THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No.: 2013-CP-46-03157

Terry M. Wilmore, #217739.....Appellant,

v.

The State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Terry M. Wilmore appeals the orders of the Honorable Lee S. Alford, dated December 5, 2013, February 7, 2014, March 28, 2014, and April 23, 2014.

Pelzer, South Carolina
May 27, 2014

Terry M. Wilmore, #217739
Perry C.I. Q-1-A 211
430 Oaklawn Road
Pelzer, S.C. 29669

Other Counsel of Record is:
Attn: J Rutledge Johnson
P.O. Box 11549
Columbia, S.C. 29211
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal From York County
Court of Common Pleas
Lee S. Alford, Circuit Court Judge

Case No.: 2013-CP-03157

Terry M. Wilmore, #217739.....Appellant,

v.

The State of South Carolina.....Respondemt.

PROOF OF SERVICE

I, Terry M. Wilmore, hereby declare that on this day May 27, 2014, I have served a Motion of Appeal of the Orders of the Honorable Lee S. Alford, upon the following Parties: (1) Chief Justice Jean Toal/ 1231 Gervais Street, P.O. Box 12456/ Columbia, S.C. 29211; (2) Honorable Daniel Shearouse (Clerk)/ Clerk's Office, P.O. Box 11330/ Columbia, S.C. 29211; (3) David Hamilton, York County Clerk of Court/ P.O. Box 649/ York, S.C 29745, by and through Perry Correctional Institution's Legal Mail System.

Terry M. Wilmore

SUBSCRIBED AND SWORN TO before me
This 27 day of May, 2014

Notary: Tamara Cornwell
My Commission Expires
September 25, 2023

Expire: _____

STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Terry M. Wilmore, #217739, Applicant, v. State of South Carolina, Respondent.	2013-CP-46-3157 **FINAL ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed October 16, 2013. The Respondent (the State) made its Return and Motion to Dismiss on December 3, 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 December 5, 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 Applicant replied to the Conditional Order of Dismissal on January 14, 2014.

In a document titled "Applicant's Response to Conditional Order Why It Should Not Become Final", the Applicant argues he should not be barred by the Statute of Limitations for newly discovered evidence because he filed his application within one year of his discovery of Martinez v. Ryan, 132 S.Ct. 1309 (2012) pursuant to S.C. Code § 17-27-45(c).

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.

First, under S.C. § 17-27-45(c), the Applicant must have filed within one year "after the date when the facts could have been ascertained by the exercise of reasonable diligence." This case was published to the public on March 20, 2012. The Applicant therefore had to file his application by March 21, 2013. This application was filed on October 16, 2013, well after the one year limitation of S.C. Code § 17-27-45(c) had run.

Second, the Applicant's assertion in his application 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 procedural default in a federal habeas corpus proceeding. See Martinez, *supra* at

H.C.

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. See Kelly v. State, App. Case No. 2013-001079 (S.C. Supreme Court filed June 20, 2013).

Further, there is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "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, 305 S.C. at 451, 409 S.E.2d at 394.

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 7th day of February, 2014.

Lee S. Alford
Chief Administrative Judge
Sixteenth Judicial Circuit

York, South Carolina.

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STATE OF SOUTH CAROLINA COUNTY OF YORK	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Terry M. Wilmore, #217739, Applicant, v. State of South Carolina, Respondent.	2013-CP-46-3157 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed October 16, 2013. The Respondent made its return and motion to dismiss on December 3, 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 June 6, 1994, term of the York County Grand Jury for murder and possession of a firearm during the commission of a violent crime (1994-GS-46-1359). He was represented by Harry Dest and Gerald Smith, Esquires. On February 7, 1995, the Applicant underwent trial by jury pursuant to which he was found guilty of the indicted offenses. He was sentenced by the Honorable J. Derham Cole to confinement for life for murder, and to five years, concurrent, for the firearms charge.

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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. Wilmore, Op. No. 96-MO-204 (S.C. Sup. Ct. filed August 21, 1996).

1997-CP-46-0919

The Applicant subsequently filed an application for PCR on June 5, 1997. The Respondent filed its Return on January 7, 1998. On October 26, 1998, an evidentiary hearing was held before the Honorable John C. Hayes, III, at which the Applicant was present and was represented by B. Allen Bullard, Esquire. By Order dated June 11, 1999, Judge Hayes denied and dismissed the Applicant's first application.

A timely Notice of Appeal was filed on the Applicant's behalf and a Petition for Writ of Certiorari was submitted by the South Carolina Office of Appellate Defense. On January 10, 2001, the South Carolina Supreme Court denied the Petition.

3:02-182-17BC

The Applicant then filed a Federal Habeas Corpus in the Federal District Court for the District of South Carolina on January 23, 2002. A Report and Recommendation was issued on September 27, 2002, recommending that the action be dismissed. On January 8, 2003, the Applicant's petition was denied by written order.

2005-CP-46-1784

The Applicant filed a second application for PCR on July 6, 2005. The Respondent filed its Return and Motion to Dismiss on October 7, 2005. By Final Order dated December 9, 2005, the Honorable John C. Hayes, III denied and dismissed the Applicant's application.

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The Applicant filed a third application for PCR on February 22, 2006. The Respondent filed its Return and Motion to Dismiss on April 28, 2006. By Final Order dated May 4, 2006, the Honorable Lee S. Alford denied and dismissed the Applicant's application. The Applicant appealed this Order and the South Carolina Court of Appeals dismissed his appeal due to the Applicant's failure to timely file a Final Brief on December 15, 2006. The Remittitur was issued on April 2, 2007.

3:11-408-JFA-JRM

The Applicant then filed a second Federal Habeas Corpus in the Federal District Court for the District of South Carolina. On April 12, 2011, the Honorable Joseph F. Anderson, Jr. denied the Applicant's petition by written order.

On August 24, 2011, the United States Court of Appeals for the Fourth Circuit issued an order dismissing the Applicant's appeal.

II.

