

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	OF THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2014-CP-42-4530
Charles Michael Dominick,	)	
S.C.D.C. No. 334038,	)	
	)	
Applicant,	)	
	)	<b>CONDITIONAL ORDER OF DISMISSAL</b>
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed by Charles Michael Dominick (Applicant) on November 4, 2014. Respondent made its Return, requesting the application be summarily dismissed.

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the October 2007 term of the Spartanburg County Grand Jury for assault and battery with intent to kill (2007-GS-42-5404) and murder (2007-GS-42-5407). He was represented by Beverly D. Jones, Esquire. On April 6, 2007, Applicant, pursuant to Alford, pled guilty to assault and battery with intent to kill and the lesser-included offense of voluntary manslaughter<sup>1</sup>. He was sentenced by the Honorable E. C. Burnett, III, to confinement for a period of twenty-eight (28) years for voluntary manslaughter and twenty (20) years for assault and battery with intent to kill, both sentences to run concurrent. Applicant did not appeal his guilty plea or sentence.

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 COURT CLERK

<sup>1</sup> The State also dismissed two additional indictments for assault and battery with intent to kill in exchange for Applicant's plea.

In his first application for post-conviction relief, Applicant alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
  - a. Counsel failed to conduct any investigation,
  - b. Counsel told Applicant that there were multiple witnesses that would testify against him and that Applicant had no defense,
  - c. Counsel allowed Applicant to plead to a charge that he had not be indicted on or waived presentment on,
  - d. Counsel failed to inform Applicant that several of the State's witnesses had given contradicting or false statements,
  - e. Counsel failed to discuss evidence of a gun, gun shot residue and drugs which were found in the victim's car and on the victim, providing a possible defense,
2. Involuntary Guilty Plea; and
3. Due Process Violations, in that
  - a. "Court was without jurisdiction to accept Applicant's plea and or sentence Applicant on manslaughter charge because it is not lesser included offense and Applicant never signed waiver presentment of indictment, which is a violation of due process and equal protection of the law."

Respondent made its Return on or about April 27, 2010. An evidentiary hearing into the matter was convened on September 13, 2010, at the Spartanburg County Courthouse. J. Faulkner Wilkes, Esquire, represented Applicant. By Order dated February 22, 2011, and filed February 24, 2011, the Honorable Roger L. Couch denied and dismissed Applicant's PCR application with prejudice.

Applicant timely filed a notice of appeal. Appellate Defender Dayne C. Phillips submitted a petition for writ of certiorari and Respondent filed a Return. By Order filed June 11, 2013, the South Carolina Court of Appeals denied Applicant's petition. The Remittitur was sent July 1, 2013.

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## Current Application

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

1. Newly Discovered Evidence
2. Ineffective Assistance of PCR Counsel
  - a. "First PCR Counsel misinformed me that I did not have any witnesses that would testify on my behalf at my first PCR hearing."
  - b. Martinez v. Ryan
3. Ineffective Assistance of Counsel
  - a. "...trial counsel was ineffective for not talking to me upon any self-defense levels."
4. Violation of Due Process

Before this Court are the Spartanburg County Clerk of Court records, Applicant's prior PCR records, Applicant's current 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 summarily dismissed because it is successive to the previous application for post-conviction relief. 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.

Successive applications are disfavored and the burden is on the 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).

Applicant alleges "...this newly discovered evidence shows that trial counsel was in fact ineffective for not talking to me upon any self-defense levels...." To the extent that Applicant alleges ineffective assistance of his trial counsel, this Court finds that this allegation could have been raised in his prior post-conviction relief application. Applicant has failed to establish sufficient reason why he could not have raised this allegation 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

The Court further finds that this Application for post-conviction relief must also be summarily dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160 (Supp. 2003). 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). Applicant pled under Alford to the offenses he challenges on April 6, 2007. He was therefore required to file his application on or before April 7, 2008, to be considered timely. This application was filed on November 4, 2014, which was well after the statutory filing period had expired.

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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, Applicant failed to file within the time mandated by the Post-Conviction Procedure Act and Applicant's post-conviction relief application must be summarily dismissed.

#### **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 Applicant's allegations. 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. The Supreme Court's ruling in Martinez v. Ryan, 132 S. Ct. 1309, 182 L.Ed.2d 272 (2012), cited by Applicant in his application, is instructive. 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

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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, 132 S. Ct. at 1315 ("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."). 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). Most importantly, 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, 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).

#### Newly Discovered Evidence

This Court finds that Applicant's claim of alleged "newly discovered evidence" fails to make a prima facie showing that he is in actual possession of new evidence and that the new evidence likely would have changed the outcome at trial. Under S.C. Code § 17-27-45(c), a newly-discovered evidence claim can be timely raised within one year of actual discovery or within one year of when, by the exercise of due diligence, such evidence *could have been* ascertained. Applicant alleges his newly discovered evidence is a statement from a witness made September 11, 2013, about what occurred on November 11, 2006. Applicant has failed to set forth with any specificity why such alleged evidence was not readily discoverable at the time of his plea or his previous PCR action. Before the Court will hold an evidentiary hearing, the Applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall, 246 S.C. 258, 143 S.E.2d 455 (1965); Blandshaw v. State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, this allegation must be summarily dismissed with prejudice.

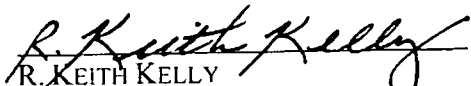
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**CONCLUSION**

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 Spartanburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Justin J. Hunter, Esquire  
PCR Division – 7<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, SC 29211

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

  
R. KEITH KELLY  
Chief Judge for Administrative Purposes  
Seventh Judicial Circuit

Spartanburg, South Carolina

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M. J. KELLY

# Spartanburg County

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M. Hope Blackley  
Clerk of Court  
May 1, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SPARTANBURG

Charles Michael Demwick  
# 334038

Applicant

7<sup>TH</sup> JUDICIAL CIRCUIT

CASE # 2014CPD 4530

VS  
State  
Respondent

CERTIFICATE OF SERVICE

I certify that, on this date, I served a copy of the Additional Ad. Dismissal  
In this action dated 4-30 2015 on 5175

By mailing to him/her, at his/her last known address, by depositing it in the U.S. Mail, in an envelope with sufficient postage affixed, addressed as follows:

Suzanne White  
Ashley Hareath  
Charles Demwick

5-1-15  
(Date)

Christie Seay  
(Signature)