

STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

CERTIORARI TO MARLBORO COUNTY
Court of Common Pleas

The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No.: 2015-000460

ALFONSO STATON, aka ALPHONZO STATON, aka ALPHONSO STATON,
aka OFONZO STATON,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Return to Petition for Writ of Certiorari

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COUNTER ISSUES PRESENTED

- I. Petitioner is not entitled to a successive PCR application based on a challenge to the effectiveness of counsel where there is no statutory or constitutional right to counsel in a Rule 29 hearing.
- II. Petitioner was not entitled to a review of his 1997 trial counsel where Petitioner's application was untimely, successive, not newly discovered evidence, and had been previously litigated.
- III. Even if Petitioner overcame the procedural bars, he is not entitled to relief because Petitioner's right to due process was not violated when he was represented at trial by a part-time solicitor from a different circuit than the circuit prosecuting his case.

STATEMENT OF FACTS

Viola Davis, last saw her sister Darlene Davis Patterson (the victim) alive on Saturday, November 12th, 1994. Viola testified her sister Darlene had hired Johnny Ringo Pearson ("Ringo" or "Pearson") to fix her car, and Ringo was at Darlene's house before the two (2) women went grocery shopping. Viola never saw her sister again after she dropped her off from the trip to the grocery store. Viola eventually became concerned, and ultimately filed a missing persons report. A week after her sister's disappearance, Viola saw Ringo pushing Darlene's car up the road. (App. p. 239, l. 2 - 254 l. 18.)

Darlene Patterson's decomposing body was found on Thanksgiving Day, November 24, 1994, in a creek off of Burnt Factory Road in Marlboro County. Her legs, hands, and head were bound with duct tape. (App. p. 261, l. 4-p. 275, l. 25). Prior to her murder, the victim had been abducted, bound, raped repeatedly by several defendants, and ultimately her head was wrapped with tape, and Petitioner and several other co-defendants threw her off a bridge into the creek.

Danny Davis is a co-defendant who received a plea agreement and testified for the State. Davis lived about seventy-five (75) yards away from Ricky Stuckey ("Stuckey") and Robert Graham's trailer, and would go there often. One afternoon in November 1994, Stuckey invited Davis to a party at the trailer. When he arrived, Stuckey, Leroy Staton, Petitioner, Jeffrey Walls, Ringo Pearson, Robert Graham, Robert Ransom, and others were there drinking and cooking pig's feet. When Davis went into the trailer, he saw a black female on the couch with her hands, feet, and mouth taped. Davis did not say anything because he didn't know what was going on, and thought it might be a game. Davis eventually left the "party." (App. p. 735, l. 4 - 738 l. 24; p. 739, l. 12 - 743, l. 24.)

At about dusk that evening, Davis returned. Stuckey, Graham, and Leroy Staton were still at the trailer. Davis went into the bathroom, and saw the girl laying on the bed still bound by the tape. Davis did not see anyone else going into the room, but no one was trying to get the girl untied. (App. p. 738, l. 25 – 739, l. 11; 744, l. 8 – 747, l. 4.)

Davis left the trailer and hung around in the yard. Eventually, he asked Pearson for a ride home. As Davis and Ransom got into the car, Pearson and Stuckey brought the girl (the victim) from the trailer and put her into the car, still bound with tape. Pearson was driving, with Stuckey, Walls, Ransom, Davis, and the victim in the car. The men then drove the victim to an old abandoned house where Stuckey used to live. Pearson and Stuckey put the victim on a couch and then carried the couch and the victim inside. The men then drove off, leaving the bound victim behind inside the old abandoned house. The men then took Davis and Ransom home for the night. (App. p. 749 l. 3 - 756 l. 16.)

The next night, Davis was arriving at Ransom's house when Pearson and Stuckey arrived. After Ransom asked them to take him to get something to drink, Stuckey stated that they had to do something with the girl (victim). Pearson left, and when he returned with the car, Leroy and Petitioner were with him. The six men then left in the car. (App. p. 756, l. 20 – 780, l. 14.)

The men then drove to another abandoned house. When they arrived, McIntosh and Walls were standing outside the house. Pearson and Stuckey brought the taped girl (victim) out of the house and put her in the back of the car. Then Pearson, Stuckey, Walls, McIntosh, Leroy Staton, Petitioner, Davis, and Ransom drove off with the victim in the car. (App. p. 760, l. 12 – 765, l. 4.) When they put the victim into the car, Ransom asked the others to pull her off him.

