

STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

AUG 28 2017

Honorable William P. Keesley, Chief Administrative Judge S.C. SUPREME COURT

Case No. 2011-CP-32-1727

Thomas J. Torrence, #094651 ..... Appellant

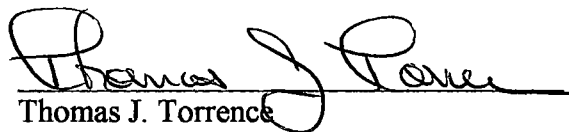
v.

State of South Carolina ..... Respondent

NOTICE OF APPEAL

Thomas J. Torrence appeals the Order in his case, attached. This appeal is taken from the Order of the Honorable William P. Keesley, dated June 30, 2017, in the above-referenced matter. Appellant received written notice of entry of this Order on July 20, 2017.

August 17, 2017



Thomas J. Torrence  
#094651  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, S.C. 219472

APPELLANT, *Pro se*

Other counsel of record:

Johanna Catalina Valenzuela, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

**STATE OF SOUTH CAROLINA  
In The Supreme Court**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

Honorable William P. Keesley, Chief Administrative Judge

Case No. 2011-CP-32-1727

**RECEIVED**

AUG 28 2017

**S.C. SUPREME COURT**

Thomas J. Torrence, #094651 ..... Appellant

v.

State of South Carolina ..... Respondent

**PROOF OF SERVICE**

The undersigned hereby certifies that he has served a true a correct copy of the Notice of Appeal and Explanation pursuant to Rule 243(c), on all parties required by Court Rules by placing a copy in the U.S. Mail, first-class postage affixed thereto, this 18th day of August 2017, addressed as follows:

Johanna Catalina Valenzuela, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

The Honorable Lisa M. Comer  
Clerk of Court, Lexington County  
205 E. Main Street, Suite 146  
Lexington, South Carolina 29072-3557



Thomas J. Torrence  
#094651  
Lieber Correctional Institution, SA-13  
P.O. Box 205  
Ridgeville, S.C. 219472

**APPELLANT, Pro se**

Thomas J. Torrence  
# 094651  
Lieber Correctional Inst. SA-13  
Post Office Box 205  
Ridgeville, South Carolina 29472

August 17, 2017

The Honorable Daniel Shearouse  
Clerk of Court  
South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29472

**Re:** *Thomas J. Torrence v. State of South Carolina*  
**C/A No. 2011-CP-32-1727**

Dear Mr. Shearouse:

Please find enclosed for filing the original Notice of Appeal and Rule 243(c) Explanation required by Court Rules in the above-referenced appeal. Also enclosed is proof of service on counsel for Respondent.

Your assistance is sincerely appreciated.

With kindest regards, I remain.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas J. Torrence". The signature is fluid and cursive, with the first name "Thomas" and last name "Torrence" clearly distinguishable.

Thomas J. Torrence  
**APPELLANT, *pro se***

**Cc:** The Honorable Lisa M. Comer  
Johanna Catalina Valenzuela, Esq.

Thomas J. Torrence  
# 094651  
Lieber Correctional Inst. SA-13  
Post Office Box 205  
Ridgeville, South Carolina 29472

August 17, 2017

The Honorable Lisa M. Comer  
Clerk of Court  
205 E. Main Street, Suite 146  
Lexington, South Carolina 29072

**Re:** *Thomas J. Torrence v. State of South Carolina*  
**C/A No. 2011-CP-32-1727**

Dear Ms. Comer:

Please find enclosed for filing a copy of the original Notice of Appeal required by Court Rules in the above-referenced appeal. Also enclosed is proof of service on counsel for Respondent.

Your assistance is sincerely appreciated.

With kindest regards, I remain.

Sincerely,

A handwritten signature in black ink that reads "Thomas J. Torrence". The signature is written in a cursive style with a large, looped initial 'T'.

Thomas J. Torrence  
**APPELLANT, *pro se***

Cc: The Honorable Daniel E. Shearouse ✓  
Johanna Catalina Valenzuela, Esq.

**STATE OF SOUTH CAROLINA  
In The Supreme Court**

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**APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas**

Honorable William P. Keesley, Chief Administrative Judge

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**Case No. 2011-CP-32-1727**

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Thomas J. Torrence, #094651 ..... Appellant

v.

State of South Carolina ..... Respondent

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**RULE 243(c) SCACR EXPLANATION**

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Thomas J. Torrence  
#094651  
Lieber Correctional Institution  
Post Office Box 205  
Ridgeville, South Carolina 219472

**APPELLANT, *Pro se***

This matter is before this Honorable Court by way of a Notice of Appeal from the June 30, 2017 order of denial of an application for post-conviction relief by the Honorable William P. Keesley, from Lexington County. As the order of denial was a summary dismissal based on the statute of limitations and as a successive application, this Explanation is filed with the Notice of Appeal, pursuant to Rule 243(c), SCACR, despite such specificity in the order of denial.

### **PROCEDURAL HISTORY**

The *pro se* Appellant, Thomas J. Torrence, was indicted at the July 1987 and April 1988 terms of the Lexington County Grand Jury for murder (1987-GS-32-1418 and 1427), Armed Robbery (1987-GS-32-1422 and 1432), Burglary 1<sup>st</sup> Degree (1987-GS-32-1433), Kidnapping (1987-GS-32-1425), and Criminal Conspiracy (1988-GS-32-0666). Appellant was served a Notice of Intent to Seek the Death Penalty. Appellant proceeded to a bifurcated trial before the Honorable Ralph K. Anderson, Jr. and a jury on May 18 – 25, 1992. Following verdicts of guilty, Appellant proceeded to the sentencing phase where the jury recommended life in lieu of the death sentence. Judge Anderson sentenced Appellant respectively to thirty (30) year life sentences for the murders, a twenty (20) year life sentence for burglary 1<sup>st</sup> degree, twenty-five (25) years on each armed robbery and five (5) years for criminal conspiracy. Based on the law regarding the murder sentence, Appellant was not sentenced on the kidnapping. The South Carolina Supreme Court affirmed Appellant's convictions and sentences on March 23, 1995, *State v. Thomas J. Torrence*, 95-MO-117 (S.C. Sup. Ct., filed March 23, 1995).

