

STATE OF SOUTH CAROLINA )  
COUNTY OF DARLINGTON )

IN THE COURT OF COMMON PLEAS )  
FOR THE FOURTH JUDICIAL CIRCUIT )

Darnell Hunter, # 260730, )

2013-CP-16-571 )

Applicant, )

v. )

CONDITIONAL ORDER )  
OF DISMISSAL )

State of South Carolina, )

Respondent. )

FILED  
2014 JAN -9 PM 12:23  
SCOTT B. SUGGS  
CLERK OF COURT/RMC  
DARLINGTON COUNTY, S.C.

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 16, 2013. The Court finds as follows:

**I. PROCEDURAL HISTORY**

**A. Underlying Conviction**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. In January 1999, The Darlington County Grand Jury indicted Applicant for murder (1999-GS-16-84), reckless homicide (1999-GS-85) and driving under suspension greater than first offense (1999-GS-16-86). Robert L. Kilgo, Esquire represented Applicant. Applicant proceeded to trial before the Honorable James E. Lockemy and a jury. The jury found Applicant guilty on the murder indictment to the lesser included offense of voluntary manslaughter, and not guilty on the other two indictments. On August 28, 1999, Judge Lockemy sentenced Applicant to twenty-four (24) years imprisonment.

A notice of appeal was filed on Applicant's behalf at the South Carolina Court of Appeals. Katherine Carruth Link, Esquire, of the South Carolina Office of Appellate Defense perfected the

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*Scott B. Suggs*  
**CLERK OF COURT/RMC  
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appeal. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Hunter, Op. No. 01-UP-159 (S.C. Ct. App. filed March 22, 2001). The South Carolina Supreme Court denied the Applicant's petition for writ of certiorari on January 10, 2002.

**B. First PCR (2002-CP-16-312)**

On April 8, 2002 Applicant filed his first PCR. Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
  - a. Failed to specifically challenge "the sufficiency of the state of mind . . . for a finding of guilty for the manslaughter conviction."
  - b. Failed to challenge the trial judge's decision to charge voluntary manslaughter "when applicant stated he wanted purely murder and reckless homicide only."
  - c. Failed to move for judgment notwithstanding the verdict.
  - d. Failed to specifically challenge defects in the indictments.
  - e. Failed to request a specific charge on witness impeachment.
  - f. Failed to inform the Applicant of advantages and disadvantages of pleading guilty.
  - g. Failed to research constitutionality of mandatory sentence.
  - h. Failed to request a specific charge on accomplice liability.
2. Ineffective assistance of appellate counsel:
  - a. Failed to raise the issue of insufficient evidence to support the voluntary manslaughter conviction.
  - b. Failed to raise the "meritorious issue of quashing of the indictments."
  - c. Failed to raise meritorious issues "that were objected to and preserved for appellate review."
3. Lack of subject matter jurisdiction.

Applicant also filed an "Amendment to Application for Post Conviction Relief" on March 10, 2003, in which he re-alleged several of the issues raised in the application, as well as the following issues:

1. Ineffective assistance of trial counsel:
  - a. Erred in allowing the Applicant to reject a "plea bargain which would have resulted in a 15 year sentence upon the service of 65% of the time."

- b. Failed to move to suppress the indictments based on a Double Jeopardy violation.
- c. Failed to object to “the burden shifting instruction of the solicitor requesting a charge of voluntary manslaughter.”

This Court convened a hearing into the application on May 17, 2005, at the Darlington County Courthouse. Applicant was present and represented by Henry M. Anderson, Jr., Esquire. This Court denied PCR and dismissed the application by written order dated July 7, 2005.

Applicant filed a timely notice of appeal from the denial of his PCR. Wanda H. Carter, Esquire, of the Office of Appellate Defense perfected the appeal with the filing of a Johnson<sup>1</sup> petition for writ of certiorari. Applicant filed a *pro se* response to the petition. On October 5, 2007, the Court of Appeals denied the petition and dismissed the appeal.

#### **C. Federal Habeas Corpus (4:08-1050-CMC-T)**

Applicant filed a petition for federal *habeas corpus* on April 4, 2008. On July 27, 2009, the federal Magistrate issued a report and recommendation to deny the petition. The United States District Court for the District of South Carolina dismissed the petition on August 19, 2009. The United States Court of Appeal for the Fourth Circuit dismissed Applicant’s appeal on June 1, 2010.

#### **D. Second PCR (2012-CP-16-312)**

Applicant filed a second PCR on May 14, 2012. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. “Due Process Violations, unconstitutional sentence”
  - a. Applicant again challenged the evidence used to convict him of voluntary manslaughter.

