

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
Hugh Lussardi, #252961 )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No. 2013-CP-42-3879

**FINAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed September 19, 2013. The Respondent made its return on April 14, 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 July 18, 2014 and filed July 18, 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 here by reference is an Affidavit of Service dated February 24, 2015, serving the above mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Response in Opposition to Respondent's Conditional Order of Dismissal" and filed on August 18, 2014 and a letter filed December 11, 2014, the Applicant argues that he is not challenging the conviction and sentence with this current PCR application. Applicant states that he is challenging the procedural and structural irregularities and due process deficiencies that occurred within his first PCR application. Applicant further argues that he is not raising any "new" grounds in his current application. Applicant concludes that the issues

SCANNED

PKK

2014 JUN 12 PM 3:40

raised were not finally adjudicated in his original PCR application and he did not knowingly, voluntarily, nor intelligently waive final adjudication of the issues. Applicant further claims that parties involved in his original PCR application “violated the South Carolina Supreme Court’s mandate defined by Marlar v. State, 753 S.E.2d 266 (S.C. 2007).

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.

This Court notes the Applicant was convicted and sentenced on July 15, 2003 and the South Carolina Court of Appeals affirmed his convictions and sentences on October 4, 2005. As this action was filed on September 19, 2013, 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 September 19, 2006. 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.’”).

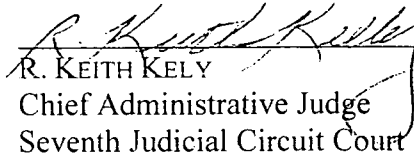
2013 JUN 2 11:3:00

RKK

RKK

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 12 day of June, 2015.

  
R. KEITH KELLY  
Chief Administrative Judge  
Seventh Judicial Circuit Court

Spartanburg, South Carolina.

2015 JUN 12 PM 3:00



structural irregularities and due process deficiencies which occurred during the litigation of Applicant's original PCR Application 2005-CP-42-3265, which deprived Applicant of his full bite of the apple. In the PCR Dismissal Order, page 3, paragraph 2, judge Cole states: "In his second and current Application for Posts Conviction Relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:". This factual and legal determination by judge Cole is erroneous as a matter of fact and law. The Appollicantsant is not challenging his conviction and sentence with this current PCR Application as stated by judge Cole. The Applicant is specifically challenging the procedural and and structural irregularities and due process deficiencies which occurred during the litigation of Applicant's original PCR Application 2005-CP-42-3265, which deprived Applicant of his full bite of the apple. (See §17-27-20; Washington v. State, 478 SE2d 833).

#### **SUCCESSIVENESS**

The case Laws and procedural default doctrines in South Carolina specifically defines successiveness as an issue that could have been raised in a previous PCR Application, but was not. When this occurs, the Applicant has the burden of asserting sufficient reason why the issue was inadequately raised in the original, supplemental or amended Application. (See S.C. Code §17-27-90; Foxworth v. State, 275 S.C. 615, 274 SE2d 415 (1981); Aice v. State, 305 S.C. 448, 409 SE2d 392 (1991).

In this current PCR Application, the Applicant does not raise any "new" grounds challenging his conviction or sentence. Therefore, the procedural default doctrine is not applicable in this case. (See S.C. Code §17-27-90 and §17-27-20).

MARLAR ISSUE NOT A MARTINEZ V. RYAN ISSUE

The Applicant specifically files this subsequent PCR Application strictly in the context that the honorable Doyet A. Early III and Kenneth P. Shabel III and assistant Attorney General S. Prentiss counts all violated the South Carolina Supreme Court's mandate defined by Marlar v. State, 753 SE2d 266 (S.C. 2007), and S.C. Code of Law §17-27-80. These three parties violation of the South Carolina Supreme Court's mandate created procedural and structural irregularities and due process deficiencies during the litigation of Applicant's original PCR Application 2005-CP-42-3265, which deprived Applicant of his full bite of the apple. The precept of the South Carolina Supreme Court outlined in Marlar is clear and unambiguous. It is not dictum to be cast aside at any of these three parties whim. All parties of litigation in this state must bow down to the mandates established by the South Carolina Supreme Court. This is fundamental and non-negotiable. The PCR judge Early III, PCR counsel Shabel III and assistant Attorney General Counts must be held accountable and the Applicant must be restored to his ability to have his one full bite of the apple. (See Marlar v. State, 753 SE2d 266 (S.C. 2007), SCRCP, Rule 52 (a), and S.C. Code of Law, §17-27-80).