On December 1, 1995, the Appellant filed an application for post-conviction relief (1995-CP-32-2656). An evidentiary hearing was convened on November 6, 2000. The PCR Court, the Honorable Rodney Peebles, issued an Order of Dismissal on December 31, 2001.

A Rule 59(e) Motion was timely filed and subsequently denied by a written Order dated June 12, 2002. A petition for writ of certiorari was perfected. On April 8, 2004, this Court denied the petition by written order. The remittitur was issued on April 26, 2004.

On June 4, 2004, Applicant was notified by the South Carolina Department of Probation, Parole and Pardon Services (“SCDPPPS”) that he was no longer eligible for parole, in contravention of the trial court’s May 25, 1992 written and oral pronouncement of sentences.

On March 14, 2005, Appellant filed post-conviction application 2005-CP-32-0833 regarding his sentence(s) and the June 4, 2004 SCDPPPS notification. John D. (“Jay”) Elliott, Esquire, was retained to represent Appellant on a writ of federal habeas corpus and the state post-conviction relief application, but later assumed *pro bono* representation. An evidentiary hearing was held before the Honorable William P. Keesley on October 10, 2007. The matter was reconvened on November 10, 2007.

On June 24, 2008, Appellant filed a *pro se* motion to substitute counsel. On July 1, 2008, Judge Keesley issued an order in regards to Appellant’s *pro se* motion to substitute counsel, instructing counsel “*to ascertain [Appellant’s] wishes to substitute counsel, pursue other issues, or pursue an appeal.*” On July 1, 2008, Judge Keesley *simultaneously* issued an Order of Dismissal.

On July 8, 2008, based on counsel’s failure to respond to Applicant’s queries, Applicant filed *pro se* documents 1) Motion to Amend Application for Post-Conviction; 2) Memorandum of Law in Support; 3) Return to Conditional Order of Dismissal and Motion to Reinstate PCR; and 4) Memorandum of Law in Support. On July 16, 2009, the Court reconvened a hearing and requested briefs from both parties within 60 days. On December 21, 2010, Judge Keesley issued an Order of Dismissal.

On January 24, 2011, counsel filed a Notice of Appeal in this Court. By Order dated March 2, 2011, this Court vacated Judge Keesley's December 21, 2010 Order based on the Motion to Amend and Rule 59(e) Motion being improperly filed and no appeal being timely filed from the July 1, 2008 Order(s). On March 13, 2011, counsel filed a Motion to Reinstate. The Motion to Reinstate was denied on April 6, 2011. The remittitur issued on April 6, 2011.

Appellant filed the instant PCR (2011-CP-32-1727) on May 4, 2011 raising post-conviction counsel's failure to timely file a Rule 59(e) Motion to Alter or Amend or a Notice of Appeal from the July 1, 2008 order(s).

On August 27, 2014 Judge Keesley issued a written Order for the parties to attend a Status Conference to determine whether the Appellant's PCR application was 1) barred by the statute of limitations and 2) whether the application raises material facts precluding application of the rule forbidding successive applications. Appellant's position, as set forth in his September 29, 2014 Memorandum of Law in Support of the Status Conference, is that, based on the "discovery rule," he was entitled to be appointed counsel and an evidentiary hearing on the facts in the application. On September 20, 2014, Judge Keesley convened the status conference. On June 2, 2016, Judge Keesley signed a Condition Order of Dismissal. On June 30, 2017, Judge Keesley issued a written Order of Dismissal (attached). The June 30<sup>th</sup> Order was entered by the Clerk on July 11, 2017 and received by Applicant on July 20, 2017.

This Rule 243(c), SCACR, "Explanation" attached to the Notice of Appeal follows:

## EXPLANATION

Appellant submits that PCR 2011-CP-32-1727 specifically addresses the question that PCR counsel, John D. Elliott, failed to timely file a Rule 59(e) Motion or a Notice of Appeal from the July 1, 2008 Order(s) of PCR 2005-CP-32-0833. Appellant filed PCR 2011-CP-32-1727 **within thirty (30) days of discovering**, upon this Court's December 21, 2010 Order and April 6, 2011 denial of Motion to Reinstate, that the appeal was dismissed based upon *PCR counsel failing to timely file the notice of appeal* or Rule 59(e) motion to the July 1, 2008 Order(s).

Appellant suggests that the confusion by the lower court concerning the classification of the instant PCR as "successive" and/or "time barred" resides solely in the chronological factors that triggered the windows of time for the filings. These factors and chronological order should be weighed to determine the timeliness and the excused successiveness to provide Appellant the appeal to which he was entitled from PCR 2005-CP-32-0833.

### **PCR 1995-CP-32-2656**

Applicant filed PCR 1995-CP-32-2656, his initial PCR, on December 1, 1995. The application and Rule 59(e) Motion were denied by written orders on December 31, 2001 and June 12, 2002, respectively. This Court denied certiorari on April 8, 2004 and the remittitur issued on April 26, 2004.

### **The SCDPPPS Notice**

On June 4, 2004, Applicant received notice from the DPPPS that he was no longer eligible for parole despite the trial court's oral and written pronouncement of sentences.

**PCR 2005-CP-32-0833**

On March 14, 2005, *within* one (1) year of the June 4, 2004 SCDPPPS notice regarding parole eligibility, Appellant filed PCR 2005-CP-32-08333 regarding the DPPPS notification and his trial court sentences. John D. (“Jay”) Elliott, esq., was retained to represent Appellant.