Stuckey said, "Bobby, you don't have to worry about her bothering you because she's already dead." (App. p. 765 ll. 1-10.)

The men then drove to a bridge on Burnt Factory Road. The men got out and threw the victim into the water. After they threw the victim in, some of the men carried Ransom, who is crippled, down to the water where he unsuccessfully tried to pull her out. The group of men then left the bridge. On the way back, the others told Davis and Ransom that if they ever said anything, the same thing would happen to them. (App. p. 765, l. 5 – p. 770, l. 11.)

Robert Ransom also is a co-defendant who received a plea agreement and testified for the State. Like Davis, Ransom also lived near to Stuckey and Graham's trailer, and was asked by Stuckey and Davis to attend the pig's feet cookout in November of 1994. When he arrived at the party that afternoon, he saw Graham, Stuckey, Walls, Petitioner, and Leroy. (App. p. 898, l. 11 – 900, l. 7.)

Ransom stated that when he went to the cooking pot "where the rest of them were standing around," Stuckey asked him if he wanted to see "the old gal they had in there." (App. p. 900, ll. 8-24.)

When they pushed Ransom, who was in a wheelchair, to the door, and he went inside, he saw a black female on the couch naked and bound with tape. Ransom told Stuckey they needed to move the girl (victim), and "there was three or four [of the men] in there like I named before." Stuckey asked the men for help in taking the victim to the back, and some of the other defendants helped Stuckey move the girl (victim). (App. p. 900, l. 8 – 903, l. 10.) Ransom then passed out in the yard in his wheelchair from drinking moonshine. Everyone else was drinking and having a good time. (App. p. 903, l. 11 – 904, l. 22.) Someone ultimately pushed Ransom home, but he returned to the trailer late that night to continue the party. At the party was Stuckey,

Leroy, Graham, McIntosh, Walls, Pearson, and Davis, who were standing in the living room. The group again asked Ransom if he wanted to see "the old gal they had in there," and they pushed open the bedroom door where Ransom saw the black female (victim) on the bed naked and bound with tape. One of the guys asked Ransom "did [he] want some". However, Ransom went back to his wheelchair. (App. p. 905, l. 11 – 909, l. 11.)

Ransom then asked the group to take him home, and heard Stuckey tell someone they needed to move the victim to another house. The men put Ransom in the car, and then Stuckey, Pearson, Walls, Davis, and Ransom took the victim to the old abandoned house. The men put the victim on a couch, took her in the abandoned house, and left her behind. (App. p. 909, l. 13 – 914, l. 7; 1031, l. 13 -1032, l. 12.)

The next night, Ransom was sitting in his back yard when Pearson, Stuckey, and Davis approached. The group discussed what to do with the victim. Stuckey then told Pearson to get the car, and Pearson returned with Leroy and Petitioner. Stuckey, Leroy, Pearson, Petitioner, Davis, and Ransom then got in the car and left and went to the abandoned house. (App. p. 906 l. 10 - 909 l. 25; 1031, l. 13 – 1032, l. 12).

When they arrived, Ransom saw Walls and McIntosh coming out of the abandoned house. Several men then carried the bound victim out of the house and put her in the car. Somebody said to go to Burnt Factory Road, and Stuckey, Pearson, Leroy, Petitioner, McIntosh, Walls, Davis and Ransom left with the victim in the car. Ransom was unsure if the victim was alive, but when the victim's head fell on his shoulder, he yelled, "Get this b*tch from crying all over me." The men laughed at him. (App. p. 918, l. 10 – 923, l. 25.)

When the group got to the bridge on Burnt Factory Road, they stopped, pulled the victim out by her feet, and threw her in the river. The body got snagged on something, and Ransom

agreed to go down there. Two of the men carried Ransom to the river, but he could not free the body, so the men pulled him out of the river. The group then left. (App. p. 924, l. 1 – 930, l. 1.) Ransom stated that after the incident, he stayed drunk and high most of the time because he was depressed about being crippled and about what he had witnessed. He testified that he called the police in February and talked with them because he was scared and wanted protection. (App. p. 933, l. 13 - 935 l. 15.)

