordell Maddox, Jr.

Applicant was present at the hearing and represented by William G. Yarborough, III, Esquire. Lindsey McCallister, Esquire, of the South Carolina Attorney General's Office, represented the State. Applicant; Applicant's stepfather, Steven Earl Holcombe; Applicant's trial counsels, Keith Denny and Wilson Burr; and Solicitor David Wagner; testified at the hearing. By

order signed April 16, 2018, and filed April 19, 2018, Judge Maddox denied the application on all grounds and dismissed the action with prejudice.

Applicant subsequently filed a motion to alter or amend pursuant to Rule 59(e), SCRCP, challenging the PCR court's finding that the photographs in question do not fall under the scope of *Brady*. The State made its return on May 14, 2018. Judge Maddox denied the motion by order issued October 3, 2019 and filed October 9, 2019.

While Applicant's Rule 59(e) motion was pending in the circuit court Applicant filed a *pro se* notice of appeal with the Supreme Court. On August 27, 2019, the Court dismissed the notice of appeal without prejudice pursuant to *Hudson v. Hudson*, 290 S.C. 215, 349 S.E.2d 341 (1986) (holding that when a timely post-trial motion is pending before the lower court, any notice of appeal will be dismissed without prejudice as premature). The remittitur was issued on September 12, 2019.

On October 9, 2019, Judge Maddox issued an order denying Applicant's 59(e) motion. Applicant then filed a *pro se* motion to reinstate his PCR appeal pursuant to Rule 260, SCACR, on February 25, 2020. By order dated June 9, 2020, the Supreme Court dismissed the notice of appeal based on Applicant's failure to establish the notice of appeal was timely served.

II. CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. Ineffective Assistance of Trial Counsel: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article I, Section's 3, 9, 10, 11, 12, 14, and 15, to the S.C. Constitution, and corresponding Laws, were denied due to the many failure's, error's, and omission's[sic] of Trial Counsel, for Counsel's failure to adequately:
 - a. Investigate Law, Fact, and Evidence;
 - b. Impeach State Witness's[sic];

- c. Defend his Client;
 - d. Object and move to Suppress/Strike;
 - e. Request beneficial Jury Instructions, and a;
 - f. Conflict of Interest's[sic]
2. State Misconduct: Petitioner's 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to:
 - a. Police Misconduct;
 - b. Prosecutorial Misconduct;
 - c. Judicial Error, and Abuse of Discretion, and;
 - d. Lack of Subject Matter Jurisdiction.
 3. Excessive Sentencing: Petitioner's 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 3, 12, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Excessive Sentencing, where petitioner was sentenced in excess of the mandatory minimum for a first offense, and no mitigating factor's[sic] were provided by counsel, nor sufficient aggravating factor's provided by the State, to warrant/justify the 25 year sentence.
 4. Ineffective Assistance of Appellate Counsel: Petitioner's 1st, 5th, 6th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 14, and 22, of the S.C. Constitution, and corresponding Laws, were denied due to Appellate Counsel's failure to properly argue:
 - a. The Insufficiency of the Evidence, and;
 - b. The 'Hand of One' Jury Instruction.
 5. Totality of the Circumstances: Petitioner's 1st, 4th, 5th, 6th, 8th, and 14th Amendment Rights to the U.S. Constitution, and Article 1, Section's 2, 3, 9, 10, 11, 12, 13, 14, 15, 16, and 22, of the S.C. Constitution, and corresponding Laws, were denied by the Totality of the Circumstances, as enumerated in PCR ISSUE'S (a thru d) above, and resulted in:
 - a. Denial of Counsel at Critical Stages;
 - b. Cumulative Misconduct, and;
 - c. Cumulative Error.

On June 8, 2021, Applicant filed an amended application, raising the following additional grounds for relief:

1. Ineffective assistance of PCR counsel: Petitioner's 1st, 5th, 6th and 14th Amendment Rights to the US Constitution; Article 1, Sections 2, 3, 9 and 14 of the South Carolina Constitution; S.C. Code of Laws Ann. § 17-23-60, § 17-27-90, § 17-27-100, and § 18-1-30; Rules 1.1 (Competence) at C.[5], Rule 103 (Diligence) at C.[1], and Rule 3.2 (Expediting Litigation) at C.[1], were denied and/or violated based on Counsel's failure's[sic] to:
 - a. Investigate, prepare, file, and litigate all petitioner's claims on the initial application;
 - b. Utilize available evidence in support of petitioner's claims; and,
 - c. Prepare and timely file the notice of appeal.

Applicant requests relief as follows:

“Vacate Conviction/Sentence and release from imprisonment, or; Grant New Trial, or; Commute Sentence, or; Resentence to minimum due to not being a Burglary 1st, or; other relief the court deems proper/just.”