The matter of successiveness following a DPPPS notice regarding parole eligibility was settled by this Court in *Tilley v. State*, 334 S.C. 24, 511 S.E.2d 689 (1999). This Court ultimately determined that Tilley’s PCR, filed within one (1) year of the DPPPS notice there, and his fourth PCR, was *not* successive.

Simply, the ground did not exist until DPPPS issued the June 4, 2004 parole ineligibility notification, almost two (2) years to the day after the last lower court order in the original 1995 PCR (June 12, 2002). Therefore, the issue(s) could not have been raised in 1995-CP-32-2656.

Despite being vacated by this Court’s March 2, 2011 Order, the Honorable William P. Keesley’s December 21, 2010 Order of Dismissal noted its error on timeliness and successiveness in three (3) instances concerning the parole eligibility issue. First, it “would be amenable to withdrawing its [July 1, 2008] determination” that dismissal of the PCR application is required by the statute of limitations. Second, “that there is less than one year between June 4, 2004 and March 2005 and agrees it should withdraw the ruling previously made [July 1, 2008].” Third, “would be inclined to modify its July 1, 2008 Order of dismissal as it relates to successive application” and “find a sufficient reason that the ground for relief was not asserted in the earlier PCR case [1995-CP-32-2656].”

In June 24, 2008, Applicant filed a Motion to Substitute Counsel simultaneously with other motions. Judge Keesley’s second July 1, 2008 Order was based upon Applicant’s

motion to substitute counsel, which would have allowed a *pro se* filing. Mr. Elliott was at all times aware of Applicant's desire to pursue an appeal.

Mr. Elliott did not file a Rule 59(e) Motion or Notice of Appeal to the July 1, 2008 Order(s) for reasons set forth in his March 13, 2011 Motion to Reinstate the Appeal before this Court.

Appellant suggests that the parties: Applicant, Mr. Elliott, the Attorney General's Office, and even Judge Keesley; believed, based on Judge Keesley's second July 1, 2008 Order, that the case was proceeding since a July 16, 2009 evidentiary hearing was conducted and additional briefs were ordered.

Judge Keesley issued a written Order of Dismissal on December 21, 2010.

### **The Appeal of PCR 2005-CP-32-0833**

Following Judge Keesley's December 21, 2010 Order of dismissal, with continued knowledge of Appellant's desire to appeal, Mr. Elliott filed a Notice of Appeal in this Court on January 24, 2011.

This Court, by a March 2, 2011 written order, vacated Judge Keesley's December 21, 2010 order based upon the improper filing of the Motion to Amend and Rule 59(e) Motion and for no appeal being timely filed from the July 1, 2008 Order(s).

Mr. Elliott filed a Motion to Reinstate on March 31, 2011. This court denied the Motion to Reinstate on April 6, 2011.

**PCR 2011-CP-32-1727**

On May 4, 2011, less than thirty (30) days following this Court's April 6, 2011 Order, Appellant filed PCR 2011-CP-32-1727 on the issue that Mr. Elliott failed to timely file a Rule 59(e) Motion or Notice of Appeal to the July 1, 2008 Order by Judge Keesley. Appellant did not discover that Mr. Elliott failed to timely file until this Court vacated the December 21, 2010 Order.

Judge Keesley ordered a status conference to determine is Appellant was entitled to proceed and whether to appoint counsel.<sup>1</sup>

Judge Keesley issued a Final Order of Dismissal dated June 30, 2017.

The June 30, 2017 Order held Appellant was convicted and sentenced on May 25, 1992 and the instant PCR was filed on May 4, 2011 that "it was clearly filed outside the expiration of the statute of limitations." This finding is incorrect given the DPPPS Notice was not issued until June 4, 2004.

The Order omits a finding on the Discovery Rule in *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013); or counsel's failure to timely file an appeal from the denial of PCR pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991); entitling an applicant to file a successive PCR to obtain the right to appeal.

Appellant submits that he was entitled to an appeal from 2005-CP-32-2656 and counsel's failure to timely file a Rule 59(e) Motion or Notice of Appeal denied him the right to appeal. Appellant further submits that 2011-CP-32-1727 is predicated solely upon counsel's failure to timely file the notice of appeal.

The June 30, 30, 2017 Order further held this is Appellant's third PCR. While the number is correct, the second PCR was timely filed following the DPPPS notice and the third

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<sup>1</sup> Orders and Applicant's briefs associated with 2011-CP-32-1727 are attached hereto in the Appendix.

PCR is based upon counsel's failure to file an appeal from the second timely filed PCR. Simply, the second and third PCR's are related.

The June 30, 2017 Order also made a finding concerning Applicant's assertion over *Martinez v. Ryan*, 1'32 S.Ct. 1309 (2012). Appellant concedes that Martinez is inapplicable and makes no further assertion on that basis. Appellant relies solely upon South Carolina state law in *Austin, supra*; *Odom v. State*, 337 S.C., 523 S.E.2d 753 (1999) and *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006). Appellant also relies upon the federal case from South Carolina of *Bostick v. Stevenson*, 589 F.3d 160 (4<sup>th</sup> Cir. 2009) discussing an attorney's duty to file a Rule 59(e) Motion following denial of a PCR.

Appellant submits that he has demonstrated why the procedural determination regarding successiveness and timeliness in the June 30, 2017 Final Order of Dismissal is incorrect. Appellant is entitled to file a petition for writ of certiorari or be remanded for an evidentiary hearing on counsel's failure to timely file a Rule 59(e) Motion and/or Notice of Appeal from the July 1, 2008 Order(s).

The PCR Court made no specific finding regarding whether or not counsel failed to timely file an appeal or Rule 59(e) Motion to the July 1, 2008 Order(s).

An Applicant is entitled to seek appellate review of the denial of relief under S.C. Code Ann. § 17-27-100.