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

1. "14 Amendment 17-27-8) 17-27-100 17-27-90"
   a. "Inadequate PCR Attorney (17-27-10)"
2. "Mercy Verdict, Counsel Prejudiced Applicant by failing to request mercy verdict"
   a. "Trial Attorney and 17-27-80 Appellate Attorney 17-27-100"

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior application for post-conviction relief. S.C. Code Ann.

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§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

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> 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 February 7, 1995. The Applicant's unsuccessful appeal was filed on August 21, 1996. The Applicant was therefore required to file his application on or before August 22, 1997. This Application was filed on October 16, 2013, well after the one year statutory filing period had expired.

Further, the Applicant contends 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 v. Ryan, 132 S. Ct. 1309 (2012) 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-

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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 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

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of a conviction). Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous. See Kelly v. State, App. Case No. 2013-001079 (S.C. Supreme Court filed June 20, 2013).

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

AND IT IS SO ORDERED this 5th day of December, 2013.

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LEE S. ALFORD
Presiding Judge
Sixteenth Judicial Circuit

_____, South Carolina

FORM 5

STATE OF SOUTH CAROLINA)
County of York)

IN THE COURT OF COMMON PLEAS

2013CP4603157

Terry M. Wilmore
Full name and prison number (if any) of Applicant
#217739

v.

State of South Carolina

APPLICATION FOR POST-CONVICTION RELIEF

FILED-RECEIVED
2013 OCT 16 PM 3:11
DAVID HAMILTON
C.C.C.P. GS
YORK COUNTY, SC

See Attachments 1-4

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry C.I. 430 Oaklawn Rd. Q1A241 (P.C.I.) Pelzer S.C. 29669

2. Name and location of Court which imposed sentence York County

3. Name(s) of co-defendant(s) (if any) None

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) 94-GS-46-1359

CERTIFIED TRUE COPY
2013 OCT 17 PM 3:51
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) June 1994 / Feb. 1995

(b) Life w/Parole eligibility

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty ✓

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

Yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. Court of Appeals State of

ii. South Carolina

iii. _____

(b) the result in each such Court to which you appealed:

i. Denied

ii. /

iii. /

(c) the date of each such result:

i. _____

ii. /

iii. /

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. /

iii. /

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: 17-27-100

(a) 14 Amendment 17-27-8) 17-27-90

(b) Mercy Verdict, Counsel Prejudiced

(c) Applicable by Failing to request mercy verdict

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) Inadequate P.C.R. Attorney (17-27-10)

(b) Trial Attorney, AND 17-27-80

(c) Appellate Attorney 17-27-100

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes

(d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Dismissed

ii. Dismissed

iii. Dismissed

iv. _____

(b) the name and location of the Court in which each was filed:

i. State Appeals Court

ii. State Supreme Court

iii. Fourth Circuit Court of Appeals

iv. _____

(c) the disposition thereof:

i. Dismissed

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. Dismissed

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. N/A

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. /

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. /

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) /

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? Yes

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Allen Bullard esquire PCR. Attorney York County Moss Justice Center

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Gerald Smith Trial Attorney

ii. _____

iii. _____

19. State clearly the relief you seek in filing this application:

Applicant asking for his right to seek P.C.R. and Appellate Review of P.C.R. Attorney not Protecting his Rights Pursuit to Austin v. State

20. Are you now under sentence from any other court that you have not challenged?

ND

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of York)

I, Terry M. Wilmore 217739, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true..

Terry M. Wilmore

SWORN to and subscribed before me this 11th day of October, 2013.

Jamaica Cornwell (L.S.)
Notary Public

My Commission Expires: September 25 2023

RECEIVED
OCT 11 2013
P.C.I. MAILROOM

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Terry M. Wilmore 217739, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Terry Wilmore
Applicant

SWORN or affirmed to and subscribed before me this 11th day of October, 2013

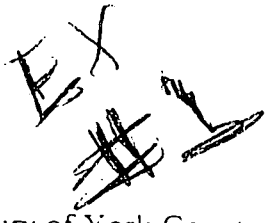
Samara Cornwell
Notary Public

My Commission Expires: September 25 2023

RECEIVED
OCT 11 2013
P.C.I. MAILROOM

ATE OF SOUTH CAROLINA)
)
)UNTY OF YORK)

INDICTMENT FOR



At a Court of General Sessions, convened on June 6, 1994, the Grand Jury of York County present)n their oath:

COUNT ONE: MURDER

That Terry Michael Wilmore did in York County on or about April 2, 1994, feloniously, wilfully and th malice aforethought, kill one Shirley Wilmore by means of shooting her with a .22 Caliber H & R :volver, and the said victim died as a proximate result thereof.

COUNT TWO: POSSESSION OF FIREARM DURING COMMISSION OF A VIOLENT CRIME

That Terry Michael Wilmore did in York County on or about April 2, 1994, possess a firearm or visibly splay what appeared to be a firearm during the commission of a violent crime, to wit: Murder, in violation of)de Section §16-23-490, Code of Laws of South Carolina, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and ovided.

CERTIFIED TRUE COPY OF ORIGINAL INSTRUMENT WHICH IS ON FILE IN THIS OFFICE.

JE Pope

SOLICITOR

TATE OF SOUTH CAROLINA)
)
OUNTY OF YORK)

INDICTMENT FOR

Exhibit #2

At a Court of General Sessions, convened on June 6, 1994, the Grand Jury of York County present on their oath:

COUNT ONE: MURDER

That Terry Michael Wilmore did in York County on or about April 2, 1994, feloniously, wilfully and th malice aforethought, kill one Shirley Wilmore by means of shooting her with a .22 Caliber H & R evolver, and the said victim died as a proximate result thereof.

COUNT TWO: POSSESSION OF FIREARM DURING COMMISSION OF A VIOLENT CRIME

That Terry Michael Wilmore did in York County on or about April 2, 1994, possess a firearm or visibly splay what appeared to be a firearm during the commission of a violent crime, to wit: Murder, in violation of ode Section §16-23-490, Code of Laws of South Carolina, (1976), as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and ovided.

