

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Bobby Patterson, #172454

2013-CP-46-0601

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 filed February 22, 2013. The Respondent made its return and motion to dismiss on

April 4, 2013

Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for York County. The Applicant was indicted at the September 10, 1990, term of the York County grand jury for murder and possession of firearm or knife during the commission of or attempt to commit violent crime (1990-GS-46-2657). He was represented by Gerald W. Smith, Esquire. On October 30-November 1, 1990, the Applicant underwent trial by jury pursuant to which he was found guilty as charged. He was sentenced by the Honorable William L. Howard to confinement for a period of life for murder and to five years, consecutive, for possession of a firearm or knife during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. State v. Patterson,

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Op. No. 92-MO-89 (S.C. Ct. App. filed April 24, 1992). The Remittitur was issued on May 12, 1992.

1993-CP-46-1247

The Applicant filed an application for PCR on September 27, 1993. The Respondent filed its Return on November 19, 1993. On June 28, 1994, an evidentiary hearing was held before the Honorable E.C. Burnett, III, at which the Applicant was present and was represented by Leroy Pendleton, Esquire. By Order dated August 18, 1994, Judge Burnett denied and dismissed the Applicant's application.

Thereafter, by petition to the South Carolina Supreme Court dated June 20, 1996, the Applicant requested a belated PCR appeal pursuant to Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1990). The Honorable Jackson V. Gregory granted an Austin review of the denial of the first application. The Applicant then filed a Petition for Writ of Certiorari. The South Carolina Supreme Court denied the petition for certiorari.

2000-CP-46-1754

On July 18, 2000, the Applicant filed a Petition for Writ of Habeas Corpus in the York County Clerk of Court's Office. On August 1, 2000, The Honorable John C. Hayes, III, issued an order denying the Applicant's petition. The action was appealed to the South Carolina Court Appeals, which denied the Applicant's request on August 27, 2003.

2003-CP-46-2594

The Applicant subsequently filed a second application for PCR on September 25, 2003. The Respondent filed its Return and Motion to Dismiss due to the Application being successive and beyond the statute of limitations on June 3, 2005. By Order dated September 8, 2005, Judge John C.

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Hayes, III, denied and dismissed the Applicant's application. The Applicant then filed a Petition for Writ of Certiorari. The South Carolina Supreme Court denied the petition for certiorari. The remittitur was sent down on November, 30, 2005.

2006-CP-46-0722

The Applicant subsequently filed a third application for PCR on March 20, 2006. The Respondent filed its Return and Motion to Dismiss due to the Application being successive and beyond the statute of limitations on August 22, 2006. By Order dated May 14, 2007, Judge John C. Hayes, III, denied and dismissed the Applicant's application.

2011-CP-46-1675

The Applicant subsequently filed a fourth application for PCR on April 29, 2011. The Respondent filed its Return and Motion to Dismiss due to the Application being successive and beyond the statute of limitations on September 14, 2011. By Order dated November 17, 2011, Judge John C. Hayes, III, denied and dismissed the Applicant's application.

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The Applicant filed a Petitioner for Writ of Habeas Corpus in the District Court for the District of South Carolina on May 30, 2012. This action is currently pending.

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

1. "Ineffective Assistance of Trial Attorney"
2. "Ineffective Assistance of 1st PCR Attorney"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily

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dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish 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. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 420 S.E.2d 834 (1992).

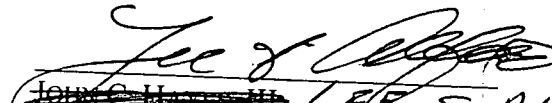
This Court additionally finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgement 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.

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). The Applicant was convicted of the offense(s) he challenges in this Application on November 1, 1990. The Remittitur was sent down after the Applicant's unsuccessful appeal on May 12, 1992. This Application was filed on February 22, 2013, well after the one year statutory filing period had expired.

Further, the Applicant contends that under the United States Supreme Court's recent decision in Martinez v. Ryan, No. 10-1001 (S.Ct. filed March 20, 2012), he is able to file a successive state PCR action alleging ineffective assistance of previous collateral counsel. This Court finds this contention to be without merit as the ruling in Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision,

AND IT IS SO ORDERED this 12th day of April, 2013.


~~John C. Harris, III~~ **LEE S. AIFORD**
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina

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finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding. See Martinez, *supra* at 6 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental "cause and prejudice" standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining "[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter." Id. Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

Additionally, Martinez's interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina's interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to -160. Therefore, the South Carolina Supreme Court's opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) ("The contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under 17-27-90."). Aice went on to note that such a holding was in accord with the United State's Supreme Court's opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987) (there is no constitutional right to counsel for collateral review

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of a conviction). Accordingly, this Court finds Applicant's claim regarding the application of Martinez to be without merit.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) 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." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The 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. The Applicant shall file any reasons he may have with the York County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: J. Rutledge Johnson, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Bobby Patterson, #172454)

2013-CP-46-0601

Applicant,)

v.)