If applicant requests an appeal and none is given or if the record other wise shows that the applicant did not knowingly and intelligently waive his right to appeal the PCR court in a successive application may find that the applicant is entitled to a belated appeal, *Odom, supra*.

When reviewing the findings of the PCR Court, this Court will uphold the finding of the PCR Court if those findings are supported by the probative evidence. *Cherry v. State*, 300

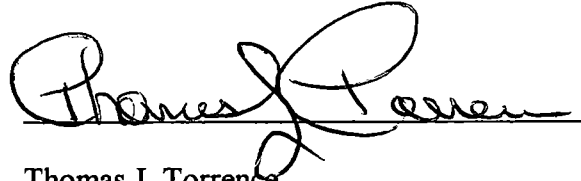
S.C. 115, 386 S.E.2d 624 (1989). However, the findings will not be upheld if not supported by probative evidence. *Holland v. State*, 322 S.C. 111, 470 S.E.2d 378 (1996).

Where the evidence clearly supports that counsel failed to timely file a Rule 59(e) Motion or Notice of Appeal from the July 1, 2008 Order(s) when Applicant desired to appeal, the PCR court findings of June 30, 2017 are incorrect and not supported by the probative evidence.

## CONCLUSION

For the foregoing reasons the Applicant is entitled to a petition for writ of certiorari.

July 17, 2017

A handwritten signature in black ink, appearing to read "Thomas J. Torrence", written over a horizontal line.

Thomas J. Torrence

#094651

Lieber Correctional Institution SA-13

Post Office Box 205

Ridgeville, South Carolina 29472

**APPELLANT, *Pro se***

**STATE OF SOUTH CAROLINA  
In The Supreme Court**

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**APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas**

**Honorable William P. Keesley, Chief Administrative Judge**

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**Case No. 2011-CP-32-1727**

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Thomas J. Torrence, #094651 . . . . . Appellant

v.

State of South Carolina . . . . . Respondent

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**PETITIONER'S RULE 243(c) SCACR APPENDIX**

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Thomas J. Torrence  
#094651  
Lieber Correctional Institution, SA-13  
P.O. Box 205  
Ridgeville, S.C. 219472

**APPELLANT, *Pro se***

Other counsel of record:

Johanna Catalina Valenzuela, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

## **INDEX**

- 1. Final Order of Dismissal, June 30, 2017; C/A No. 2011-CP-32-1727**
- 2. Conditional Order of Dismissal, June 2, 2016**
- 3. Applicant's Memorandum of Law in support of Status Conference, September 29, 2014**
- 4. Applicant's Response and Opposition to the Court's Conditional Order of Dismissal and Renewed Motions for Appointment of Counsel and an Evidentiary Hearing, June 22, 2016**

**ORIGINAL**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE ELEVENTH JUDICIAL CIRCUIT

Thomas John Torrence, ) Case No.: 2011-CP-32-1727  
S.C.D.C. No. 94651, )  
Applicant, )

v. )

State of South Carolina )  
Respondent. )

**FINAL ORDER OF DISMISSAL**

2017 JUL 11 AM 7:55  
CLERK OF COURT  
ELEVENTH JUDICIAL CIRCUIT  
LEXINGTON, SOUTH CAROLINA

This matter comes before the Court by way of an application for post-conviction relief filed May 4, 2011. Respondent made its return on or about July 10, 2014, requesting the application be summarily dismissed as untimely and for failing to state a claim. Applicant filed a memorandum in opposition to the motion to dismiss on July 18, 2014, and both Applicant and Respondent filed Memorandums of Law in October of 2014.

*WJTC #1*

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 June 2, 2016 and filed June 3, 2016, provisionally denying and dismissing this action, while giving the Applicant 30 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 June 23, 2016, serving the above-mentioned Conditional Order of Dismissal on Applicant.

On June 27, 2016, Applicant responded to this Court's Conditional Order of Dismissal in a filing entitled "Applicant's Response and Opposition to the Court's Conditional Order of Dismissal and Renewed Motions for Appointment of Counsel and an Evidentiary Hearing" in

which Applicant argues that without an evidentiary hearing to determine whether his PCR counsel was deficient, the Court cannot summarily dismiss the instant PCR as successive. Applicant also argues he did not become aware of his PCR counsel's deficient performance until the "Supreme Court's March 2, 2011 Order vacating this Court's December 21, 2010 Order of Dismissal." Applicant's Response to COD, p. 3.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their 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 May 25, 1992, and the remittitur was issued on April 10, 1995. As this action was filed on May 4, 2011, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-2745(a) (Supp. 2003).

WPA  
#2  
This is the Applicant's third 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 raise issues related to his case in his first PCR application filed September 29, 2003. 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.'").

Finally, 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 (2012) 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 fundamental miscarriage of justice.”).

**IT IS THEREFORE ORDERED** that for the reasons set forth in this Court’s Conditional Order of Dismissal, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE**.

This Court hereby cautions Applicant that he must file and serve a Notice of Appeal within 30 days of the service of this Order to secure appellate review. See Rule 203, SCACR.

#3 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 30th day of June, 2017.

  
WILLIAM P. KEESLEY  
Chief Administrative Judge  
Eleventh Judicial Circuit

Lexington, South Carolina



This judgment was entered on 11th July 2017, and a copy mailed first class or placed in the appropriate attorney's box or 14th July 2017, to attorneys of record or to parties (when appearing pro se) as follows:

**Thomas John Torrence #94651**  
Lieber Correctional Institution  
PO Box 205 Ridgeville, SC 29472

**Johanna Catalina Valenzuela**  
PO Box 142 Columbia, SC 29202

---

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

---

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Lisa M. Comer/jp**

---

**Court Reporter**

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**Lisa M. Comer - Clerk of Court**

**Court Reporter:**

**E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.**

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

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

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**ORIGINAL**

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

**FILED** IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Thomas John Torrence, #94651,

2011 JUN -3 A 10:27 2011-CP-32-1727

Applicant,

HEATHER CARTERS  
CLERK OF COURT  
LEXINGTON SC

v.