This issue is not a Martinez v. Ryan issue. It is a Marlar v. State issue. On page 6 through page 8 of the conditional order of dismissal. Judge Code characterizes this issue as a Martinez v. Ryan, 132 S.Ct. 1309 (2012). This is an erroneous both factually and legally and is negatively skewing the proper analysis and determination of Applicant's entitlement to this subsequent PCR Application.

WHEREFORE, this Applicant prays this court to vacate the Conditional Order of Dismissal, and to schedule this subsequent PCR Application for an evidentiary hearing.

Date 8-12-14.

s/ Hugh Lussardi -  
Hugh Lussardi #272961

SWORN and SUBSCRIBED before me

this 12th day of August 2014.

Susan H. Frye

Notary Public For South Carolina

My Commission Expires

My Commission Expires \_\_\_\_\_

March 5, 2018

2014 AUG 18 AM 10:24  
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA  
COUNTY OF SPARTANBURG

IN THE COURT OF COMMON PLEAS  
SEVENTH JUDICIAL CIRCUIT

Hugh Lussardi, #252961,

2013-CP-42-3879

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 September 19, 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 October 2002 term of the Spartanburg County Grand Jury for First Degree Burglary (2002-GS-42-4595) and for Grand Larceny (2002-GS-42-4594). On July 14-15, 2003, the Applicant proceeded to trial. He was represented by Stephen Hill, Esquire. The jury found the Applicant guilty as indicted. The Honorable J. Derham Cole sentenced the Applicant to confinement for a period of life for First Degree Burglary and five (5) years for Grand Larceny to run concurrently.<sup>1</sup>

A timely notice of appeal was filed on Applicant's behalf and an appeal was perfected by Robert M. Dudek of the South Carolina Office of Appellate Defense. On March 8, 2005, the

<sup>1</sup> The Applicant had two (2) previous Burglary convictions. He was indicted at the June 1987 term of the Spartanburg Grand Jury for First Degree Burglary (87-GS-42-1870), Second Degree Burglary (87-GS-42-1871), and Second Degree Burglary and Grand Larceny (87-GS-42-1872). Applicant pleaded guilty to all charges on September 9, 1987. The Honorable Julius H. Bagget sentenced Applicant to five (5) years suspended upon five (5) years probation on each charge.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2014 JUL 18 PM 2:01  
M. HOPE BLACKLEY

South Carolina Court of Appeals entered its opinion affirming the Applicant's conviction and sentence. State v. Lussardi, No. 2005-UP-529, 2005 WL 7084366 (S.C. Ct. App. filed September 16, 2005). The remittitur was returned to the lower court on October 4, 2005.

**2005-CP-42-3265**

The Applicant subsequently filed an application for post conviction relief (PCR) on October 14, 2005. The Applicant raised the following issues in his first PCR:

1. Ineffective assistance of trial counsel, in that counsel:
  - a. "Failed to investigate, object to or inform Applicant about two prior offenses being a continuous court of conduct under § 17-25-50."
  - b. "Failed to impeach or attack the credibility of prosecution witness [Thomas Lawter] with prior inconsistent statements."
  - c. "Failed to adequately consult with Applicant and thoroughly investigate offense."

An evidentiary hearing was convened on September 19, 2006 before the Honorable Doyet A. Early. Applicant was present and represented by Kenneth P. Shabel, Esquire. S. Premiss, Esquire of the South Carolina Attorney General's Office, represented the Respondent. Following the submission of all testimony, the Honorable Doyet A. Early denied and dismissed the application with prejudice by order dated January 28, 2008. The court found that counsel was not ineffective.

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2008 JUL 18 PM 12:01  
W. HOPE BLACKBERRY

Applicant then filed a Petition for Writ of Certiorari challenging the post conviction relief court's decision. Wanda H. Carter of the South Carolina Division of Appellate Defense filed a petition pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The South Carolina Supreme Court entered an order denying certiorari and granting appellate counsel's request to be relieved on December 4, 2008. The remittitur was sent down on December 22, 2008.

The Applicant then filed a petition for writ of habeas corpus *pro se* on April 10, 2009

where he alleged:

1. Counsel failed to investigate, object to or inform applicant about two prior offenses being a continuous course of conduct under § 17-25-50.
2. Counsel failed to impeach or attack the credibility of prosecution witness Thomas Lawter with prior inconsistent statements.
3. Counsel elicited an in court identification from one of the state's witnesses, Sheila Culbreth. The witness had already been through direct examination and she had nothing harmful until counsel cross-examined her.
4. Counsel was ineffective when he elicited testimony from a codefendant, Thomas Lawter, that when police came to codefendant's house they were looking for Lussardi which was false.

