

STATE of South Carolina  
In The Supreme Court

Appeal From Aiken County  
Court of Common Pleas

Do Yet A. Early, III  
Chief Administrative Judge  
Second Judicial Circuit Court

Case No: 2014-CP-02-00221

**RECEIVED**

FEB 24 2015

S.C. Supreme Court

Booker T. McKenney #325168 . . . . . Appellant

State of South Carolina, <sup>US.</sup> . . . . . Respondent

Notice of Appeal

Booker T. McKenney #325168 Appeals the order of the  
Honorable Do Yet A. Early, III dated January 30, 2015.  
Appellant received notice of entry of this order on  
February 13, 2015.

Respectfully Submitted,

Other counsel of Record  
Daniel Gourley  
Asst Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

~~S/Booker T. McKenney~~  
Booker T. McKenney #325168  
McCormick Corr. Inst.  
386 Redemption Way  
McCormick, S.C. 29899

Dated: 2/19/15 2015.

STATE of South Carolina  
In The Supreme Court

Booker T. McKenney #325168..... Appellant

US.

STATE of South Carolina..... Respondent

Case NO: 2014-CP-02-00221

Certificate of Service

**RECEIVED**

FEB 24 2015

S.C. Supreme Court

The undersigned hereby certifies that a Notice of Appeal has been served on opposing counsel, Daniel Gourley, AssT. Attorney General and also on the Honorable Liz Goldard, Clerk of Court for Aiken County And on the Honorable Daniel E. Shearouse, Clerk of the Supreme Court by mailing three copies in envelopes properly addressed with postage prepaid this 19<sup>th</sup> day of Feb. 2015, to the addresses below.

Daniel E. Shearouse  
Clerk of Supreme Court  
P.O. Box 11330  
Columbia, S.C. 29211

Daniel Gourley  
AssT. Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211

Respectfully Submitted,  
~~S/ Booker T. McKenney~~  
Booker T. McKenney #325168  
McCormick Com. Inst.  
386 Redemption Way  
McCormick, S.C. 29899

Liz Goldard  
Clerk of Court  
P.O. Box 583  
Aiken, S.C. 29802

STATE OF SOUTH CAROLINA )  
 COUNTY OF AIKEN )  
 Booker T. McKenney, #325168 )  
 Applicant. )  
 v. )  
 State of South Carolina. )  
 Respondent. )

IN THE COURT OF COMMON PLEAS  
 FOR THE SECOND JUDICIAL CIRCUIT

Case No. 2014-CP-02-00221

**FINAL ORDER OF DISMISSAL**

FILED 2.10 2015  
*Liz Goodard*  
 C.C.P.&G.S.  
*Kathleen J. Stroble*  
 Deputy Clerk

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 31, 2014<sup>1</sup>. The Respondent made its return on August 5, 2014, requesting the application be summarily dismissed based upon statute of limitations and successiveness.

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 signed August 6, 2014 and filed August 13, 2014, 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. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated August 13, 2014, serving the above mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Response to Conditional Order of Dismissal" and filed on August 26, 2014, the Applicant argues that he raised a due process violation in his present PCR application and the State failed to address this issue in its return and motion to dismiss. Therefore, the State has waived to its right to raise the statute of limitations as a defense. Applicant further argues that he should not be barred by the statute of limitations under Austin v.

<sup>1</sup> The application was received by the South Carolina Attorney General's office on May 7, 2014.

*MLC*  
*ET*

STATE OF SOUTH CAROLINA  
 COUNTY OF AIKEN  
 I, Liz Goodard, Clerk of Court of Common Pleas and General  
 Sessions for Aiken County, South Carolina do hereby certify  
 that the foregoing constitutes a true and correct copy of the  
 original documents which have been filed in my office this  
10 day of February 2015  
*Liz Goodard*  
 C.C.P. & G.S. Aiken County, S.C.  
*Kathleen J. Stroble*  
 Deputy Clerk

State. Applicant further filed a document captioned as "Notice and Motion for Rehearing Pursuant to Rule 59(A) and 59(E)." In this document, Applicant reargues his initial allegation of ineffective assistance of PCR Counsel for counsel's failure to file a Rule 59(E) after the Honorable W. Jeffrey Young's order denied his original PCR application (2008-CP-02-1760). Applicant states that he could not have filed this issue in his first application because his appointed trial counsel and state appointed PCR attorney waived Applicant's rights to comply with the state's procedures.