**CONDITIONAL ORDER OF**

State of South Carolina,

**DISMISSAL**

Respondent.

This application for post-conviction relief (PCR) was filed May 4, 2011 and has a protracted procedural history. The court grants the respondent's motion for a conditional order of dismissal under S.C. Code §17-27-70. The applicant has 30 days from the date that this order is mailed to him by the Clerk of Court in which to file any reply to the entry of an order summarily dismissing this case. The court denies the applicant's request for appointment of counsel pursuant to administrative order 2008-10-06-01 issued October 6, 2008 by Chief Justice Jean H. Toal of the Supreme Court of South Carolina.

*Call for #1*

S.C. Code §17-27-70(b) and (c) read:

(b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

(c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine

issue of material fact and the moving party is entitled to judgment as a matter of law.

The applicant was sentenced in May 1992 on charges contained in indictments from 1987. He is serving sentences for two counts of murder, two counts of armed robbery, kidnapping, burglary in the first degree, and criminal conspiracy. Originally, he faced the death penalty. He has been determined to be ineligible for parole consideration.

This is the third PCR application filed by Mr. Thomas John Torrence. The first was filed as case number 1995-CP-32-02656. The second was case number 2005-CP-32-00833.

In the current application, Mr. Torrence alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of prior PCR counsel, in that
  - a. Counsel failed to timely file a Rule 59(e) Motion to Alter or Amend Judgment, and for subsequently failing to file a notice of intent to appeal the dismissal.

In response, the State seeks a conditional order of dismissal on several grounds. They are, as follows:

- a. The current application for PCR is successive to the two previous applications for PCR. S.C. Code Ann. § 17-27-90.
- b. The current application for PCR fails to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-45(a).
- c. The contention that the prior PCR counsel was ineffective does not warrant a successive PCR application. S.C. Code Ann. § 17-27-90; Aice v. State, 409 S.E. 2d 392, 394 (1991); Pennsylvania v. Finley, 481 U.S. 551 (1987).

A status conference was convened on the record on September 20, 2014, at the Westbrook/Lexington County Judicial Center during which arguments and memoranda were submitted. The court has reviewed records of the Lexington County Clerk of Court, the applicant's previous PCR records, his PCR applications, memoranda, and other pleadings, and the respondent's Return and Motion to Dismiss.

The current application seeks to obtain a review of allegedly deficient performance by PCR counsel in the second PCR application that was filed in 2005. The court grants a conditional order of dismissal. The applicant has not complied with the filing requirements, his application is successive, and the alleged ineffectiveness of PCR counsel in the 2005 application does not warrant a successive PCR hearing or the granting of an Austin appeal.

In the 2005 PCR, the undersigned judge dismissed the application by order of July 1, 2008. Relief was denied upon the finding that the application was successive and not filed in a timely manner. The order also found that the applicant's allegations relating to the DPPPS failed to state a claim cognizable under the Uniform Post Conviction Relief Act. The applicant had retained counsel who represented him in that 2005 PCR case. After the issuance of the order, the applicant attempted to file a *pro se* motion to amend his application and sought reconsideration through a Rule 59(e) Motion to Alter or Amend. Ultimately, the undersigned judge issued another order on December 21, 2010, denying those motions. In the December 2010 order, the undersigned judge ruled that the procedural requirements for a Rule 59 motion had not been met, but in conformity with what it understood the court's role to be, considered the issue as if it were properly raised and found no merit to the motion to alter or amend.

The applicant filed a notice of appeal on January 24, 2011. The Supreme Court of South Carolina issued an Order dated March 2, 2011, vacating the December 21, 2010 order of the circuit court because the motions were not properly before the circuit court. The Supreme Court held that the consideration of the motion violated the rule against hybrid representation, as the motion was filed *pro se* when the applicant had counsel, and the Supreme Court held that the Motion to Alter or Amend was not filed within the 10-day limitation period. That placed the case in the posture that the order of July 2008 had dismissed the case summarily.

The applicant, through his attorney, then moved to reinstate the appeal on March 13, 2011. It was asserted that the Supreme Court erroneously interpreted Rule 59(e). The Supreme Court denied the Motion to Reinstate Appeal on April 6, 2011. The remittitur was issued that same day.

In the current application, the applicant seeks a review under Austin v. State<sup>1</sup> asserting that counsel in his 2005 PCR case was ineffective in not filing a Rule 59(e) motion and in failing to file an appeal. Generally, as discussed below, alleging ineffective PCR counsel is not a cognizable claim for post-conviction relief. The Supreme Court of South Carolina recognized in Austin, however, a general exception to the rule barring claims of ineffective assistance of PCR counsel, where prior PCR counsel fails to appeal the denial of the application. This exception "is limited to its particular factual situation..." Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his application. The applicant relies upon Austin, stating that the appropriate procedure is to conduct "an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied the opportunity to seek appellate review."

The Austin case is distinguishable on its facts. In his first PCR case filed in 1995, Mr. Torrence was provided a review of his PCR claims and had the opportunity to appeal the circuit court's decision. Before the appellate court elected to deny the petition for writ of certiorari and remitted the case in 2004, the applicant filed a second PCR action in March 2005. He couched that PCR application in terms of challenging his sentence, the actions of the South Carolina Department of Probation, Parole, and Pardon Services (DPPPS), and the determination that a prior conviction arising from a guilty plea in Chester County in 1979 was determined to be a

<sup>1</sup> Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

violent crime affecting his sentence and parole eligibility. The undersigned judge determined that the second PCR case should be denied, finding it to be not cognizable under the PCR Act, successive, and not filed in a timely fashion.