J E Pope

SOLICITOR

TE OF SOUTH CAROLINA

OUNTY OF YORK

316

COUNT NO: __ __

CASE NO: 94 GS-46- 1357

WARRANT NO: D696201

CHARGE: Murder

#116

THE STATE

VS 217739

Larry Michael Wilmore

sentence of the Court is that Larry Michael Wilmore, the defendant named in

tment be confined to the State Board of Corrections/ York County Detention for a term of natural life

l) (or) pay a fine of $ ____ : provided that upon the service of ____

payment of $ ____ plus (pay) (waive) cost and assessments as applicable *, the balan

pended and the defendant is placed on probation for ____ (months) (years).

STITUTION: (Yes) (No)

RING HELD OR WAIVED ON: ____

PHYSICAL INJURY $ ____

(and) (or)

PROPERTY DAMAGE $ ____

TOTAL$ ____

ABLE TO CLERK FOR (VICTIM) ____

CIAL CONDITIONS OF PROBATION AND/OR SENTENCE: ____

FEB 16 1995

E: 2-7-95

K, SOUTH CAROLINA

ST AND ASSESSMENTS:

FINE	$
ACADEMY	$
C.C.A.	$
L.C.F.	$
C.A.T.	$
OTHER	$
GRAND TOTAL	$

Presiding Judge

Clerk of Court

Date of Birth 04-11-62

Social Security 251-33-7713

Drivers License —

ATTORNEY FOR DEF:

ADDRESS: 962 Longtown

Lyn SC

Y RECEIVED BY: Larry Michael Wilmore

Defendant

M/F

W

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WITNESSES

YORK CITY POLICE DEPARTMENT

D. Smith

ARREST WARRANT NO. D-680221
D-680222

ACTION OF GRAND JURY

True Bill

Foreman of Grand Jury — Date: 6/6/94

VERDICT

Count one - guilty of murder

Count two - guilty

Foreman of Petit Jury — Date: Docket 2-7-95

DOCKET NO. 94-GS-46-1359

The State of South Carolina,

County of YORK

COURT OF GENERAL SESSIONS

JUNE 6, 1994 TERM

THE STATE

vs.

TERRY MICHAEL WILMORE

Exhibit #3

Indictment for

COUNT ONE: MURDER

S.C. CODE §16-3-10
CDR-116

COUNT TWO: POSSESSION OF A FIREARM DURING COMMISSION OF A VIOLENT CRIME

S.C. CODE §16-23-490
CDR - 157

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Terry M. Wilmore, #217739
Applicant,

C/A NO.:

v.

State of South Carolina,
Respondent.

OCTOBER 11, 2013

Applicant, Terry M. Wilmore, was indicted by an York County Grand Jury during June 1994 term of General Sessions for murder and possession of a fire arm during the commission of a violent crime.

LAW / ANALYSIS

I. MERCY

See Simmon v. State, 331 SC 332, 503 SE2d 164 (1998)

Applicant argues trial counsel, PCR attorney and appellate defense attorneys were all ineffective prejudicially and inadequant in that they all failed to raise and argue for Applicant a (Mercy Verdict).

Applicant was tried under the previous indictment number for murder and possessing a firearm or visibly display what appeared to be a firearm during the commission of a violent crime, to wit murder, in violation of Code of Laws of South Carolina, (1976), as amended 16-3-10 CDR Code 157.

Applicant was denied his 14th amendment right to appeal his mercy verdict because all attorneys failed to adequantly raise all issues.

[Supreme Court] held that Austine appeals need not be filed within the one year statute of limitations because they are

Note, State v. Wertz, OP No. 98-UP-009 (S.C. Ct App filed Feb 19, (1998)

ATTACHMENTS

STATE OF SOUTH CAROLINA

COUNTY OF YORK

(MERCY VERDICT)

The court abandoned this charge, trial attorney, PCR attorney and appellate review attorney failed to protect the Applicant's first bite at the apple, and failed to protect Applicant's rights to adequantly raise and issue in original supplement amend pcr violation of S.C. Code 17-27-90, 17-27-100.

S.C. Code Ann. 17-27-45(a) provides (A) application for relief filed pursuant to this chapter must be raised within one year after entry of a judgement of conviction or within one (1) year after sending of remittur to lower court. However, in Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) the State Supreme Court held one year statute of limitations of 17-27-45(A) does not apply to Austine v. State, appeals. Thus, when counsels fail to adequantly or timely raise the denial of pcr issues properly, application claims ineffective trial, pcr and appellate counsels for not timely raising the now argued claim.

Under the pcr rules, a applicant is entitled to his [full] adjudication on the merits of the original petition, or one bite [at the apple] citing Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 393, 395 (1991) (emphasis added)

under chubb v. state 303 S.C 396, 401 SE2d 159 (1991) failure to argue mercy is per se prejudicial, to due process, dening applicant full bite of the apple in original supplemental pcr application

belated appeals intended to correct unjust procedural defects, under the PCR rules. Applicant is entitled to a full adjudication on the merits of the (original) petition or one bite at the apple. Odom, 337 S.C. at 261, 523 S.E.2d at 755, citing Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 393, 395 (1991) (emphasis added).

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

Terry M. Wilmore, #217739,
Applicant,

C/A NO.:

v.

State of South Carolina
Respondent.

AFFIDAVIT AND AFFIDAVIT OF SERVICE BY MAILING

1. I am an employee at Perry C.I. in the above-captioned action.
2. Applicant just found out about Austine review and put it in mail ten days later.
3. I have this day Oct 11, 2013 served a copy of Austine PCR application on Respondent by deposition same in the United States mail, postage prefixed.

TO:

Attention
Attorney General
P.O. Box 11549
Columbia, S.C. 29211

York County Clerk of Court
P.O. Box 649
York, S.C. 29745

/S/ Terry M. Wilmore

CERTIFICATE OF SERVICE

I certify that on October 11, 2013 I, Terry M. Wilmore submitted into (Perry C.I.) mailroom staff a copy of Austine PCR application, proper postage prepaid and determined.