Jeffery Graham (“Jeffery”), the cousin of Robert Graham, reluctantly testified during the State’s case. Jeffery admitted giving a written statement to police in which he incriminated a number of the defendants. However, during his testimony on the stand he asserted that various portions of the statement were not true, that he had not looked the statement over when he signed it, that he made the statement for self-preservation, that the police had harassed him, and that he did not have an independent recollection of the things in the statement. (App. p. 612, ll. 20-25; 614, l. 12 – 615, l. 19; 616, l. 18 – 619, l. 21; 630, l. 13 – 639, l. 22; 651, l. 4 – 653, l. 8; 655, l. 15 – 662, l. 25; 664, l. 5 – 682, l. 4.) However, Jeffery was also examined by the Solicitor on his testimony before the federal grand jury, in which he described events consistent with his written statement to police. (App. p. 680, l. 5 – 698, l. 3; 703, l. 17 – 706, l. 23.) Jeffery stated that his grand jury testimony was the truth. (App. p. 680, ll. 5-21; p. 706, ll. 13-23.) On re-cross examination, however, Jeffery again hedged, stating that he had been threatened by the police before his grand jury testimony, that some of the testimony was not true, that the U.S. Attorney was questioning him with his statement to police, that some of his information was rumors, and that he did not have an independent recollection of anything. (App. p. 709, l. 11 – 710, l. 22; 716, l. 18 – 719, l. 6; 720, l. 9 – 729, l. 14.)

Because Jeffery repudiated parts of his statement and often gave conflicting testimony on the stand, the following is a summary of his testimony in the light most favorable to the State: Jeffery testified that in November, 1994, Leroy and Pearson came to his trailer and asked him to go to a party. Leroy and Pearson stated that "somebody had a woman up there." (App. p. 608, l. 13 – 612, l. 12.) In Jeffery's written statement, he told police that "Leroy Staton told me that he had a woman. Leroy Staton asked me if I wanted to get a piece." Jeffery figured they had a woman and everyone was going to mess around with her. App. p. 614, l. 21 – 615, l. 19; 686, ll. 1-23.)

Subsequently, Jeffery overheard a conversation at Mack Stuckey's garage where Ricky Stuckey ("Stuckey"), Joe Stuckey, Mack Stuckey, Leroy, Petitioner, Jeffery Walls, and Martin McIntosh were hanging out. Stuckey said, "Y'all need to get that b*tch out of my house." Jeffery later said that McIntosh was outside when the statement was made. (App. p. 622, l. 17 – 626, l. 8; 628, ll. 5-18; 644, ll. 19-25; 704, l. 17 – 705, l. 25.) Jeffery later went to Stuckey and Robert Graham's trailer with Robert Graham. At the trailer, Jeffery saw Joe Stuckey, Ricky Stuckey ("Stuckey"), Leroy, Petitioner, and Quincey Graham. Everybody was in the yard drinking and partying. Robert Graham went into the trailer for a few minutes. (App. p. 616, l. 1 – 621, l. 2; 625, l. 9 – 626, l. 20; 686, l. 17 – 690, l. 5; 698, l. 6 – 699. l. 3.)

Jeffery testified at the trial that "there ain't no question that they had some b*tch up there in the trailer." (App. p. 640, l. 23 – 641, l. 2.) Jeffery denied his statement where he previously said: (1) that five people told him they had sex with Darlene at Ricky Stuckey's trailer, (2) that Stuckey told him he "stuck" Darlene, and (3) that he learned from Joe Stuckey, Ricky Stuckey, Leroy, and McIntosh that they had a girl out at Ricky's trailer. (App. p. 630, l. 13 – 634, l. 22.) In his grand jury testimony, Jeffery said that Ricky Stuckey ("Stuckey"), Joe Stuckey, Robert

Graham, a "white guy" named Danny, and Paul Fletcher all had sex with the girl at the trailer. (App. p. 693, l. 15 – 696, l. 11.)

The victim was found on Thanksgiving day, November 24th, in the creek, bound by grey duct tape and wearing only one (1) earring. (App. p. 261-330; p. 330, ll. 9- 17.) The pathologist, Dr. Conradi, testified that the victim was moderately decomposed which could destroy any evidence of bruising or sexual assault. In her opinion, the cause of death was asphyxiation from the duct tape wrapped around the victim's head, but she agreed she could not rule out drowning as a cause of death. Dr. Conradi could not determine the time of death any better than between November 12th and November 20th. (App. p. 551, l. 19 – 558, l. 11; 564, l. 16 – 569, l. 21; 572, l. 4 – 574, l. 22.)