In an effort to sort through the procedural issues, there were two orders filed in the 2005 PCR by the undersigned judge on July 3, 2008, as well as the December 2010 order that has since been vacated by the Supreme Court. Reference to those orders documents the procedural history showing that Mr. Torrence had filed an administrative challenge to the determination of parole ineligibility, and that case was pending before the Administrative Law Court.

Those orders also noted that he had filed a federal action related to the issues he was raising in his 2005 PCR action. He filed a federal *habeas corpus* petition while that second PCR was pending, and the federal courts dismissed his claims. The dismissal at the district court level was appealed to the Fourth Circuit Court of Appeals, without success.

WPK  
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Factually and procedurally, this case is different than what was presented in Austin. Mr. Torrence has not been denied the opportunity to seek review of his allegations and has not been denied appellate review of his claims. There is nothing in the record to suggest that the applicant requested appellate review of his retained attorney in the 2005 PCR case and was denied; but, even if there were, the circuit court denied the relief in the 2005 PCR case as being untimely and successive, and the Supreme Court considered the request to entertain the appeal and denied it.

In Austin, the Supreme Court of South Carolina crafted a specific remedy to correct an unfair situation under a specific set of facts – denial of the right to appeal an applicant's initial PCR. Here, the applicant is asserting a right to appeal the summary dismissal of a successive and time barred application for post-conviction relief. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991) – Austin's sister case – seems to provide more guidance for the present situation. In

Aice, the Supreme Court held that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel. Id. This applicant has already had his "full bite at the apple." He had other avenues of relief regarding his claims. Accordingly, he has failed to present a sufficient reason for this successive application to proceed.

As for the allegations about ineffectiveness related to the failure of counsel to file a Rule 59 motion in a timely fashion, the court finds no basis for allowing a PCR case on this ground. In this third PCR application, the applicant alleges, in part, that counsel in his 2005 PCR case was ineffective for failing to file a Rule 59(e) motion. The failure to file a Rule 59(e) motion does not affect an applicant's ability to appeal a PCR denial. Moreover, as the now-vacated order filed on December 22, 2010 clearly showed, had the case been in a procedural posture to allow the undersigned judge to consider a Rule 59 motion, the court indicated no basis for altering or amending its dismissal.

WPK  
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Filing of a Rule 59(e) motion is not a prerequisite to filing an appeal, but is merely an optional tool that an applicant may use to preserve issues that were not specifically ruled upon in the court's final order of dismissal. As this record demonstrates, Mr. Torrence is well-versed in filing legal proceedings, including appeals, in various courts and administrative agencies. After the applicant's *pro se* Rule 59(e) motion was denied, the applicant filed a notice of appeal to the South Carolina Supreme Court which was also denied. The applicant then moved to reinstate the appeal, explaining to the court why his appeal should be granted, and the South Carolina Supreme Court denied this motion as well. The applicant has had an opportunity to argue why an appeal from his Rule 59(e) motion denial should be granted, and the Supreme Court has disagreed.

Although the applicant is correct in noting that our courts routinely uphold Austin claims and allow a claim of ineffective assistance of PCR counsel where PCR counsel failed to appeal the denial of the PCR application, this was not the situation in this applicant's case. There is no sufficient showing warranting inquiry as to whether an Austin review should be allowed in this case. The applicant now 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 in this instance.

The Supreme Court's ruling in Martinez v. Ryan, 132 S. Ct. 1309 (2012) is instructive. Martinez does not grant an applicant the 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 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.").

WPA  
#7


With this framework in mind, Martinez does not appear to have application to successive state PCR actions such as the present case, 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 its 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 is 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 not correct, in this court's view. See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013). This is not a situation that presents a question of whether dismissal of the current PCR action would cause a fundamental miscarriage of justice.

**THEREFORE, IT IS ORDERED** that a conditional order of dismissal is hereby entered concerning the present application for PCR. The applicant is granted 30 days from the date that

a copy of this order is mailed to him by the Clerk of Court in which to file any reply or response to this order. If he fails to do so, the court will enter the final order of dismissal. If he does submit a reply, the court will consider it in deciding whether or not to make the summary dismissal of his application final.

**AND IT IS SO ORDERED** this 2<sup>nd</sup> day of June, 2016.

  
\_\_\_\_\_  
William P. Keesley  
Chief Judge for Administrative Purposes  
Common Pleas, Eleventh Judicial Circuit

#9

FORM 4

STATE OF SOUTH CAROLINA  
 COUNTY OF LEXINGTON  
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
 CASE NUMBER 2011CP3201727

Thomas John Torrence  
 #94651

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for:  Plaintiff  Defendant  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

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

ORDER INFORMATION

This order  ends  does not end the case.

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

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on June 6, 2016, to attorneys of record or to parties (when appearing pro se) as follows:

**Thomas John Torrence #94651 Lieber Correctional  
Institution PO Box 205 Ridgeville, SC 29472**

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**Johanna Catalina Valenzuela PO Box 11549 Columbia, SC  
29211-1549**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

**Beth A. Carrigg/kpk**

**Court Reporter**

**Beth A. Carrigg - Clerk of Court**

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

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

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THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
Thomas John. Torrence, # 094651,	)	<b>C/A No. 2011-CP-32-1727</b>
	)	
Applicant,	)	<b>STATUS CONFERENCE</b>
	)	
v.	)	<b>APPLICANT'S</b>
	)	<b>MEMORANDUM OF LAW</b>
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

Thomas John Torrence, the Applicant herein, is appearing *pro se* for the purpose of this status conference. This status conference proceeds pursuant to the August 27, 2014 written Order of the Honorable William P. Keesley. Pursuant to the Court's Order, the purpose of this status conference is to determine whether the application at hand is 1) barred by the statute of limitations and 2) whether the application raises material facts precluding application of the rule forbidding successive applications. The Applicant believes that based on the "discovery rule," he is entitled to be appointed counsel and an evidentiary hearing on the facts in the application.

