

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

RECEIVED

SEP 09 2016

S.C. SUPREME COURT

CARMEN T. MULLEN, CIRCUIT COURT JUDGE

#2014-CP-07-0933

JUDEX DESIR #298745.....APPLICANT

Vs.

STATE OF SOUTH CAROLINA.....RESPONDENT

NOTICE OF APPEAL

Notice is hereby given that [Judex Desir], Applicant in the above named case, hereby appeal to the South Carolina Supreme Court from the final judgment from an Order of the Honorable Carmen T. Mullen, dismissing Applicant's PCR application entered in this action received by Applicant on the 29th of August, 2016 and said judgment was entered on the 23rd of August, 2016.

Respectfully Submitted

s/ Judex Desir

Dated 02 day of September, 2016

CERTIFICATE OF SERVICE

I, Judex Desir, do hereby swear under the penalty of law that I have placed this Notice of Appeal in the mailroom here at Ridgeland Institution, with sufficient postage affixed.

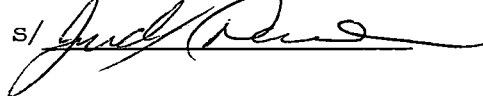
Thus, the said document was placed in the mailroom and addressed to the person(s) whose names and addresses are listed below.

Clerck of Court

P.O.Box 11330

Colombia, S.C. 29211

Respectfully Submitted,

s/ 

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Judex Desir,)
S.C.D.C. No. 298745,)

2014-CP-07-933

Applicant,)

CONDITIONAL ORDER OF DISMISSAL

v.)

State of South Carolina,)

Respondent.)

2014 OCT -8 PM 2:41
ROSEMARY S. ROBERTSON
CLERK OF COURT
COUNTY OF BEAUFORT
SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief (PCR) filed April 16, 2014. The State (Respondent) made its return, requesting the application be summarily dismissed.

I.

Judex Desir (Applicant) is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Beaufort County. Applicant was indicted at the April 2003 term of the Beaufort County Grand Jury for armed robbery (2003-GS-07-715), conspiracy (2003-GS-07-716), and four counts of kidnapping (2003-GS-07-718, 719, 720, 721). Applicant was also indicted for pointing and presenting a firearm (2003-GS-07-717) but the charge was *nolle prossed*. Nicholas Felix, Esquire represented Applicant.

Applicant proceeded to trial and was found guilty as indicted on December 18, 2003. The Honorable Jackson V. Gregory sentenced Applicant to imprisonment of twenty-two years for each count of kidnapping, twenty-two years for armed robbery, and five years for conspiracy, to be served concurrently.

Applicant appealed his conviction, and Eleanor Duffy Cleary, Esquire perfected the appeal in the form of an *Anders*¹ brief. The South Carolina Supreme Court dismissed the appeal on March 9, 2006. *State v. Desir*, Op. No. 2006-UP-139 (S.C. Sup. Ct. filed March 9, 2006). The remittitur was issued on May 25, 2006.

2006-CP-07-1377

Applicant filed his first PCR application on May 31, 2006 (2006-CP-07-1377).

Applicant raised the following grounds for relief:

1. Subject matter jurisdiction.
2. Due process violation.
3. Ineffective assistance of counsel in that trial counsel failed to object to the sufficiency of the indictments.

Respondent filed its return on August 24, 2006, and subsequently amended its return on March 23, 2007. An evidentiary hearing was convened on April 16, 2008 at the Beaufort County Courthouse. Cory Fleming, Esquire represented Applicant. The Honorable Michael G. Nettles denied and dismissed the application with prejudice by order filed May 16, 2008.

Applicant appealed the PCR court's decision and Robert Pachak, Esquire filed a *Johnson*² petition for a writ of certiorari on Applicant's behalf. Applicant also filed a *pro se* petition. The South Carolina Supreme Court denied the petition on April 10, 2009. Applicant then filed a petition for rehearing on April 22, 2009. The court denied Applicant's motion and the remittitur was issued on May 28, 2009.