TO:

Attention
Attorney General
P.O. Box 11549
Columbia, S.C. 29211

York County Clerk of Court
P.O. Box 649
York, S.C. 29745

/S/ Terry M. Wilmore
Terry M. Wilmore

STATE OF SOUTH CAROLINA
COUNTY OF YORK

JUDICIAL CIRCUIT
COURT OF COMMON PLEAS

Terry M. Wilmore,

v.

State of South Carolina,

2013-CP-460-3157
NOTICE AND MOTION MOTION AND MOTION FOR SUMMARY JUDGEMENT PURSUANT TO S.C. CODE ANN. 17-27-80, 17-27-90, 17-27-100

You are summoned by this complaint, a copy of which is herewith served upon you and to serve a copy of your answer to complaint on Terry M. Wilmore #211739 P.C.I. 430 Oaklawn Rd Q-1-A 211 SC 29669 within (30) days after service hereof, exclusive if you fail to answer complaint hereof, judgement by default for austine appellate review (PCR) will be granted.

Nov 19, 2013

s/ Terry M. Wilmore

Terry M. Wilmore #217739
430 Oaklawn Rd
Q-1-A 211 P.C.I. 29669

STATE OF SOUTH CAROLINA
COUNTY OF York

COURT OF COMMON PLEAS
2-13-CP-460-3157

Terry M. Wilmore, #217739

v.

State of South Carolina,

FORM 5
NOTICE AND MOTION MOTION AND MOTION TO AMEND PURSUANT TO RULE 5

TO: York County Clerk:

Please find enclosed applicant's Notice and motion, motion and motion to amend, pursuant to (SCRCP 5) and for summary judgement pursuant to S.C. Code Ann. 17-27-70(c) McCoy v. State (2013) Odom v. State Austine v. State extended in Wilson v. State 348 S.C. 215, 559 S.E.2d 581 (2002) Supreme Court emphasis [added]!

J. Rutledge Johnson
Office of Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

CC: Kevin Brackett, Solicitor

York County
Clerk of Court's Office

Nov 19, 2013

J. Rutledge Johnson
Office of Attorney General
P.O. Box 11549
Columbia, S.C. 29211-1549

RE: ODom, Austine, and Wilson first pcr application, attacking denial of right to adjudicate all original merited claims.

Dear Clerk,

Enclosed please find applicant's original and copy of motion and motion notice and motion, pursuant to Rule 56 for summary judgement on the pleadings law, and facts for filing and for my clocked filed return thirty (30) days after notice is served, or soon thereafter as applicant can be heard.

/s/ Terry M. Wilmore
Terry M. Wilmore
217739

Clerk of Court's Office
P.O. Box 649
York, S.C. 29745

NOTICE AND MOTION FOR SUMMARY JUDGEMENT ON THE PLEADINGS, LAWS, AND FACTS PURSUANT TO SCRCP 56 (as follows).

(1) In Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) the State Supreme Court ruled applicant has a guaranteed 14th statutory, state and constitutional amendment right under federal law, where counsel during trial failed to timely object to mercy verdict, or have mercy verdict request charge the jury for a lesser punishment than that prescribed by the statute for which applicant was sentenced, because pcr counsel failed to timely adequately raise and argue at pcr the mercy request charge not being submitted to the jury it was not timely or adequately raised, ruled upon or preserved for appeal. Consequently because applicant's appeal attorney or direct appeal could not brief or raise this mercy ruling and certiorari it tied the appellate defense attorney's hands and she could not raise the issue because it was not adequately and timely raise on pcr level. Thus, the statute of limitation, where trial, pcr, and appellate attorney failed to timely adequately raise the (mercy verdict). Simmons v. State, 331 S.C. 333, 503 S.E.2d 164 (1998) applicant is able to apply for a subsequent application on the pleadings, the law and the facts, claiming ineffective assistance of trial, pcr, and appellate attorneys for failing to timely adequate raise all applicant's issues, defense, claims, arguments, and preserve all his rights during his first trial, pcr and direct appeal process. State v. Wertz, Op. No. 98-UP-009 (S.C. Ct. App. filed Feb 1998), applicant motion for summary judgement is to correct the unjust procedural defects where because of inadequate attorneys, judges, applicant was deprived of the one full bite, full adjudication of S.C. Code 17-27-80, S.C. Code 17-27-90, S.C. Code 17-27-100, motion for summary judgement is on the pleading,

affidavits, laws and facts concerning state heinderances and procedural defects, where the state appointed judges, trial attorney, pcr attorney, and appeal attorney who failed to adequately raise, rule, argue and timely preserve all applicant's rights to ensure a full adjudication of all claims under the 14th amendment of the state and federal constitution. Chubb v. State, 303 S.C. 396, 401 S.E.2d 159 (1991), failure to argue mercy is per se prejudicial to due process, denying applicant full bite of the apple in original application and supplemental complaint under the pcr rules applicant was entitled to a full adjudication on the merits of the original application or one [full bite] at the apple [extended] in Wilson v. State, every defendant has a right to file a direct appeal and one pcr application, since the state's attorney and judges has been ineffective in providing applicant due process in its procedures to ajudicate argue timely adequately preserve his (mercy ruling) where the jury could have voted for as little as five (5) years and the judge would not been able to sentence applicant to the prejudicial sentence of life in prison, applicant was then prejudicially denied his right to a pcr, because the state's only opposition can be statute of limitations, successiveness, which they cause. Id. at 218, 559 S.E.2d at 583.

Hence, there can be no geniune issues of material fact, and applicant is entitled to a judgement of a full bite at the apple raising, preserving adequately, raising the merits of his first original pcr. The state's motion for summary dismissal cannot survive or defeat the geniune issues of material facts for which applicant has raised and argued in this motion for summary judgement S.C. Code 17-27-70(b).

Lastly, a conditional order of dismissal would be prejudicial to the mandate of Austine, Odom and finally Wilson v. State, where applicant has prevailed by showing he has a 14th amendment right to be heard, and to exhaust inadequately untimely raised and preserved claim that cause a procedural default. Applicant also under after discovered evidence claims summary judgement

Please allow this to surfice as my certificate of service. 30 days exclusive response.