Sam Walls, the brother of co-defendant Jeffrey Walls, testified that in November of 1994 his car was being fixed by Pearson. He stated that after Pearson fixed his car, he found a roll of grey duct tape in it. This duct tape came from his mother's house, where co-defendant Jeffery Walls lived. (App. p. 337, l. 9 – 343, l. 10.) A SLED agent testified that this duct tape was perfectly consistent in structure and composition to the duct tape used to bind the victim, and duct tape later found on the floor of the old abandoned house. The agent testified that the duct tape was very unusual and was not manufactured or directly sold in the United States. (App. p. 434, l. 2 – 451, l. 13; 461, l. 18 – 466, l. 5.)

Police officers testified that they found the victim's other earring and her glasses at the old abandoned house. (App. p. 370, l. 18 – 381, l. 22; p. 417, l. 8 – 421, l. 18; 428, l. 8 – 433, l. 6.) James Steen and Danny Davis confirmed the finding of the glasses and earring when cleaning out the old abandoned house. (App. p. 3995, l. 22 – 416, l. 20; 773, l. 6 – 776, l. 9; p. 808, l. 9 – 811, l. 10.)

Jerry Ward is a career criminal and was an inmate on safekeeping status at the same prison where the defendants were held for periods of time prior to trial. Ward got to know Stuckey, Pearson, Davis, Ransom, and Walls. He heard Pearson and Walls arguing over which one of them was the first one to have sex with the victim at Stuckey's mobile home. He heard from "bits and pieces" of conversations with the defendants that they kept the victim for about two (2) days. Stuckey and Walls said they had to tape the victim's face because she was becoming uncontrollable. While Stuckey denied having sex with the victim, he told Walls he watched Pearson have sex with the victim. (App. p. 1054, l. 5 – 1069, l. 6.) On cross-examination, Ward testified that he told police Pearson confessed to killing the victim. (App. p. 1070, l. 4 – 1071, l. 24.)

STATEMENT OF THE CASE

A. Underlying Conviction

Petitioner (Alfonso Staton) is presently incarcerated at Lee Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Marlboro County. Petitioner was indicted by the December 1996 term of the Marlboro County Grand Jury for kidnapping (1996-GS-34-0979, count 1), murder (1996-GS-34-0979, count 2), first-degree sexual conduct (1996-GS-34-0979, count 3), and criminal conspiracy (1996-GS-34-0979, count 4). William B. Rogers, Esquire, represented Petitioner on all charges. The State was represented by Solicitor Ralph Wilson. On March 10, 1997- March 19, 1997, Petitioner proceeded to trial before the Honorable Edward B. Cottingham and a jury, after which Petitioner was found guilty of murder, kidnapping, and conspiracy on March 18, 1997. Petitioner was acquitted of first-degree sexual conduct. Petitioner was sentenced to life imprisonment for

murder, no sentence on the kidnapping charge¹, and a concurrent five years for criminal conspiracy by Judge Cottingham.²

Petitioner filed a timely notice of appeal. Joseph L. Savitz, III, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal. The State was represented by Creighton Waters, Esquire. The South Carolina Court of Appeals affirmed Petitioner's convictions and sentences. State v. Staton, Op. No. 2001-UP-478 (S.C. Ct. App. filed November 8, 2001). On November 21, 2002, the South Carolina Supreme Court denied Petitioner's petition for writ of certiorari. (App. 2143). On November 25, 2002, the remittitur was returned to the circuit court.

B. First Post-Conviction Relief Action

Petitioner filed his first application for post-conviction relief on June 10, 2003 (2003-CP-34-244). The State filed its return on November 3, 2003.

In the application, Petitioner alleged the following grounds:

1. Ineffective assistance of trial counsel:
 - Failed to object to indictment.
 - Failed to object to improper evidence.
 - Failed to subpoena alibi witnesses.
2. Subject matter jurisdiction.
3. Prosecutorial misconduct.

The Honorable John H. Milling convened an evidentiary hearing on the matter on January 11, 2005. Petitioner was present at the hearing and was represented by Candice A. Liveley,

¹ Pursuant to S.C. Code Ann. Section 16-3-910, Petitioner was not sentenced on the kidnapping charge because he was sentenced to life imprisonment for murder.