2009-CP-07-2223

Applicant filed his second PCR application on April 20, 2009 (2009-CP-07-2223). Applicant

¹ *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

² *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

raised the following grounds for relief:

1. Ineffective assistance of counsel
2. PCR court failed to comply with SC Code Ann. § 17-27-80.

Applicant also filed *pro se* documents entitled “Petition for Declaratory Judgment” and “Motion for Impanelment Documents of the State Grand Jury.” Respondent made its return and motion to dismiss on February 18, 2010. The Honorable Carmen T. Mullen signed the conditional order of dismissal on March 8, 2010. Applicant then filed a *pro se* document entitled “Applicant’s Objection to the Conditional Order of Dismissal.” Judge Mullen signed a final order of dismissal on June 23, 2010.

Applicant appealed the PCR court’s decision and the South Carolina Supreme Court dismissed the appeal on August 25, 2010. The remittitur was issued on September 10, 2010.

8:10-cv-488

Applicant filed a *pro se* federal petition for habeas corpus and raised the following issues:

1. Ineffective assistance of counsel.
 - a. My trial counsel was ineffective, when he failed to object to my fatally defective indictments prior to trial as required by S.C. Code Ann. § 17-19-90. Denying me the effective assistance of counsel as guaranteed by the Sixth Amendment.
 - b. I was denied my Sixth Amendment right to the effective assistance of counsel, when counsel failed to object to the trial court’s instructions to the jury that constructively amended all of my indictments that resulted in me being denied my right to a fair trial that is protected by the Amendment’s due process clause.

Respondent filed its return and motion for summary judgment, and Applicant filed a response opposing Respondent’s motion. On September 28, 2010, the Honorable Bruce Howe Hendricks, United States Magistrate Judge, issued a report and recommendation to grant Respondent’s motion and dismiss Applicant’s petition. The Honorable Henry F. Floyd, United

States District Judge, adopted the magistrate's recommendation and dismissed Applicant's petition with prejudice on September 29, 2011.

Applicant then appealed the district court's judgment to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit dismissed the appeal on May 3, 2012. The mandate was issued on May 25, 2012.

II.

In his third and current PCR application, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Whether PCR counsel's professional misconduct deceit disloyalty and/or dishonesty effectively demonstrated that he was not a genuinely representative agent when the Appellant missed the 10 day filing deadline which resulted in expiration of limitation period to preserve for Appellate review potential meritorious ground: Trial counsel was ineffective failing to object to the trial court's instructions to the jury that constructively amended "all" of Petitioner's indictment(s), despite the Applicant's expressed desire to preserve unaddressed issues and PCR counsel advising him in the event Honorable Michael G. Nettles does not address each issue a SCRCP 59(e) alter to amend judgment motion would be filed on his behalf to preserve unaddressed issues?
 - a. Order denying relief, denial of Article 1 Sec. 3, and SCRCP 59(e)
2. Whether PCR counsel's professional misconduct deceit disloyalty and/or dishonesty effectively severed the lawyer/client relationship rendering the inconsistency of the PCR Act mandates and SCRCP during initial PCR proceedings external to the Applicant because of the extraordinary circumstances surrounding PCR counsel's misconduct which prevented a ruling on potential meritorious ground: was trial counsel ineffective failing to object to the Trial Court's instructions to the jury that constructively amended "all" of Petitioner's indictments.
 - a. Violation of U.S.C.A. Sixth and Fourteenth Amendment right, § 17-27-80, 17-27-100, SCRCP 52(a), 52(e), and denial of Article 1 Sec. 3.

Before this Court are the Beaufort County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, and the records from Applicant's past PCR applications, PCR appeals, and federal habeas petition.

III.