### I. PROCEDURAL HISTORY

On March 23, 1995, the South Carolina Supreme Court affirmed Applicant's conviction and sentence.<sup>1</sup> On April 10, 1995, the Supreme Court issued the remittitur. On December 1, 1995, the Applicant filed an application for post-conviction relief<sup>2</sup> (1995-CP-32-2656). An evidentiary hearing was held on November 6, 2000. The PCR Court issued an Order of Dismissal on December 31, 2001. A Rule 59(e) motion was timely filed and subsequently denied by Order dated June 12, 2002. A petition for writ of certiorari was perfected. On April 8, 2004, the Supreme Court denied the petition by written Order. The remittitur was issued on April 26, 2004.

<sup>1</sup> *State v. Thomas J. Torrence*, 95-MO-117.

<sup>2</sup> Prior to enactment of S.C. Code Ann. § 17-27-45(a) (1995 Act No. 7, Part II, § 40, effect. January 1996)

On June 4, 2004, Applicant was notified by the South Carolina Department of Probation, Parole, and Pardon Services ("SCDPPPS) that he was no longer eligible for parole, in contravention of the trial court's May 25, 1992 written and oral pronouncement of sentence.

On March 14, 2005, Applicant filed post-conviction application (2005-CP-32-0833) regarding his sentence(s) and the June 4, 2004 SCDPPPS notification. John D. ("Jay") Elliott, Esquire, was retained to represent Applicant, but later assumed *pro bono* representation. An evidentiary hearing was held before this Court on October 10, 2007. The matter was reconvened on November 10, 2007.

On June 24, 2008, Applicant filed a *pro se* motion to substitute counsel. On July 1, 2008, this Court issued an order in regards to Applicant's *pro se* motion to substitute counsel, instructing counsel to ascertain Applicant's wishes to substitute counsel, pursue other issues, or pursue an appeal. On July 1, 2008, this Court also issued an Order of Dismissal.

On July 8, 2008, Applicant filed *pro se* documents 1) Motion to Amend Application for Post-Conviction; 2) Memorandum of Law in Support; 3) Return to Conditional Order of Dismissal and Motion to Reinstate PCR; and 4) Memorandum of Law in Support. On July 16, 2009, this Court reconvened a hearing and requested briefs from both parties within 60 days. On December 21, 2010, this Court issued an Order of Dismissal.

On January 24, 2011, counsel filed a Notice of Appeal in the Supreme Court. By Order dated March 2, 2011, the Supreme Court vacated this Court's December 21, 2010 Order based on the Motion to Amend and Rule 59(e) Motion being improperly filed and no appeal being timely filed from the July 1, 2008 Order(s). On March 13, 2011, counsel filed a Motion to Reinstate. The Motion to Reinstate was denied on April 6, 2011. The remittitur issued April 6, 2011.

The instant PCR application was filed May 4, 2011.

## II. SUMMARY DISMISSAL

Summary dismissal is appropriate when the court is satisfied “that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings...” (S.C. Code. Ann. §17-27-70(b)). In contrast, summary dismissal “on the pleadings and record is not proper if there exists a material issue of fact.” *Id.* The South Carolina Supreme Court held that, “[s]ummary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief.” *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-27-70(b) and (c)). Furthermore, “[w]hen considering the State’s motion for summary dismissal on an application for PCR, a judge must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant.” *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581, 582 (2002); *Al-Shabazz v. State*, 338 S.C. 354, 363, 527 S.E.2d 742, 747 (2000).

The Applicant contends that the fact counsel failed to timely perfect a motion to alter or amend judgment or a timely notice of appeal from the July 1, 2008 Order(s) creates the existence of a material issue of fact and that an evidentiary hearing is needed to develop the facts. Additionally, as set out below, Applicant is entitled to relief under S.C. Code §§17-27-45(c) and 17-27-90, therefore, summary dismissal would be inappropriate.

## III. STATUTE OF LIMITATIONS, SUCCESSIVENESS and THE “DISCOVERY” RULE

Respondent asserts that the application was filed well after the statute of limitations had expired. In support of this argument, Respondent mistakenly relies on S.C. Code Ann. §17-27-

45(a). Applicant contends that the controlling statute of limitations for facts from the date of actual discovery is found in S.C. Code §17-27-45(c). The discovery rule reads as follows:

If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter 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 §17-27-45(c).

Applicant filed the instant application on May 4, 2011. The facts were discovered that counsel did not file a Rule 59(e) Motion or Notice of Appeal in the previous application following the remittitur issued by the South Carolina Supreme Court on April 6, 2011, thus, this application was filed within the one-year statute of limitations under S.C. Code Ann. §17-27-45(c).

A post-conviction relief applicant must raise all grounds for relief in his original, supplemental or amended application. Furthermore, any ground not raised may not be used as the basis for a subsequent application, “unless the court finds a ground for relief asserted which for sufficient reason was not asserted” in the original, supplemental or amended application. (S.C. Code Ann. §17-27-90). The basis for Applicant’s present post-conviction relief action is counsel’s failure to timely file a Rule 59(e) Motion to Alter or Amend, or a Notice of Appeal following the July 1, 2008 Order(s). In *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991) the Supreme Court held that “[W]e therefore remand for an evidentiary hearing on the issue of whether in fact the petitioner requested and was denied the opportunity to seek appellate review.” This was not available to this Applicant during the previous post-conviction proceedings. Applicant asserts these omissions create genuine issues of material fact whether Applicant’s post-conviction relief claim is successive; therefore, summary dismissal without an evidentiary hearing would be inappropriate.

In a recent PCR case, our Supreme Court addressed the issue that is before this Court. In *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013), the Court held that “[w]here an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.” *Id.* at 369, 737 S.E.2d at 626.