This Court has reviewed the Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

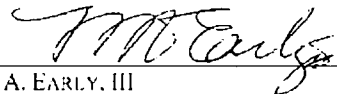
Initially, this Court notes that Applicant captioned a document as a motion for Rule 59(A) or Rule 59(E). As this matter has not reached its final judgment, a motion to alter or amend judgment pursuant to Rule 59 is premature. As a result, this Court interprets Applicant's motion pursuant to Rule 59(E) as an additional response to the Conditional Order of Dismissal. Furthermore, Applicant's argument regarding Austin v. State is misplaced. A review of Applicant's procedural history reveals Applicant appealed the denial of his first PCR application. The South Carolina Supreme Court denied Applicant's appeal and the remittitur was issued on July 9, 2013. Therefore, Austin is not applicable to Applicant's case. Additionally, Applicant's claim that he received ineffective assistance of PCR counsel for failing to file a Rule 59(E) in his original PCR application (2008-CP-02-1760) is not a proper claim for PCR. This Court reminds Applicant that there is no claim of ineffective assistance of PCR Counsel in state courts. Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

*WJE*  
*2*

This Court notes the Applicant pled guilty on November 13, 2007. As this action was filed on January 31, 2014, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-2745(a) (Supp.2003). This is the Applicant's second application for post-conviction relief. This Court notes successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to his case at the evidentiary hearing for his first PCR application on January 26, 2010. See Odom v. State, 337 S.C. 256, 261 523 S.E.2d 753, 755 (1999). ("[A]n Applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'").

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

AND IT IS SO ORDERED this 30 day of Jan, 2015.



DOYET A. EARLY, III  
Chief Administrative Judge  
Second Judicial Circuit Court

Bamberg, South Carolina.

Booker T. McKenney, #325168, )  
)  
Applicant, )  
)  
v. )  
)  
State of South Carolina, )  
)  
Respondent. )  
\_\_\_\_\_ )

**CONDITIONAL ORDER  
OF DISMISSAL** 8.13.14  
~~FILED~~ 800  
Liz Hodard  
CC, C.P. & G.S.  
Anita Knoepfle 105  
Deputy Clerk

This matter comes before this Court by way of an application for post-conviction relief January 31, 2014.<sup>1</sup> In its Return, Respondent requests that the action be summarily dismissed.

**PROCEDURAL HISTORY**

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. The Applicant was indicted at the April 2007 term of the Aiken County Grand Jury for Possession of a Firearm or Knife During Commission of or Attempt to Commit a Violent Crime (2007-GS-02-0728) and Assault and Battery with Intent to Kill (2007-GS-02-0729). He was represented by Everett K. Chandler, Esquire. On November 13, 2007, the Applicant pled guilty before the Honorable J. Michelle Childs and was sentenced to five (5) years' incarceration for Possession of a Firearm or Knife During Commission of or Attempt to Commit a Violent Crime and to twenty (20) years' incarceration for Assault and Battery With Intent to Kill. The Applicant did not appeal his guilty plea or sentence.

<sup>1</sup> The Applicant was received by the South Carolina Attorney General's Office on May 7, 2014.

700E  
#1

1. Ineffective assistance of counsel; and
  - a. "Failure to adequately investigate the case and inform Petitioner."
  - b. "Failure to communicate with Petitioner."
  - c. "Failure to give accurate information concerning parole eligibility."
  - d. "Failure to present evidence in mitigation."
  - e. "Failure to present evidence of threats made to Petitioner."
  - f. "Failure to present evidence of Petitioner's prior hospitalization for alcohol abuse."
  - g. "Failure to brief Petitioner on plea colloquy."
2. Involuntary guilty plea.
  - a. Applicant was promised a certain sentence by his attorney and "...the cumulative effect of these statements was to convince Petitioner he would receive a particular sentence and to establish in Petitioner's mind the idea that it was more important for him to go along with the flow of the proceedings rather than provide truthful answers at his plea hearing, rendering his plea involuntary."

The State made its return on March 1, 2009. An evidentiary hearing was convened on January 26, 2010, at which Applicant was present and represented by David Farrell, Esquire. In a written Order dated a March 17, 2010 and filed March 25, 2010, the Honorable Judge W. Jeffrey Young, denied and dismissed the application with prejudice.

A timely notice of appeal was filed. In a written Order, dated June 19, 2013, the South Carolina Supreme Court denied the petition for writ of certiorari and granted counsel's request to withdraw. The Remittitur was issued on July 9, 2013.

In his current application, Applicant alleges that he is being held in custody unlawfully based on the following allegations:

1. Ineffective Assistance of PCR Counsel
  - a. "Appointed PCR Counsel failed to file a 59(E) motion to preserve for appellate review and denied applicant the rights to properly exhaust his available state remedies. "See exhibits A



his claim.”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court 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 judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on November 13, 2007. Therefore, the Applicant had to file his application by November 14, 2008. This Application was filed January 31, 2014, which was well after the 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."