The federal district court granted summary judgment in favor of the respondent and dismissed with prejudice the habeas petition on October 20, 2009 for lack of prosecution and for failure to comply with the court's orders pursuant to Rule 41(b) of the Federal Rules of Civil Procedure and the factors outlined in Chandler Leasing Corp. v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982).

### CURRENT APPLICATION

In his second and current application for post conviction relief the Applicant alleges that

he is being held in custody unlawfully for the following reasons:

1. "When the Honorable Doyet A. Early, III signed the (PCR) Order of Dismissal, he failed to address four (4) issues raised by Applicant in his first PCR proceeding."
2. PCR counsel was ineffective because:
  - a. He failed to "inform the PCR judge of the omissions prior to issuance of the order," and
  - b. "He did not file Motion to Alter or Amend Judgment pursuant to SCRCF, Rule 59(e), thereby, failing to preserve Applicant's four (4) [unadjudicated] issues for appellate review." (parentheticals provided by Applicant).
3. "Obviously, this failure caused Applicant to lose the review he was entitled to on unaddressed issues. The following four (4) issues, although raised during Applicant's PCR proceeding, were neither ruled on by the PCR Court nor preserved for appellate review:"

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2014 JUL 18 PM 2:01  
M. HOPE BLACKLEY

- a. "Trial counsel was ineffective in failing to challenge prior inconsistent statement to attack credibility of codefendant."
  - b. "Trial counsel was ineffective by eliciting a prejudicial, in-court identification from Shelia Culbreath; she had already undergone Solicitor's direct examination, wherein she had not said anything harmful until trial counsel's cross-exam."
  - c. "Trial counsel was ineffective by eliciting false testimony from Tommy Lauter that, when police came to his house they were actually looking for the Defendant. This false statement was prejudicial because it planted seed in the minds of jurors that the police must have already had evidence linking Defendant to the crime which was not true. This falsehood also had the damaging effect of making the codefendant seem more credible."
  - d. "Trial counsel was ineffective because he failed to request the accomplice jury instruction; that accomplice's testimony should be scrutinized with caution."
4. PCR counsel, Assistant Attorney General, and PCR judge all violated rules set forth in Marlar v. State, 653 S.E.2d 266 (S.C. 2007).

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 Petition and Motion to Dismiss.

FILED  
 CLERK OF COURT  
 SPARTANBURG COUNTY  
 2014 JUN 18 PM 12:01  
 M. HOPE BLACKLEY

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Successiveness

The Court finds that the current application for post conviction relief must be summarily 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).

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 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).

FILED  
CLERK OF COURT  
PARTANBURG COUNTY  
2014 JUL 18 PM 12:01  
M. HOPE BLACKLEY

The Applicant was found guilty of the offense(s) he challenges in this Application on July 15, 2003. The remittitur from the Applicant's direct appeal was issued on October 4, 2005. The Applicant was therefore required to file his application on or before October 4, 2006. This Application was filed on September 19, 2013 which is nearly seven (7) years 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) (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 summarily 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. 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,

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2014 JUL 18 PM 2:02  
M. HOPE BLAUGHER

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 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.

2015 JUL 8 PM 12:02  
SPARTANBURG COUNTY  
FEDERAL COURTS  
MHOPE BLACKLEY

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 he is allowed to bring this untimely and successive state PCR application is misguided and erroneous. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

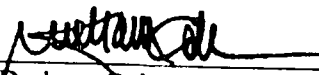
### III. CONCLUSION

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 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 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 - 7<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, SC 29211

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

FILED  
CLERK OF COURT  
SPARTANBURG COUNTY  
2014 JUL 18 PM 12:02  
M. HOPE BLACKLEY

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

\_\_\_\_\_, South Carolina

Hugh Howard: 252961  
BRCI Me. 171  
1460 Broad River Rd,  
Columbia S.C. 29210

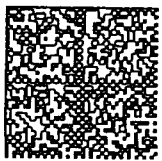
**RECEIVED**

JUL 16 2015

BRCI  
MAILROOM

David E. Shannon, Clerk of Court  
P.O. Box 11330  
Columbia S.C.  
29211

**LEGAL MAIL**



UNITED STATES POSTAGE  
FIRST CLASS PERMIT NO. 1000 COLUMBIA, SC  
PHINLEY BOWERS  
02 1M \$ 00.925  
0008003534 JUL 16 2015  
MAILED FROM ZIP CODE 29210

THE DEPARTMENT OF CORRECTIONS HAS NOT  
INSPECTED OR CENSORED THE CONTENTS. THEREFORE, THE  
DEPARTMENT DOES NOT ASSUME RESPONSIBILITY FOR  
ITS CONTENTS.  
BROAD RIVER CORRECTIONAL INSTITUTION  
S.C. DEPARTMENT OF CORRECTIONS