On Nov 19th, 2013, I Terry M. Wilmore #217739, served by P.C.I. Notice and Motion, Motion and Motion For Summary Judgement pursuant to Rule 56, on pleadings, exhibits, affidavits, law and facts.

TO: Attorney General
Office
P.O. Box 11549
Columbia, S.C. 29211

TO: York County Clerk
of Courts Office
P.O. box 649
York S.C. 29745

SWORN AND SUBSCRIBED TO before me
This 19th day of November, 2013

s/ Terry Wilmore
Terry M. Wilmore

Notary: Nancy C Merchant

Expire: 1-23-2023

STATE OF SOUTH CAROLINA COUNTY OF YORK	)	IN THE COURT OF COMMON PLEAS SIXTEENTH JUDICIAL CIRCUIT
Terry M. Wilmore, #217739, Applicant,	)	2013-CP-46-3157
v.	)	**RETURN AND MOTION TO DISMISS**
State of South Carolina, Respondent.	)	

In response to the post-conviction relief application filed October 16, 2013, the Respondent would show this Court:

I.

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 June 6, 1994, term of the York County Grand Jury for murder and possession of a firearm during the commission of a violent crime (1994-GS-46-1359). He was represented by Harry Dest and Gerald Smith, Esquires. On February 7, 1995, the Applicant underwent trial by jury pursuant to which he was found guilty of the indicted offenses. He was sentenced by the Honorable J. Derham Cole to confinement for life for murder, and to five years, concurrent, for the firearms charge.

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. Wilmore, Op. No. 96-MO-204 (S.C. Sup. Ct. filed August 21, 1996).

1997-CP-46-0919

The Applicant subsequently filed an application for PCR on June 5, 1997. The Respondent filed its Return on January 7, 1998. On October 26, 1998, an evidentiary hearing was held before the Honorable John C. Hayes, III, at which the Applicant was present and was represented by B. Allen Bullard, Esquire. By Order dated June 11, 1999, Judge Hayes denied and dismissed the Applicant's first application.

A timely Notice of Appeal was filed on the Applicant's behalf and a Petition for Writ of Certiorari was submitted by the South Carolina Office of Appellate Defense. On January 10, 2001, the South Carolina Supreme Court denied the Petition.

3:02-182-17BC

The Applicant then filed a Federal Habeas Corpus in the Federal District Court for the District of South Carolina on January 23, 2002. A Report and Recommendation was issued on September 27, 2002, recommending that the action be dismissed. On January 8, 2003, the Applicant's petition was denied by written order.

2005-CP-46-1784

The Applicant filed a second application for PCR on July 6, 2005. The Respondent filed its Return and Motion to Dismiss on October 7, 2005. By Final Order dated December 9, 2005, the Honorable John C. Hayes, III denied and dismissed the Applicant's application.

2006-CP-46-0441

The Applicant filed a third application for PCR on February 22, 2006. The Respondent filed its Return and Motion to Dismiss on April 28, 2006. By Final Order dated May 4, 2006,

the Honorable Lee S. Alford denied and dismissed the Applicant's application. The Applicant appealed this Order and the South Carolina Court of Appeals dismissed his appeal due to the Applicant's failure to timely file a Final Brief on December 15, 2006. The Remittitur was issued on April 2, 2007.

3:11-408-JFA-JRM

The Applicant then filed a second Federal Habeas Corpus in the Federal District Court for the District of South Carolina. On April 12, 2011, the Honorable Joseph F. Anderson, Jr. denied the Applicant's petition by written order.

On August 24, 2011, the United States Court of Appeals for the Fourth Circuit issued an order dismissing the Applicant's appeal.

II.

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

1. "14 Amendment 17-27-8) 17-27-100 17-27-90"
    a. "Inadequate PCR Attorney (17-27-10)"
2. "Mercy Verdict, Counsel Prejudiced Applicant by failing to request mercy verdict"
    a. "Trial Attorney and 17-27-80 Appellate Attorney 17-27-100"

For the purpose of this Return, the Respondent incorporates the York County Clerk of Court records, the application, and the Applicant prior PCR applications and Federal Habeas materials by reference. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

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The Court should summarily dismiss the current Application because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to 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." [Emphasis in original]. Id., 305 S.C. 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. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised these new grounds for relief in his prior post-conviction relief application. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

IV.

The Respondent submits that this Application for Post-Conviction Relief should also 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, et. seq. 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 February 7, 1995. The Applicant's unsuccessful appeal was filed on August 21, 1996. The Applicant was therefore required to file his application on or before August 22, 1997. This Application was filed on October 16, 2013, well after the one year statutory filing period had expired.

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, the Respondent requests that this Court summarily dismiss the application for post-conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

V.

The Applicant contends he is able to file a successive state PCR action alleging ineffective assistance of previous collateral counsel. The Respondent asserts this contention to be without merit as the ruling in Martinez v. Ryan, 132 S. Ct. 1309 (2012) 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 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

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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). Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous. See Kelly v. State, App. Case No. 2013-001079 (S.C. Supreme Court filed June 20, 2013).

VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. RUTLEDGE JOHNSON
Assistant Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By: _____
Attorneys for the Respondents

Columbia, South Carolina
December 3, 2013

27

Copy

The Honorable David Hamilton
Clerk of Court, York County
P.O. Box 649
York, S.C. 29745

January 14, 2014

RE: Terry Wilmore
[illegible]: 2013-CP-46-3157

Dear Clerk Hamilton:

Enclosed please find two (2) original responses from Applicant as to why the State's conditional order should not become final and a motion for summary judgement on all proceedings as there is no genuine issues of material fact presented as to why conditional order should not become final. Please file one into the record of this Court assign it a case number and of course clock stamp my copy and return it to me for my records.

Thank you for your valuable time and kind attention in this matter.

Sincerely, Terry M. Wilmore

Terry Wilmore

FILED-RECEIVED
2014 JAN 17 PM 4:36
DAVID HAMILTON
C.C.C.P.&GS
YORK COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF YORK

FILED-RECEIVED
2014 JAN 17 PM 4:36
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Terry M. Wilmore,
Applicant,

C/A NO.: 2013-CP-46-3157

v.