² Eleven defendants were charged with at least some crime in the kidnapping, rape, and murder of the victim. Martin McIntosh, Ricky Stuckey, Jeffrey Walls, Leroy Staton, Alfonso Staton (Petitioner), and Robert Graham were tried together. The other defendants indicted in this case are state's witnesses Danny Davis, Robert Ransom, and Dwayne Sloan, as well as Ringo Pearson and Robert Lee Whitfield. Ringo Pearson eventually pleaded guilty to murder. In 2004, Martin McIntosh's conviction and sentence was reversed. Thereafter, he pleaded guilty to misprisonment of a felony and is no longer incarcerated.

Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented Respondent. At the hearing, Petitioner testified on his own behalf. Also testifying for Petitioner were Kathey Staton, Calvin Bethae, and Larry Quick. The PCR Court also noted Petitioner's trial counsel, William B. Rogers, Jr., Esquire testified for the State. The PCR Court noted it had before it a copy of the trial transcript, the records of the Marlboro County Clerk of Court, Petitioner's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the Respondent's Return to the same.

At the hearing, Petitioner alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - Failed to object to indictment.
 - Failed to object to improper evidence.
 - Failed to subpoena alibi witnesses.
2. Subject matter jurisdiction.
3. Prosecutorial misconduct.

Petitioner filed an amendment to his PCR application on August 26, 2004 in which he expanded upon his argument that a defective indictment deprived the trial court of subject matter jurisdiction.

Subsequent to the hearing, Judge Milling denied all of Petitioner's claims by an order dismissing post-conviction relief on September 16, 2005. (App. p. 2143-2144).

Petitioner timely appealed Judge Milling's order. Wanda Carter, Esquire, of the South Carolina Office of Appellate Defense, perfected the appeal by filing a petition for writ of certiorari on June 18, 2007. The South Carolina Supreme Court granted certiorari on two issues on May 8, 2008. However, the Supreme Court dismissed the writ as improvidently granted on February 23, 2009. The remittitur was returned to the circuit court on March 11, 2009.

C. Rule 29 Motion

On May 6, 2009, Petitioner filed a motion for a new trial pursuant to Rule 29(b) of the South Carolina Rules of Criminal Procedure on the basis of after-discovered evidence of a conflict of interest and a co-defendant's statement to authorities. (Supp. App. p. 1.) A hearing was convened on the motion on October 6, 2011, before the Honorable Howard King. Petitioner was represented by William E. Grove, Esquire, and the State was represented by Fifteenth Circuit Solicitor Assistant Solicitor Donna Elder. (App. pp. 1950, 1952, ll. 13-14.) By order dated October 19, 2011, Judge King denied Petitioner's motion. (App. p. 1978). Petitioner subsequently filed a motion for reconsideration, (Supp. App. p. 17) which was denied by order filed January 19, 2012. (App. pp. 1979-80.) Petitioner then filed a notice of appeal on Judge King's order on February 13, 2012, but it was dismissed on March 27, 2012 by the South Carolina Court of Appeals for failure to timely serve the notice of appeal. (App. p. 1983). The Court of Appeals denied the petition for rehearing on September 7, 2012. The Supreme Court denied the petition for writ of certiorari on April 3, 2014. A remittitur was returned to the circuit court on April 8, 2014.

D. Federal Habeas Corpus Petition

On August 28, 2012, pursuant to Rhines³, Petitioner filed a federal habeas corpus petition (5:12-2483-JFA-KDW) in the United States Federal Court for the District of South Carolina. In response, the Honorable Kaymani West recommended the matter be held in abeyance, pending the result of Petitioner's state claims related to an alleged conflict of interest regarding trial counsel that was raised in his Rule 29 and PCR application. (App. 2059-2087). Furthermore, Judge West recommended the State's Motion for Summary Judgment be denied without prejudice. Id.

³ Rhines v. Weber, 544 U.S. 269 (2005).

E. Current Application

On April 26, 2013, Petitioner filed his current application for post-conviction relief, alleging his Rule 29(b) counsel was ineffective for failing to file an appeal and requesting a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) and Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). (App. p. 2002). The Honorable Michael Baxley issued a Conditional Order of Dismissal on October 22, 2013. (Supp. App. 20).

A hearing was convened before the Honorable Thomas Russo regarding Petitioner's Motion to Amend his Post-Conviction Relief application and the State's Motion to Dismiss. (App. pp. 2112-2113). Petitioner sought a full hearing and the remedy of a belated appeal. (App. p. 2120).