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<sup>1</sup> Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

The Honorable Paul M. Burch entered a Conditional Order of Dismissal, signed June 28, 2012, and filed July 2, 2012, provisionally denying and dismissing the application as successive and untimely. Applicant did not respond to the conditional order, and Judge Burch dismissed the application by order dated August 28, 2012, and filed September 4, 2012. Applicant did not appeal the dismissal of his second PCR.

## II. CURRENT APPLICATION

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

1. "Ineffective Assistance of 1<sup>st</sup> Collateral Review Counsel (PCR)"
  - a. PCR counsel was ineffective pursuant to Martinez v. Ryan, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1309 (2012), for being unprepared for the hearing.
  - b. PCR counsel was ineffective for failing to file a Rule 59, SCRPC, motion.
2. "Ineffective Assistance of Trial Counsel"
  - a. Failure to object to the insufficiency of the evidence
3. "Ineffective assistance of Appellate Counsel"
  - a. Failure to raise insufficiency of evidence on appeal.

Respondent made a Return and Motion to Dismiss on December 30, 2013, asking the Court to dismiss the Application as successive, untimely, and failing to state a cognizable claim under the Post-Conviction Procedure Act.

## III. FINDINGS OF FACT AND CONCLUSION OF LAW

S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code

Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law in ruling on Respondent's motion to dismiss:

**A. Successive**

The Court finds this application should be dismissed because it is successive to the previous application for post-conviction relief. Successive applications are disfavored. Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). S.C. Code Ann. § 17-27-90 requires that:

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, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. If the applicant could have raised these allegations previously, 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. Id.

Applicant could have raised the "new" grounds for relief in his prior post-conviction relief application. In fact, these allegations regarding the sufficiency of the evidence used to convict him of voluntary manslaughter were raised in his prior applications. Applicant has failed to present any reasons why he should be allowed to proceed with a successive application. Therefore, the Court

finds summary dismissal is appropriate.

**B. Failure to Timely File**

The Court further finds this Application should be dismissed as untimely S.C. Code Ann.

§17-27-45(a) provides that:

“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.”

This statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996).

Applicant's direct appeal was concluded in January 2002. He was therefore required to file his application before January 2003. This application was filed on May 16, 2013, which was well beyond the time that the statutory filing period had expired. Therefore, the Court finds that summary dismissal is appropriate.

**C. Failure to State a Claim**

The Court further finds this application should be dismissed for failure to state a cognizable claim under the Post-Conviction Procedure Act. An applicant may commence a post-conviction relief action based on the following grounds:

- “(1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, parole or conditional release [was] unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy....”

S.C. Code Ann. § 17-27-20(a). Applicant alleges Martinez v. Ryan allows him to proceed on a claim of ineffective assistance of collateral counsel. However, the ruling in Martinez has no bearing on Applicant’s ability to raise ineffective assistance of PCR counsel claims in a successive PCR application. Rather, Martinez addresses a narrow exception to the procedural default rules imposed on federal habeas corpus petitions. See Martinez, 132 S. Ct. at 1315 (“The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.”). Thus, the holding in Martinez is limited to federal habeas corpus review and is not applicable to state PCR actions. See Kelly v. State, Order No. 2013-06-20-01 (S.C. Sup. Ct. order dated June 20, 2013) (“Like other states, we hereby recognize that the holding in Martinez is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.”).

Therefore, Martinez does not allow Applicant to bring this untimely and successive state PCR application alleging ineffective assistance of PCR counsel. The South Carolina Supreme Court’s opinion in Aice 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.”). Furthermore, there is no constitutional right to effective assistance of collateral review counsel. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). Thus, Applicant has failed to demonstrate “[t]hat the conviction or the

sentence was in violation of the Constitution of the United States or the Constitution or laws of this State[.]” S.C. Code Ann. § 17-27-20(a)(1). Therefore, the application should be summarily dismissed.


**IV. CONCLUSION**

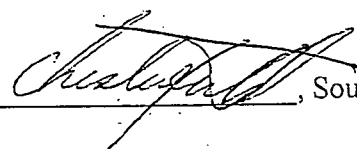
The Court finds that the record before it creates no genuine issue of material fact and Respondent is therefore entitled to judgment as a matter of law.

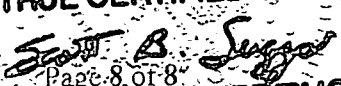
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order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

Office of the Attorney General  
Attn: Joshua L. Thomas, Esquire  
Post Office Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 2nd day of January, 2013.

  
THE HONORABLE PAUL M. BURCH  
Chief Judge for Administrative Purposes  
Fourth Judicial Circuit

  
South Carolina

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