State of South Carolina,)

Respondent.)

FINAL ORDER OF DISMISSAL

DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, S.C.

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This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed February 22, 2013. The Respondent (the State) made its Return and Motion to Dismiss on April 4, 2013, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated April 19, 2013, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Respondent received a copy of the Conditional Order of Dismissal on May 9, 2013. The Applicant replied to the Conditional Order of Dismissal on May 28, 2013.

In a document titled "Applicant(sic) Affidavit in Opposition to Respondent Motion for Summary Judgment", the Applicant first argues he is entitled to an evidentiary hearing because he is in possession of after-discovered evidence that the solicitor utilized perjured testimony to ensure the Applicant's conviction. He also argues Martinez v. Ryan, 132 S.Ct. 1309 (2012) entitles him to claim ineffective assistance of PCR counsel. This Court has reviewed the Applicant's response to

the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court finds his claim of after-discovered evidence meritless. First, the Applicant provides no proof that the solicitor utilized perjured testimony to ensure the Applicant's conviction. He provides this Court no affidavit from the solicitor or any other such document or testimony which shows the solicitor engaged in the unethical practice of law. Further under § 17-27-45(c), the Applicant has failed to show when he discovered this alleged evidence or that he filed within a year of when he discovered or should have discovered this evidence by due diligence.

Further, the Applicant's assertion that Martinez v. Ryan allows him to file a successive PCR application to allege ineffective assistance of counsel against PCR counsel is meritless. Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's

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procedural default in a federal habeas corpus proceeding. See Martinez, *supra* at 6 (“Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of a claim of ineffective assistance at trial.”).

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental “cause and prejudice” standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining “[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter.” Id. Therefore, Applicant’s contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

Additionally, Martinez’s interpretation of federal laws applicable to federal habeas corpus actions has no effect on South Carolina’s interpretation and application of its Post-Conviction Relief statute. S.C. Code Ann. § 17-27-10 to -160. Therefore, the South Carolina Supreme Court’s opinion in Aice v. State is still applicable to a claim raised in a subsequent state PCR action alleging ineffective assistance of prior collateral counsel. See Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991) (“The contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under 17-27-90.”). Aice went on to note that such a holding was in accord with the United States Supreme Court’s opinion in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987) (there is no constitutional right to counsel for collateral review of a conviction). Accordingly, this Court finds Applicant’s claim regarding the application of Martinez to be without merit.

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The Applicant has shown no reason why these issues were not raised in his first PCR application. Further, S.C. Code § 17-27-90 states “[a]ll 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.” Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

The Applicant has also shown no reason why these issues were not raised within the statute of limitations for filing a PCR application pursuant to S.C. Code. § 17-27-45(a). S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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). The Applicant was convicted of the offense(s) he challenges in this Application on November 1, 1990. The Remittitur was sent down after the Applicant's unsuccessful appeal on May 12, 1992. This Application was filed on February 22, 2013, well after the one year statutory filing period had expired.

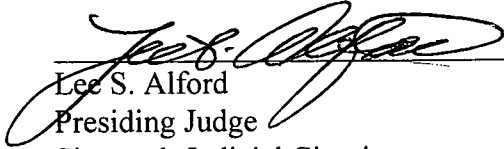
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Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 15th day of July, 2013.



Lee S. Alford
Presiding Judge
Sixteenth Judicial Circuit

Yall, South Carolina.

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The State of South Carolina
In The Supreme Court

Appeal From Sixteenth Judicial Circuit

Lee S. Alford, presiding Judge

CASE NO. 2013-CP-46-0601

Bobby Patterson,

Appellant,

v.

State of South Carolina,

Respondent.

Proof of Service

I certify that on JULY 30 2013 I mailed a copy of appellant conditional order of dismissal and final order of dismissal to the following address,
Office of Attorney General, State of South Carolina,
P.O. Box 11549, Columbia, S.C. 29211.

Respectfully submitted,

Bobby Patterson

Date: JULY 30 2013

Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29211

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JUL 30 2013
S.C. SUPREME COURT
S.C. SUPREME COURT

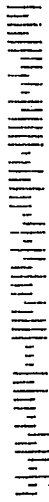
RE: Bobby Patterson v. State
Case No. 2013-CP-46-0601

Dear Honorable Clerk:

Mistakenly omitted from Appellant notice of appeal, enclosed please find one copy of conditional order of dismissal, and final order of dismissal, to be filed in the above cited action.

Your assistance in this matter would be greatly appreciated.

Respectfully submitted,
Bobby Patterson



14160 Laurel Road
Columbia, South Carolina 29210



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Daniel E. Shearouse, Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, South Carolina 29210

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