State of South Carolina,
Respondent.

APPLICANT'S RESPONSE TO CONDITIONAL ORDER WHY IT SHOULD NOT BECOME FINAL

This matter comes before this Court by way of Applicant's Post-Conviction relief, filed October 16, 2013.

REASONS WHY CONDITIONAL ORDER SHOULD NOT BECOME FINAL:

(1) Applicant filed his post-conviction relief application within the one (1) year specified requirement from time in which he discovered it, pursuant to S.C. Code Ann. §17-27-45(C).

(2) Applicant has included the State of South Carolina in the Supreme Court, with the date 9/15/13. See exhibit #1 evidencing by the Clerk of Court's filing that he filed subsequent PCR a month later. The case was made known to Applicant and sent through institutional mail copied off the www.sccourts.org website, named on writ of certiorari mercy verdict (page 5 of 6).

(3) Applicant did not knowingly and freely waive his 14th amendment constitutional State and Federal statutory right to have all his issues [timely] raised, preserved for the record and adjudicated in his prior PCR original supplemental amended complaint.

(4) From page 1 of 8 throughout the State's conditional order of dismissal, it only advises this Honorable Court of the procedural history of Applicant's prior pleadings,

exhaustions and [only] in a conclusory matter argues the facts, law and assertions that provides this Court jurisdiction to hear his merited issues.

(5) The conditional order should not become final because it does not include Odom v. State; Austine v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), extended in Wilson, 348 S.C. 215, 559 S.E.2d 581 (2002). It has been a long standing practice by our esteemed State Supreme Court, that the remedy to correct unjust state created heinderances to 1/3 Applicant raises issue which should or could have been raised pursuant to S.C. Code Ann. 17-27-90 is to file a subsequent PCR.

(6) McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (S.C. 2013). The State is asking this Court to allow conditional order to become final in violation of a bench mark ruling in McCoy. The lower court ruled against a successive untimely PCR and order that McCoy failed to prove a newly discovered evidence claim which was discovered after the limitation doctrine. The Supreme Court reversed applicant's newly discovered evidence as a result of the mercy verdict is that he was denied his 14th amendment constitutional right to have the benefit of the mercy verdict which the jury could have requested a minimum of five (5) years, instead of life sentence at the time applicant went to trial the mercy statute was still on the books.

(7) In McCoy, when the State files a motion to dismiss applicant's PCR, stating successiveness or failure to state a claim or that it wasn't [timely] genuine issues of material facts exsists as to whether applicant Wilmore claims or barred by limitations.

(8) It was filed in one year of discovering the mercy verdict case as evidence in record. S.C. Code 17-27-45(c) provides that if a PCR applicant like Wilmore discovers material facts require vacating of his conviction or sentence, applicant may file a PCR applicant [within] one year after the discovered date of actual discovery, applicant could not have raised

these issues in original order of PCR because they were not known. S.C. Code 17-27-90.

(9) Thus, applicant moves pursuant to S.C. Code Ann. §17-27-70(c) for summary judgement on the after discovered evidence doctrine, pursuant to S.C. Code section 17-27-45(c) Odom, Austine, Wilson as there is no genuine issues of material facts and applicant is entitled to judgement as a matter of S.C. Rule 50 section 6-9, and the appointment of counsel on the newly discovered assertions arguments, exhibits, affidavits and authorites to include case law in support there of. See exhibit #1.

(10) Because no evidentiary hearing was held, in McCoy the State Supreme Court ruled on newly discovered evidence not refuted the record. This PCR Court must assume facts present by applicant are true and view facts in light most favorable to applicant, Leamon v. State, 365 S.C. 452, 611 S.E.2d 494 (2005). Apllicant has alleged facts which has established an exception to the conditional rule of order becoming final. S.C. Code Ann. 17-27-80. Hence, a question of fact is [raised] which can only be resolved by a hearing, Delaney v. State, 269 S.C. 555, 556, 238 S.E.2d 679 (1977), emphasis in original. As to the timelyness issue this Court must not misconstrue section 17-25-45(A), with 17-27-45(c) discovery rule with limitation (doctrines) applicant argues he did not discovery the now claims until October 15, 2013, being numerous reasons why conditional order should not become final and why summary judgement should be granted to applicant under the one year limitation on discovery 17-27-45(c) genuine issues of material facts exsist under 17-27-90 which allows applicant a full bite of the apple, inspite of the State's only argument that he has had prior PCRs. Odom, 337 S.C. at 261, 523 S.E.2d at 755.

It is so motioned for summary judgement Rule 56 on the pleadings under Chubb v. State, 303 S.C. 395, 401 S.E.2d 159 (1991) failure of counsel to adequantly timely raise these issues was highly prejudicial for briefing on Appellate review.

The Honorable David Hamilton
Clerk of Court, York County
P.O. Box 649
York, S.C. 29745

CERTIFICATE OF SERVICE

I, Terry Wilmore, hereby certify that on January ___, 2014, I placed my response to State's conditional order of dismissal, as to why it should not become final upon the following parties: (1) York County Clerk of Court's Office, David Hamilton (Clerk)/ P.O. Box 649/ York, S.C. 29745; and (2) Attorney Ruthledge Johnson/ P.O. Box 11549/ Columbia, S.C. 29211, through Perry C.I. Mail-room staff. motion for SUMMARY judgement on the pleadings pursuit to S.C. ANN 17-27-70(C). Please Allow this to suffice as my Affidavit of Service that All issues, Arguements, exhibit, grounds And Claims Are true

SWORN AND SUBSCRIBED TO before me
This 13 day of January, 2014

s/ Terry Wilmore
Terry Wilmore

Notary: Tamara Conwell
My Commission Expires
Expire: September 25, 2023

RECEIVED
JAN 13 2014
R.C.I. MAILROOM

FILED-RECEIVED
2014 JAN 17 PM 4:36
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

exhibit #1

counsel was not ineffective. The charges which were nol prossed prior to the first trial were not properly brought on retrial. Accordingly, Petitioner's convictions for the two counts of armed robbery, assault and battery with intent to kill, and use of a motor vehicle without the owner's consent are **REVERSED**.