On November 24, 2014, Judge Russo issued a Final Order of Dismissal. Regarding setting aside the Conditional Order of Dismissal, he held the parties "fully argued the merits of these allegations at the hearing and presented relevant exhibits." (App. p. 2145). In addition, he denied a belated appeal to Petitioner because he was not entitled to effective assistance of counsel on post-trial motions. (App. p. 2146). Lastly, Judge Russo held Petitioner was barred from re-litigating the conflict of interest issue, as it was already raised in the Rule 29(b) Motion; however, he ruled there was no conflict of interest regardless.

Petitioner filed a notice of appeal and filed the petition for writ of certiorari on September 13, 2016. This return to petition for certiorari follows.

STANDARD OF REVIEW

The proper standard for reviewing a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989). In a PCR proceeding, the petitioner bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

ARGUMENT

I. Petitioner is not entitled to a successive PCR application based on a challenge to the effectiveness of counsel where there is no statutory or constitutional right to counsel in a Rule 29 hearing.

Petitioner is not entitled to assistance of counsel on a collateral proceeding filed in General Sessions. Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (“We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”) *quoted with approval by* Aice v. State, 305 S.C. 448, 452 n.2, 409 S.E.2d 392, 395 n.2 (1991). While state law provides for appointment of counsel in post-conviction relief proceedings, it does not provide for such in a Rule 29, SCRCrimP proceeding. *See* Aice. Petitioner enjoyed the entire appellate process, the full “bite at the apple” as described by Aice and was not entitled to representation of counsel in a second state court collateral proceeding. Accordingly, the PCR Court correctly found Petitioner is barred from challenging the effectiveness of his Rule 29 counsel.

Petitioner’s Sixth Amendment guarantee to counsel does not extend to post-trial motions, thus there is no constitutional right to a belated appeal of the denial of his Rule 29(b) motion. In State v. Clinkscales, 318 S.C. 513, 458 S.E.2d 548 (1995), this Court addressed whether

Clinkscales “was entitled to counsel on his Motion for a New Trial” and held the answer was that he was not entitled to counsel. In rejecting this similar claim, this Court explained:

A defendant's Sixth Amendment right to assistance of counsel attaches at all critical stages of a criminal prosecution. Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). However, this constitutional right extends only to the first right of appeal. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

We hold that Clinkscales was not entitled to counsel. Clearly, the New Trial Motion on the ground of after-discovered evidence was not heard and determined at a critical stage. Moreover, the record does not contain evidence which would support a New Trial for after-discovered evidence.

Id.; see also, United States v. Tajeddini, 945 F.2d 458, 470 (1st Cir. 1991) (there is no constitutional right to counsel for post-appeal motions for new trial because they are collateral attacks), *abrogated on other grds.*, Roe v. Flores-Ortega, 528 U.S. 470 (2000); United States v. Williamson, 706 F.3d 405, 415-18 (4th Cir. 2013) (concluding that there is no Sixth Amendment right to counsel to pursue a Rule 33 motion based on newly discovered evidence filed more than fourteen days after the district court enters the judgment of conviction because “such a motion [is] truly collateral to the judgment of conviction and the appeal”); United States v. Lee, 513 F.2d 423, 424 (D.C. Cir. 1975) (“There is no right to appointment of counsel for a new trial motion, and certainly not after an appeal.”); United States v. Birrell, 482 F.2d 890, 892 (2d Cir.1973).

In this case, Petitioner filed, *pro se*, his own motion to reconsider the Rule 29 order. (Supp. App. pp. 17-19.) He now argues the failure to perfect the notice of appeal was caused by counsel Petitioner had not been using since the hearing for the Rule 29 order. Because Petitioner’s post-trial Rule 29(b) motion is not considered a critical stage of his criminal prosecution proceedings, he has no constitutional right to counsel in this post-trial stage of the criminal process. Therefore, because Petitioner has no guaranteed right to counsel for this

motion, he is afforded no right to challenge the effectiveness of his Rule 29 counsel or receive a belated appeal as a result.