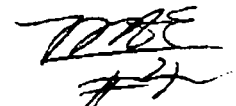
*MAC*  
#3

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, 274 S.C. 243, 262 S.E.2d 735 (1980). In regards to the allegations set forth in Applicant's Amendment to the PCR application, these are the same allegations raised by Applicant in a previous PCR application and therefore, by very definition, are successive in nature.

In addition to these allegations being barred by the Uniform Post Conviction Procedure Act, and being procedurally barred, there is no merit to these allegations. The Applicant contends he is able to file a successive state post conviction relief action alleging ineffective

Handwritten signature and initials, possibly "WBE" and "#2".

to raise ineffective assistance of collateral counsel claims in a subsequent, successive state post conviction relief 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.”).

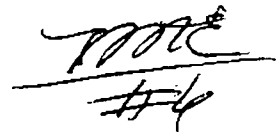
With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental “cause and prejudice” standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state post conviction relief 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]

Handwritten signature and initials, possibly "MJC" with "#5" below it.

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 actions." Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute, for being successive and for failing to raise cognizable issues for PCR.

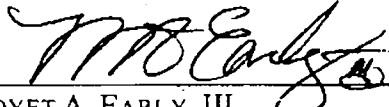
[signature block on following page]

A handwritten signature in black ink, appearing to be "T.M.C.", is written above a horizontal line. Below the line are the initials "H.L." also in black ink.

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, factual or legal, with the Aiken County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Daniel Gourley, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 6 day of August, 2014.

  
DOYET A. EARLY, III  
Chief Judge for Administrative Purposes  
Second Judicial Circuit

Bamberg, South Carolina.

BOOKER T. MCKENNEY, #325168 )  
 Plaintiff, )  
 vs. )  
STATE OF SOUTH CAROLINA )  
 Defendant. )

**MOTION AND ORDER INFORMATION  
 FORM AND COVERSHEET**

Plaintiff's Attorney: Booker T. McKenney, #325168, Bar No. _____ Address: McCormick Correctional Institution McCormick, SC 29899 Phone: _____ Fax _____ E-mail: _____ Other: _____	Defendant's Attorney: Daniel Gourley, Bar No. _____ Address: PO Box 11549 Columbia, SC 29211 Phone: _____ Fax _____ E-mail: _____ Other: _____
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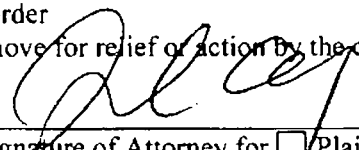
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: \_\_\_\_\_  
 Estimated Time Needed: \_\_\_\_\_ Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

Written motion attached  
 Form Motion/Order  
 I hereby move for relief or action by the court as set forth in the attached proposed order.

  
 Signature of Attorney for  Plaintiff /  Defendant

August 5, 2014  
 Date submitted

**SECTION III: Motion Fee**

PAID - AMOUNT: \$ \_\_\_\_\_  
 EXEMPT: (check reason)

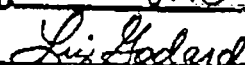
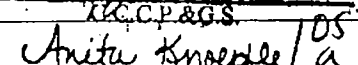
- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status  State Agency v. Indigent Party
- Sexually Violent Predator Act  Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication  Motion for Execution (Rule 69, SCRPC)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter: \_\_\_\_\_  
 Other: \_\_\_\_\_

<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
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**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_  
 MOTION FEE COLLECTED: \$ \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \$ \_\_\_\_\_

FILED 8.13.2014  
  
 Lisa Hodard  
 CLERK, P&GS  
  
 Anita Knoepfel  
 Deputy Clerk

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:

**ORDER INFORMATION**

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

8/13/2014

Date

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

*Liz Godard by [Signature]*

Court Reporter

Liz Godard - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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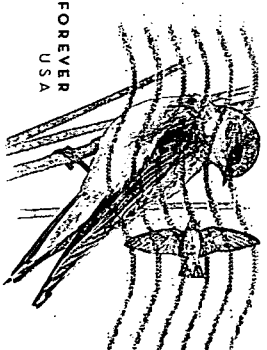
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Baxter T. McKerney #325168  
McCormick Cor. Inst.  
386 Redemption Way  
McCormick, S.C. 29809

AUGUSTA GA 300  
20 FEB 2015 PM 21



FOREVER  
USA

Bank Swallow

Daniel E. Shearuse  
Clerk of Supreme Court  
P.O. Box 11330  
Columbia, S.C. 29211

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FEB 20 2015

MCCI  
MAIL ROOM

THE DEPARTMENT OF CORRECTIONS HAS NOT  
INSPECTED OR CENSORED THIS ITEM; THEREFORE,  
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY  
FOR ITS CONTENTS.  
MCCORMICK CORRECTIONAL INST.  
S.C. DEPARTMENT OF CORRECTIONS