II. Mercy

Petitioner argues counsel was ineffective in failing to appeal to the jury for mercy. We agree.

Petitioner was tried under the previous burglary scheme. *See Simmons v. State*, 331 S.C. 333, 503 S.E.2d 164 (1998) (discussing the former burglary statute, S.C. Code Ann. § 16-11-311 (Supp. 1997), and the impact of improper remarks by the solicitor regarding the mercy issue). Under the old statute, a conviction for burglary without a recommendation for mercy carried a mandatory life sentence, while burglary with a recommendation of mercy could carry as little as five years in prison. Petitioner's counsel admitted at the PCR hearing that he simply forgot to argue for a recommendation of mercy to the jury. He testified it was not a tactical decision to avoid arguing for mercy, rather, he "didn't think about it" until several days later when he "was sitting in [his] office and . . . realized [he] did not argue for mercy." The PCR court found counsel was deficient in failing to argue for a mercy recommendation. In fact, the State, in their brief to this Court, does not seem to contest counsel was deficient. The State simply argues Petitioner was not prejudiced by counsel's error. We find counsel was deficient, and Petitioner suffered prejudice.

The PCR court found Petitioner was not prejudiced by counsel's failure to argue for mercy. The court found Petitioner's other sentences totaled 45 active years, thus making counsel's error non-prejudicial. The PCR court stated, " a letter to trial counsel from the Department of Probation, Parole, and Pardon Services, evinces that the remaining sentences, particularly the twenty- five year sentence for armed robbery, will move [petitioner's] parole eligibility date back further than when he merely had a life sentence for burglary. Therefore, [petitioner] has not been prejudiced by [counsel's] error, because even if he had received the minimum possible sentence on the burglary charge (five years), he still would not have been eligible for parole any sooner."

As stated above, Petitioner should only have been tried for the burglary charge. Therefore, he should not have had additional "active years" to serve, pushing his parole eligibility back beyond what it would have been for a single burglary charge. Without these additional years, then, according to the PCR judge's reasoning, Petitioner was clearly prejudiced by counsel's failure to argue for mercy. Regardless, Petitioner is entitled to relief under *Chubb v. State*, 303 S.C. 395, 401 S.E.2d 159 (1991). Under *Chubb*, failure to argue mercy is *per se* prejudicial.

Accordingly, we **REVERSE** the PCR court's finding that Petitioner was not prejudiced by his counsel's failure to argue for a mercy recommendation and **REMAND** for a new trial.

CONCLUSION

Based on the forgoing, we find Petitioner's convictions for armed robbery, assault and battery with intent to kill, and use of a motor vehicle without the owner's consent were not properly brought by the solicitor. Accordingly, they are **REVERSED**. We further find Petitioner was prejudiced by counsel's failure to argue for mercy on the burglary charge.

Terry M. Wilmore, #217739
Perry C.I. Q-1-A 211
430 Oaklawn Road
Pelzer, S.C. 29669

March 19, 2014

The Honorable David Hamilton
Clerk of Court, York County
P.O. Box 649
York, S.C. 29745

Honorable Lee Alford, Judge
1675-15 York Hwy.
York, S.C. 29745

RE: Rule 59(e) Motion to Alter or Amend Judgement, Appointing Counsel
C/A No.: 2013-CP-46-3157

Dear Mr. Hamilton:

You will find enclosed two copies, one original in the above entitled matter. Please clock file the original and forward me a copy for my records, motion to reconsider, order rescinding the final order of dismissal and appointment of attorney, Rule 59(e) altering or amending judgement. Thank you for your time and kind attention in this matter.

Sincerely,

Terry M. Wilmore

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Terry M. Wilmore,
Applicant,

C/A NO.: 2013-CP-46-3157

v.

State of South Carolina,
Respondent.

MOTION TO RECONSIDER ORDER RESCINDING THE FINAL ORDER OF DISMISSAL AND APPOINTMENT OF ATTORNEY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to indictment (1994-46-1359). On February 7, 1995, Applicant was tried by jury in York County and was found guilty of murder. He was sentenced by the Honorable J. Durham Cole to life for murder and five years (concurrent) for weapon charge. A timely appeal was filed and the conviction was affirmed. State v. Wilmore, Op. No. 96-MO-204 (S.C. Ct. filed August 21, 1996).

Applicant filed an PCR on June 5, 1997. The State made its return on January 7, 1998. By order dated June 11, 1999, Judge Hayes denied and dismissed Applicant's PCR.

PCR attorney Allen Bullard, esquire, failed to raise the issues and preserve them for appellate review.

PCR attorney failed to adequately advise Applicant properly

APPOINTMENT OF COUNSEL

Applicants PCR should not be summarily dismissed just because its his second application. The rule is to appoint counsel after State's return. See S.C. Code Ann. §17-27-60, also see Rule 71.1(d) SCRCP.

ARGUMENT

Although successive PCR applications are [disfavored] they are not [prohibited]. Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 602 (2008) (emphasis added).

REQUEST FOR HEARING

Applicant alleges that his [first PCR] counsel [failed] to file a motion pursuant to Rule 59(e), SCRCP. First PCR counsel then appealed the denial of PCR. In the appeal of Applicant's first, first PCR counsel filed a Johnson petition.

Applicant asserts that had it not been for [first PCR counsel's] erronous decision in not filing a 59(e) the result of the [PCR appeal] would have been different.

Counsel's failure to file a 59(e) acts as a procedural bar to preclude the Appellate Court from reviewing the issues now raised for appellate review. It is incumbent upon a party in any PCR action to file a Rule 59(e) motion in the event the PCR Court fails to make specific finding of facts and conclusions of law regarding the issues, claims, and assertions now raised. (Citing Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007)).