Further, Petitioner's expansive view of Austin⁴ applying the constitutional right to counsel of appellate review of PCR actions to post-trial motions is without merit. The holding in Austin is limited to a particular set of facts, which are inconsistent with those at hand. Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). The right to appeal in Austin stems from a statutory requirement that a defendant be appointed counsel in all post-conviction relief actions and for appellate review if those actions are denied. Id. However, this right to counsel for appellate review merely entails the first right of appeal, which does not include post-trial motions, such as the Rule 29(b) motion Petitioner made here. Clinkscales, 318 S.C. at 513, 458 S.E.2d at 549. There is no statutory or constitutional right to counsel that attaches to a post-trial motion under Rule 29(b). Id.

Petitioner's attempt to create a rule based on the practice of the Court to appoint counsel to 29(b) appeals fails as well. Petitioner argues that with the exception of one municipal court case, counsel has handled all 29(b) appeals in the past twenty years. At least some of these cases involved repeat filers who wished to represent themselves but this Court denied the motion to proceed *pro se* and, in some instances, ordered the repeat filers to cease filing *pro se* motions with it during the pendency of the appeal. See, e.g., State v. Koon (2013-UP-216) Order filed Jan. 30, 2013 (denying Koon's motion to relieve counsel and proceed *pro se* and declining to consider Koon's remaining *pro se* filings). It is also significant that Petitioner is challenging his right to effective counsel at the Rule 29 hearing and in filing post-hearing motions; the focus is therefore more appropriately placed on the appointment of counsel to inmates at the trial level and not at the appellate level.

⁴ Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Here, the appointment **did not stem** from any statutory or common-law created right to counsel for these types of post-trial motions. The State appointed Petitioner an attorney for the Rule 29(b) hearing. Therefore, the PCR court did not err in holding that because Petitioner possessed no right to an attorney for the Rule 29(b) hearing, he possessed no right to challenge the effectiveness of that counsel for allegedly failing to file a notice of appeal on Petitioner's behalf and had therefore failed to state a cognizable claim that entitled him to a successive post-conviction relief application.

II. Petitioner was not entitled to a review of his 1997 trial counsel where Petitioner's application was untimely, successive, not newly discovered evidence, and had been previously litigated.

A. Petitioner's application was outside of the statute of limitations

Petitioner argues the PCR Court erred in finding his due process rights were not violated due to his trial counsel being a part-time solicitor at the time of his trial. However, Petitioner did not timely file an application on this issue.

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 applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

At Petitioner's Rule 29(b) hearing, the Court found Petitioner knew or should have known about his trial counsel's potential conflict of interest at the time of Petitioner's trial. Petitioner should have raised the issue to the trial court or on direct appeal or even at his first PCR hearing. Even taking Petitioner's own version of the facts, which are as he stated to the Rule 29 Court:

Mr. Staton: But I wasn't aware of [my trial counsel's possible conflict of interest] before I filed my PCR. I filed my PCR in 2004---2003. I didn't become aware of this issue **until 2007**, which I then proceeded to file this [Rule 29] motion.

(App. p. 1960, ll. 17-20 (emphasis added).)

Petitioner filed his Rule 29 motion on May 26, **2009**. (Supp. App. pp. 1-16.) Petitioner did not file his present PCR application until **April 26, 2013**. The PCR Court was correct in dismissing this allegation for failure to timely file.

B. Successive

Additionally, the PCR Court was correct in finding Petitioner's application was barred as successive. Successive applications for post-conviction relief 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 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 grounds raised in a subsequent application are limited to those that "could not have been raised . . . in the previous application." Id. If Applicant could have raised these allegations in a previous application, then he may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Here, like the Rule 29 Court, the PCR Court determined Petitioner failed to show the allegations could not have been previously raised in Petitioner's first PCR.

C. Claim was not newly discovered evidence

Similarly, Petitioner's claim about counsel's alleged conflict is not newly discovered evidence.

An application alleging newly discovered evidence must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. § 17-27-45(c).

Further, a defendant requesting a new trial based on after-discovered evidence must show that the evidence:

1. Is such as would probably change the result if a new trial was held;
2. Has been discovered since the trial;
3. Could not by the exercise of due diligence have been discovered before the trial;
4. Is material to the issue of guilt or innocence; and
5. Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983) (citing State v. Caskey, 273 S.C. 325, 256 S.E.2d 737 (1979)); Clark v. State, 315 S.C. 385, 434 S.E.2d 266 (1993). The credibility of newly discovered evidence is for the trial court to determine. State v. Porter, 269 S.C. 618, 621, 239 S.E.2d 641, 643 (1977). The granting of a new trial of after-discovered evidence is not favored, and appellate courts will affirm the trial court's denial of such a motion unless the trial court abused its discretion. State v. Harris, 391 S.C. 539, 706 S.E.2d 526 (Ct.App. 2011).

