

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
J. DERHAM COLE, CHIEF JUDGE FOR ADMINISTRATIVE PURPOSES

CASE NO. 2013-CP-42-3202

THE STATERESPONDENT,
V.
ALAN DUANE ROSE, #313915 APPELLANT.

NOTICE OF APPEAL

ALAN DUANE ROSE, #313915 APPEALS THE ORDER OF THE HONORABLE J. DERHAM COLE DATED JULY 18, 2014, WHICH DISMISSED HIS POST-CONVICTION RELIEF APPLICATION, APPELLANT RECEIVED WRITTEN NOTICE OF THE ONDER ON JULY 18, 2014.

~~AUGUST 11~~ ^{October 3} 2014
AR

S/ Alan Duane Rose 313915
ALAN DUANE ROSE, #313915
BRCI-MOULTRIE #1099
4460 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA
29210

OTHER COUNSEL OF RECORD:
OFFICE OF THE ATTORNEY GENERAL
J. CLAYTON MITCHELL, ESQUIRE
PCR DIVISION-7TH CIRCUIT
P.O. BOX 11549
COLUMBIA, SOUTH CAROLINA 29211

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S.C. SUPREME COURT

PCR

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J. DERHAM COLE, CHIEF JUDGE FOR ADMINISTRATIVE PURPOSES **S.C. SUPREME COURT**

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THE STATERESPONDENT,
V.
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PROOF OF SERVICE

I CERTIFY THAT I SERVED THE NOTICE OF APPEAL ON J. CLAYTON MITCHELL BY DEPOSITING A COPY OF IT IN THE UNIYED STATES MAIL, POSTAGE PREPAID, ON ~~AUGUST 11~~ ^{October 3} 2014, ADDRESSED TO HIS OFFICE AT P.O. BOX 11549, COLUMBIA, SOUTH CAROLINA 29211 BY DELIVERING A COPY TO THE BROAD RIVER CORRECTIONAL INSTITUTION MAIL ROOM ON THE ABOVE DATE.

~~AUGUST 11~~ ^{October 3} 2014
AA

S/ Alan Duane Rose #313915
ALAN DUANE ROSE, #313915
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PCR DIVISION-7TH CIRCUIT
P.O. BOX 11549
COLUMBIA, SOUTH CAROLINA 29211

STATE OF SOUTH CAROLINA
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Alan Duane Rose, #313915,

2013-CP-42-3202

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 August 12, 2013.

I. 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 Spartanburg County. The Applicant was indicted at the September 2005 term of the Spartanburg County Grand Jury for Criminal Sexual Conduct with a Minor, First Degree (2005-GS-42-4380) and Lewd Act Upon a Minor Under 16 Years of Age (2005-GS-42-4381). He was represented on the charges by Scott W. Davis, Esquire. On February 16, 2006, the Applicant proceeded to trial where he was found guilty as indicted. He was sentenced by the Honorable Roger L. Couch to confinement for a period of twenty-five (25) years on the Criminal Sexual Conduct with a Minor charge and to fifteen (15) years on the Lewd Act Upon a Minor Under 16 Years of Age charge. The sentences were to run concurrently. The Applicant did not initially appeal his conviction or sentence.

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The Applicant subsequently filed an application for post conviction relief (PCR) on November 8, 2006. The Applicant raised the following issues in his first PCR:

1. Involuntary waiver of appeal, in that
 - a. "No direct appeal."
 - b. "I thought my lawyer did that [filed an appeal]. Unaware of time limit. I never waived my right to appeal."
2. "The girl lied, changed from one date to another. Witness, she was not at my house when incident. Police railroaded me, her Granma works for Spartanburg County Sheriff."
3. Insufficient indictments, in that
 - a. "Indictment 1st had 7-4-2001 as date of incident then they changed it to 7-4-200, 1999, 1998, 1998 [indecipherable] . . ."
 - b. "1st indictment for lewd act the date was 7-4-01 then it was changed to 7-4-00, 99, 98, 97. Finally 7-4-99."
 - c. "My wife, daughter and friend said she was not at my house 7-4-99."
 - d. "I was threatened with a habitual criminal after 4 hours of interrogation, and after I asked for counsel."