This Court finds this current application must be summarily dismissed because it is successive to Applicant's two previous applications. Courts disfavor successive applications and place the burden on Applicant to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State/Plath v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code 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 indicate 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." *Id.*, 305 S.C. at 450, 409 S.E.2d at 394. If Applicant could have raised these allegations in a previous application, then Applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been raised previously. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991).

The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” *Aice*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” *Id.* at 451, 409 S.E.2d at 395. *Aice* further held that “the contention that prior PCR counsel was ineffective is not *per se* a “sufficient reason” allowing for a successive PCR application under § 17-27-90.” *Id.* at 452, 409 S.E.2d at 394. Applicant’s contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application.

This Court finds Applicant failed to present any sufficient reasons why this Court should allow his successive application.

IV.

This Court should also summarily dismiss this application for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. *See* S.C. Code Ann. §§ 17-27-10 to -160 (2003). Section 17-27-45(a) states:

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 held the statute of limitations applies to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996). Applicant was convicted of the offense he challenges in this application on December 18, 2003. The remittitur from his appeal was issued on May 25, 2006; therefore, Applicant was required to file his application on or before May 25, 2007. Applicant filed this application on April 16, 2014, **more than six years** after the statutory filing period expired.

A motion for summary judgment is a proper mechanism 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, Section 17-27-70(c) of the South Carolina Code 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." This Court must summarily dismiss this application for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

V.

Pursuant to Section 17-27-70(b) of the South Carolina Code, this 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 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 Beaufort County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Elizabeth H. Neyle, Esquire
PCR Division
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 8 day of Oct, 2014.

C. Mullen

CARMEN T. MULLEN
Chief Judge for Administrative Purposes
Fourteenth Judicial Circuit

Beaufort, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS)
FOURTEENTH JUDICIAL CIRCUIT)

Judex Desir, #298745)

2014-CP-07-0933

Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

2015 JUN 29 PM 3:22
BEAUFORT COUNTY S.C.
CLERK OF COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed April 16, 2014. The Respondent (the State) made its Return and Motion to Dismiss on October 2, 2014, requesting that the Application be summarily dismissed. 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 dated October 8, 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 November 20, 2014, serving the above-mentioned Conditional Order of Dismissal on the Applicant. The Applicant made a timely response filed on November 25, 2014.

In a document titled "Response to Summary Judgment and Return", the Applicant argues that his PCR counsel during his 2006 case was ineffective. This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings,

and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

The Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, "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, 305 S.C. at 451, 409 S.E.2d at 394. Further, Kelly v. State explicitly states, "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, 365, 745 S.E.2d 377 (2013). Therefore, the Applicant's contention that prior PCR counsel was ineffective is not properly before this Court.

As to the claim that Applicant's trial counsel was ineffective, this Court finds that the current allegations were or 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).

This Court also finds Applicant has shown no reason why these issues were not raised within the statute of limitations for filing a PCR application pursuant to S.C. Code. § 17-27-45(a). 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 held the one-year 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 South Carolina Supreme Court affirmed Applicant's conviction on March 9, 2006. The Remittitur after Applicant's unsuccessful appeal was issued on May 25, 2006. Therefore, Applicant was required to file his PCR application on or before May 26, 2007. Applicant filed this application on April 16, 2014, well after the statutory filing period expired.

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

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 17 day of June, 2015

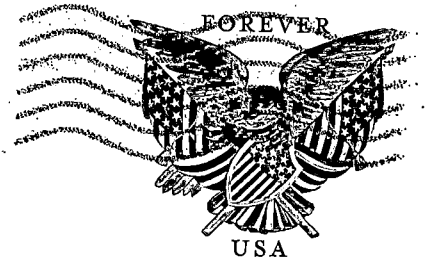


Carmen T. Mullen
Chief Administrative Judge
Fourteenth Judicial Circuit

Beaufort, South Carolina.

Judex Desik 278740
Ridgeland CORR. Inst
C-B-59
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Ridgeland, S.C. 29936

CHARLESTON SC 294
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RIDGELAND CORRECTIONAL
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