Petitioner should have known about the alleged conflict at the time of the trial and admits he had actual knowledge in 2007. (App. p. 1960, ll. 17-20.) Furthermore, the PCR Court adopted Judge King's holding that the evidence was "not such as would likely change the result

if a new trial was held” (App. p. 1948)⁵ and held Petitioner had not demonstrated that the alleged conflict was material to his guilt or innocence in light of the extensive trial record before the Court (App. p. 2148).

D. Collateral Estoppel

Furthermore, this issue was previously litigated in the Rule 29(b) hearing and ruled upon by an order from Judge King. Judge Russo ruled the doctrine of collateral estoppel prevented Petitioner from re-litigating his allegation of an existing conflict of interest, as he had raised it as a ground for a new trial in his Rule 29(b) motion. The doctrine of collateral estoppel “prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” Carolina Renewal, Inc. v. S.C. Dep’t of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). “The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” Id. (citing Beall v. Doe, 281 S.C. 363, 315 S.E. 2d, 186 (Ct. App. 1984)). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 191, 427 S.E. 2d 918, 919 (Ct. App. 1993) (citing Hilton Head Ctr. Of S.C., Inc. v. Pub. Serv. Comm’n of S.C., 294 S.C. 9, 362 S.E.2d 176 (1987); Beall, 281 S.C. 363, 315 S.E.2d 186).

Here, Petitioner initially raised his allegation of a conflict of interest in his Rule 29(b) motion before Judge King. Subsequently, Judge King denied Petitioner’s motion, on the merits. Therefore, Petitioner is procedurally barred from subsequently raising the same argument, even

⁵ The PCR Court “adopt[ed] Judge King’s reasoning for denying a new trial on” the grounds of it not being newly discovered evidence. (App. p. 2148.)

in different terms.

III. Even if Petitioner overcame the procedural bars, he is not entitled to relief because Petitioner's right to due process was not violated when he was represented at trial by a part-time solicitor from a different circuit than the circuit prosecuting his case.

However, even if Petitioner were to be procedurally allowed to allege a claim of a conflict of interest, he would not be successful because he has failed to effectively establish the existence of a conflict of interest regarding his trial counsel.

“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant[’]s.” State v. Gregory, 364 S.C. 150, 152, 612 S.E.2d 449, 450 (2005) (citing Fuller v. State, 347 S.C. 640, 557 S.E.2d 664 (2001)). Petitioner’s trial counsel started as a part-time solicitor for the **Fourth** Circuit Solicitor’s office before Petitioner’s trial commenced. However, Petitioner’s case was adjudicated by the **Fifteenth** Circuit Solicitor’s Office. Because Petitioner’s case was prosecuted in an entirely separate circuit, no conflict of interest was ever created. See e.g. Rule 1.11(d)(2)(i), RPC, Rule 407, SCACR (government lawyer only conflicted out of matters in which he “participated personally and substantially while in private practice”). Petitioner’s trial counsel did not represent parties directly adverse to one another, and his prosecutorial work was entirely unrelated and occurred in a different area of the state under the control and discretion of solicitors belonging to a different agency. Therefore, probative evidence supports the PCR court’s finding that no conflict of interest exists between Petitioner and his trial counsel. Even if that had been the case, trial counsel’s alleged conflict did not have any material bearing on Petitioner’s guilt or innocence and would not have changed the outcome of the case had a new trial been granted.

CONCLUSION

For the reasons stated above, this Court should deny the Petition for Writ of Certiorari and affirm the PCR Court's ruling. Should this Court grant Certiorari, Respondent requests permission under the rules to brief the issues discussed above fully.

Respectfully submitted,

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13 Jan., 2017

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Marlboro County
Court of Common Pleas
The Honorable Thomas A. Russo, Circuit Court Judge

Appellate Case No. 2015-000460
Lower Court Case No. 2013-CP-34-0089

ALFONSO STATON, 241380,

Petitioner,

v.

STATE OF SOUTH CAROLINA,


Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of Return to Petition for Writ of Certiorari has been served upon opposing counsel by mailing two (2) copies in the United States mail, postage prepaid:

Tristan M. Shaffer, Esquire
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This 13th day of January, 2017


MALLORY MORRIS
Legal Assistant for Respondent