An evidentiary hearing was convened on July 18, 2007 before the Honorable J. Derham. Applicant was present and represented by N. Douglas Brannon, Esquire. S. Prentiss Esquire of the South Carolina Attorney General's Office, represented the Respondent. At the hearing the Applicant expressed his intention to withdraw all PCR allegations in order to be granted a belated review of direct appeal issues pursuant to White v. State, 263, S.C. 110, 208 S.E.2d 35 (1974). The State consented to the Applicant's request. The court agreed that Applicant was denied a direct appeal because trial counsel did not advise Applicant of his appellate rights. The court ordered all other allegations to be dismissed with prejudice, per agreement with the Applicant by order filed September 14, 2007.

Robert M. Pachak, Esquire, of the South Carolina Office of Appellate Defense filed a petition for writ of certiorari and a belated review of direct appeal issues pursuant to White on

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Applicant's behalf. The Applicant contended that he did not knowingly and intelligently waive his Fifth Amendment rights to testify at trial because the trial judge informed him of this right in the presence of the jury. The South Carolina Court of Appeals affirmed Applicant's conviction and ruled that this issue was not preserved as trial counsel did not object to the judge's advisement. State v. Wilson, Op. No. 2009-MO-002 (S.C. Ct. App. filed January 12, 2009). The remittitur was issued on January 28, 2009.

2009-CP-42-0657

The Applicant then filed his second application for post conviction relief on February 3, 2009. The Applicant raised the following issues in his second PCR:

- 1) "Counsel failed to file 'notice' as set out in 203."
 - a) "See SCRPC Rule 203."
- 2) "Newly Discovered evidence '2009-MO-002'"
 - a) "White v. State review 2009-MO-002."
- 3) "Unconstitutional sentence of '85%' 'Truth-In-sentence'"
 - a) "'Single Subject Clause' of SC Constitution. art"

The Respondent filed its return on July 13, 2009. The Honorable J. Mark Hayes and dismiss the application with prejudice by order filed May 9, 2011. The court found that the application was filed untimely and barred as a matter of law because it was successive to the applicant's previous application.

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CURRENT APPLICATION

In his *third* and 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 prior PCR counsel, in that
 - a. "Applicant submits that his previous post-conviction relief counsel of record violated the Applicant's procedural due process rights by abandoning the Applicant's rights to be fully heard under the State Constitution and the 14th amendment Due Process Clause. A new substantive standard and right that has been applied to the Applicant retroactively."

- b. "That the Applicant could not through the exercise of due diligence litigate the claim's [sic] due to PCR counsel's concealment. Thus causing the Applicant to unknowingly and unintelligently to waiv [sic] his rights in that respect."

Before this Court are the records of the Spartanburg County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, Applicant's previous PCR records, Applicant's PCR application and Respondent's Return and Motion to Dismiss.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Successiveness

The Court finds that the current application for post conviction relief must be dismissed because it is successive to the previous application for post conviction relief. S.C. Code Ann. § 17-27-90 (2003) 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.

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).

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This Court finds that the current allegations 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).

Statute of Limitations

This Court further finds 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 found guilty of the offenses he challenges in this Application on February 16, 2006. The Applicant was therefore required to file his application on or before February 16, 2007. This application was filed on August 12, 2013 which was over six (6) years after the statutory filing period had expired. Even if this Court were to apply the later remittitur date from the Applicant's belated review of his direct appeal issues pursuant to White v. State issued on

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January 28, 2009, this application was still filed over three (3) years after the statute of limitations 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) (2003) 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 dismisses the application for post conviction relief for failure to file within the time mandated by the Post-Conviction Procedure Act.

Ineffective Assistance of PCR Counsel

In addition to these allegations being barred by the Uniform Post Conviction Procedure Act, and being procedurally barred, this Court finds there is no merit to the allegation of ineffective assistance of post conviction relief counsel. 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. 609 (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

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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 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.

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.”) The South Carolina Supreme Court has found – in a published order – that “the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief

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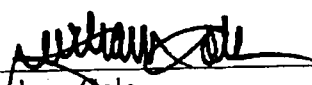
actions.” Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). This Court finds Applicant’s contention that Martinez allows him to bring this untimely and successive state PCR application is misguided and erroneous.

III. 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 thirty (30) 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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
J. Clayton Mitchell, Esquire
PCR Division – 7th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 18 day of July, 2014.



J. Derham Cole
Chief Judge for Administrative Purposes
Seventh Judicial Circuit

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_____, South Carolina

ALAN DUANE ROSE, SCDC#313915
BRCI-MOULTRIE #1099
4460 BROAD RIVER ROAD
COLUMBIA, SOUTH CAROLINA 29210

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