Before this Court are the Oconee County Clerk of Court records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

Because there is no genuine issue of material fact which would necessitate an evidentiary hearing, this Court hereby informs the parties of its intent to dismiss the application as procedurally barred. *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); *See also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an

evidentiary hearing). Pursuant to section 17-27-70 and -80 of the South Carolina Code, this Court makes the following findings of facts and conclusions of law based upon the pleadings, records submitted by both parties, and the applicable law:

A. Statute of Limitations

As an initial matter, this Court finds this action must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act² (the 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.

(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(A)-(C).

Our 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

² S.C. Code Ann. § 17-27-10 to -160

summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 445 S.E.2d 638 (1994). Additionally, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See also Leamon*, 363 S.C. at 434, 611 S.E.2d at 495 (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief).

Applicant’s second and current PCR application was filed well after the expiration of the statutory filing period. Applicant was convicted on April 25, 2012, and the remittitur from the direct appeal was issued on January 5, 2015. This application was filed on May 20, 2020—over *five years* after the requisite filing period expired.

Accordingly, this action must be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive

This Court further finds Applicant’s allegations of ineffective assistance of trial and appellate counsel must be summarily dismissed as 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 for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Section 17-27-90 is clear—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 or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). 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 has failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief actions. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were” (citing *Gamble v. State*, 298 S.C.

176, 178, 379 S.E.2d 118, 119 (1989)). Applicant's allegations of ineffective assistance of trial counsel and "state misconduct" were raised in the proceeding based on Applicant's prior application for post-conviction relief. Applicant's remaining allegations could have been raised in his previous action; thus, these allegations are successive and barred under section 17-27-90. Applicant has failed to meet the burden imposed upon him, and this Court must summarily dismiss the application as successive to Applicant's previous PCR action.

C. *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant's previous state proceedings, this Court further finds this action is 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 Cas. 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*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. *Id.* at 616, 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered "the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the merits." *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the

applications, as well as those that *could have* been raised. *Id.* at 616-17, 274 S.E.2d at 415-16 (emphasis added).

Applicant has litigated a previous PCR application in the circuit court, where he had a full opportunity to raise all his allegations of ineffective assistance of trial and appellate counsel. The finality of the previous court rulings should be respected, and this Court must summarily dismiss this action as barred by the principles of *res judicata*.

D. Failure to State a Claim

This Court further finds this application must be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant's contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief 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 post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991). *Austin* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only

applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action and filed a *pro se* notice of appeal. The appeal was then dismissed without prejudice because the 59(c) was still pending in the circuit court. After the order denying Applicant’s 59(c) was issued, Applicant filed a *pro se* motion to reinstate his PCR appeal. The appeal was then dismissed based on Applicant’s failure to establish the notice of appeal was timely served. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Therefore, Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims. This Court must dismiss this claim for failing to state a cognizable claim upon which relief can be based.

E. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

305 S.C. at 451-52, 409 S.E.2d at 394-95.

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.'" *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 262

(1973) (Powell, J., concurring)). In his concurring and dissenting opinion in *Mackey v. United States*, 401 U.S. 667, 691 (1971), Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441-42, 248 S.E.2d 120, 123 (1978). Applicant's attempt to litigate his successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

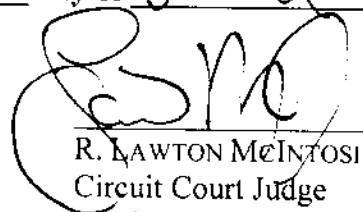
Pursuant to section 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this order upon him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

Office of the Attorney General
Lillian L. Meadows
Post-Conviction Relief Division – 10th Circuit

Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 5 day of October, 2021.



R. LAWTON McINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson, South Carolina

2021 OCT 12 P 2:20

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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Marcus Daniel Allison, #350669,

Case No. 2020-CP-37-00319

Applicant,

v.

Certificate of Service

State of South Carolina,

Respondent.

1. Undersigned is counsel of record for the Respondent in the above-captioned action.
2. Pursuant to the South Carolina Supreme Court’s Order “RE: Operation of the Trial Courts During the Coronavirus Emergency” (Appellate Case No. 2020-000447), as amended August 27, 2021, “a lawyer admitted to practice law in this state may serve a document on another lawyer admitted to practice law in this state using the lawyer’s primary email address listed in the Attorney Information System (AIS).”
3. Undersigned has served a copy of the **Conditional Order of Dismissal** in the above-captioned matter on opposing counsel by emailing a copy to the email address as listed in the AIS:

E. Charles Grose, Jr., Esquire
charles@groselawfirm.com

DATED this 20th of October, 2021.

s/LillianMeadows
LILLIAN L. MEADOWS
Assistant Attorney General
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737
LillyMeadows@scag.gov