In the application Applicant argues that [first]PCR counsel's decision not to file a Rule 59(e) barred him from having his now raised facts from being heard on appeal. Essentially, Applicant is claiming that first PCR counsel's ineffectiveness [robbed] him of his [one fair] bite at the [apple].

Although Applicant cites Martinez v. Ryan, his claims is in part based upon state law. Odom, Austine, and Wilson, 348 S.C. 215, 559 S.E.2d 581 (2002) exclusively allows Applicant to seek [belated] appellate review of these PCR claims, when Applicant was prejudicially not properly advised of his right to appeal all the now raised issues similarly. Counsel in first PCR failure to file a 59(e) denied Applicant complete access to the Appellate Court process. See Wilson, Supra.

Therefore, Applicant should be afforded a hearing and appointment of counsel for this claim.

The State failed to include the Odom, Austine, and Wilson remedy in your final order of summary dismissal. Also summary judgement motion filed properly and controlling case McCoy v. State, (2013).

Please rule according to findings of facts and conclusions of law on each claim, arguments, issues and case law in support of the Applicant's PCR.

CONCLUSION

Based upon the foregoing, Applicant respectfully request that this Honorable Court reconsider its order of dismissal, altering amending judgement and appoint counsel for him at an evidentiary hearing.

Respectfully Submitted,

Terry M. Wilmore

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Terry M. Wilmore,
Applicant,

C/A NO.: 2013-CP-46-3157

v.

State of South Carolina,
Respondent.

PROOF OF SERVICE

3-19-14

I, Terry M. Wilmore, hereby declare that on this day I have served a Motion to Reconsider Order Rescinding The Final Order of Dismissal and Appointment of Attorney, upon the following Parties: 1) David Hamilton, York County Clerk of Court/ P.O. Box 649/ York, S.C. 29745; 2) Honorable Lee Alford, Judge/ 1675-1J York Hwy./ York, S.C. 29745, by and through Perry Correctional Institution's Legal Mail System.

Terry M. Wilmore

SUBSCRIBED AND SWORN TO before me
This 19 day of March, 2014

Notary: Tamara Cinnelli
My Commission Expires
September 25, 2023
Expire: _____

FILED-RECEIVED
2014 MAR 26 PM 12:38
DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

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STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Terry M. Wilmore, #217739,
Applicant,

C/A NO.: 2013-CP-46-3157

v.

State of South Carolina,
Respondent.

MOTION FOR RECONSIDERATION ON 59(e) TO ALTER OR AMEND JUDGEMENT

Now comes the Applicant in the above matter for reconsideration of his 59(e) Alter or Amend Judgement.

Applicant's 59(e) motion was mailed on March 19, 2014, and filed March 26, 2014. Therefore Applicant received his final order of dismissal on March 7, 2014 that was signed by the Honorable Judge Alford on February 7, 2014. However, the order was filed by the Clerk of Court on March 3, 2014 and Applicant received the order on March 7, 2014. Therefore, Applicant should be granted reconsideration on his 59(e) motion to Alter or Amend Judgement, because Applicant's motiom would not have been past his deadline.

Terry M. Wilmore
TERRY M. WILMORE

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)
)
)
Terry M. Wilmore, #217739)
)
Applicant,)
)
vs.)
)
State of South Carolina,)
)
Respondent.)
)

IN THE COURT OF COMMON PLEAS
THE SIXTEENTH JUDICIAL CIRCUIT

2013-CP-46-3157

ORDER

This matter comes before the Court pursuant to a Rule 59(e) Motion to Alter or Amend Judgment. The Applicant requests that the court Alter its Final Order of Dismissal dated February 7, 2014. Under the rules of procedure, a Motion to Alter or Amend Judgment must be made within ten days after a final order is issued. In this instance, the Applicant filed his Motion past the deadline. In addition, this Motion to Alter or Amend is without merit. Therefore, the court declines to Alter or Amend its previous Order dated February 7, 2014.

IT IS SO ORDERED.

York, S. C.

March 28, 2014

Lee S. Alford
Resident Judge
of the Sixteenth Judicial Circuit

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) OF THE SIXTEENTH JUDICIAL CIRCUIT
)
) 2013-CP-46-3157
Terry M. Wilmore, #217739)
)
Applicant,) **ORDER**
)
vs.)
)
State of South Carolina,)
)
Respondent.)

This matter is before the Court on Motion of Terry M. Wilmore to Reconsider the Order of this Court denying his Motion for Reconsideration of the Order of the Court dismissing his PCR Application. The Motion to Reconsider the Order, dated March 28, 2014, is hereby denied.

The Final Order of Dismissal was dated February 7, 2014. The Order was filed on March 3, 2014 and Applicant asserts that he received it on March 7, 2014. He did not mail his Motion to Reconsider until March 19, 2014 and it was not received until March 26, 2014. More than ten (10) days passed before his motion was even put in the mail according to him. It was not received until March 26, 2014, a week later.

The Motion was not timely made and is without merit in any event. The Motion to Reconsider the Order Denying the 59(e) Motion to Reconsider is therefore denied.

IT IS SO ORDERED.

York, S.C.

April 23, 2014

Lee S. Alford
Chief Administrative Judge
for the Sixteenth Judicial Circuit

Terry M. Wilmore, #217739
Perry C.I. Q-1-A 211
430 Oaklawn Road
Pelzer, S.C. 29669

May 27, 2014

Honorable Daniel Shearouse, Clerk
Clerk's Office
P.O. Box 11330
Columbia, S.C. 29211

RE: Notice of Appeal

Dear Mr. Shearouse:

Please find enclosed one original Notice of Appeal alone with the Orders of the Honorable Lee S. Alford and Appellant's Objection and Motions that was filed with the Circuit Court, in the Court of Common Pleas. Please file this with your office. Thank you for your time in this matter.

Sincerely,

Terry M. Wilmore

Terry M. Wi[illegible]
Perry Correctional Inst,
Q1A21 430 Oaklawn Rd
Pelzer S.C. 29665

UNITED STATES POSTAGE
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Honorable Daniel Shearouse, Clerk
Clerk's Office
P.O. Box 11330
Columbia S.C. 29211