Applicant asserts that the instant post-conviction relief action was filed within the statute of limitations provided by S.C. Code Ann. §17-27-45(c). Additionally, the claim of being denied appropriate review was not available to Applicant at the time of the previous post-conviction proceeding until the Supreme Court Order and remittitur of April 6, 2011. Therefore, this is sufficient reason for why this ground was not previously asserted. Furthermore, based on the record and pleadings, genuine issues of material fact exist as to whether Applicant’s post-conviction relief action is untimely or successive, which can only be resolved by an evidentiary hearing.

#### IV. EFFECTIVENESS OF PCR COUNSEL

Respondent asserts that Applicant’s assertion that previous PCR counsel was ineffective is without merit and erroneously applies *Martinez v. Ryan*, 132 S.Ct. 1309 (2012). Applicant submits that our Supreme Court in *Austin v. State*, *supra* has held that this is the single instance of counsel’s ineffectiveness in a collateral proceeding.<sup>3</sup> The Supreme Court has consistently applied this ruling since *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999).<sup>4</sup>

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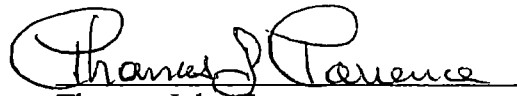
<sup>3</sup> “[w]e find his allegation that counsel failed to seek review in this case sufficiently states a claim of ineffective assistance.”

<sup>4</sup> “*Austin* appeal is used when an applicant is prevented from seeking appellate review of a denial of his or her PCR application, such as when the attorney fails to seek timely review.”

**CONCLUSION**

**WHEREFORE**, based upon the foregoing facts and argument, the Applicant respectfully prays that the Conditional Order of Dismissal not be made a final order and that an evidentiary hearing be scheduled.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Thomas J. Torrence", written over a horizontal line.

Thomas John Torrence

#094651

Lieber Corr. Inst. WD-186

P.O. Box 205

Ridgeville, SC 29472

September 29, 2014  
Ridgeville, SC

**APPLICANT**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
Thomas J. Torrence, # 094651,	)	<b>C/A 2011-CP-32-1727</b>
	)	
Applicant,	)	<b>APPLICANT'S RESPONSE AND</b>
	)	<b>OPPOSITION TO THE COURT'S</b>
vs.	)	<b>CONDITIONAL ORDER OF</b>
	)	<b>DISMISSAL</b>
State of South Carolina,	)	<b>and</b>
	)	<b>RENEWED MOTIONS FOR</b>
Respondent.	)	<b>APPOINTMENT OF COUNSEL</b>
_____	)	<b>and an EVIDENTIARY HEARING</b>

**NOW COMES**, Thomas John Torrence, the *pro se* Applicant herein, who respectfully moves this Honorable Court to not make the June 2, 2016 Conditional Order (“COD”) a Final Order and respectfully renews his July 14, 2014 and September 20, 2014 motions for appointment of counsel and an evidentiary hearing pursuant to the procedures established in *Austin v. State*.<sup>1</sup> In support of this Response / Opposition and renewed motions, the Applicant would show this Court the following.

Applicant specifically objects to the Court granting Respondent’s motion for a conditional order of dismissal under S.C. Code §17-27-70 and the denial of Applicant’s request for counsel.<sup>2</sup> Applicant specifically objects that pursuant to §17-27-70(b) and (c) the record fully supports there exists a genuine material issue of fact where post-conviction relief (“PCR”) counsel<sup>3</sup> failed to *timely* file either a Rule 59(e), SCRCP motion to alter or amend the judgment or a notice of appeal. The Applicant specifically objects to this finding where an evidentiary hearing was not convened here to present Mr.

<sup>1</sup> 305 S.C. 453, 409 S.E.2d 395 (1991)

<sup>2</sup> COD, p.1

<sup>3</sup> John D. (“Jay”) Elliott, Esquire

Elliott as a witness to: 1) Acknowledge [his] negligence in failing to file the Rule 59(e) Motion or Notice of Appeal timely after the July 1, 2008 Order of Dismissal.<sup>4</sup> 2) Determine from Mr. Elliott whether the Applicant expressed a desire to appeal or whether Mr. Elliott inquired of Applicant's desire to appeal; and 3) To allow Applicant to testify on the record concerning his desire to appeal.

The Applicant submits that the very nexus of the instant PCR, an appeal pursuant to the standard annunciated in *Austin*, was not ascertained at the September 20, 2014 Status Conference as the material issue of fact witness (Mr. Elliott) was absent and unable to establish the record in regards to the *Austin* prerequisite, that counsel failed to file an appeal. The COD, p.2, states clearly, this Court "reviewed the records of the Lexington County Clerk of Court, the applicant's previous PCR records, his PCR applications, memoranda, and other pleadings, and the respondent's Return and Motion to Dismiss." The COD lacks any factual determination on the question of whether Mr. Elliott failed to timely file an appeal or the testimony of Mr. Elliott on that fact other than Mr. Elliott's assertions in the March 13, 2011 Motion to reinstate.<sup>5</sup>

The COD states "the applicant has not complied with the filing requirements, his application is successive, and the alleged ineffectiveness of PCR counsel in the 2005 application does not warrant a successive PCR hearing or the granting of an *Austin* appeal; "COD p. 3.

The Applicant will attempt to contend those findings in the order of sequence held in the COD p. 3.

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<sup>4</sup> Established in the Record by Counsel's March 13, 2011 Motion to Reinstate [the PCR appeal]; Exhibit E in the instant May 4, 2011 PCR Application

<sup>5</sup> See footnote 4, *ante*

First, as to filing requirements, Applicant submits the filing requirements for the statute of limitations is governed by §17-27-45(c), “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.” Neither the Applicant nor Mr. Elliott were aware an issue existed <sup>6</sup> until the Supreme Court’s March 2, 2011 Order vacating this Court’s December 21, 2010 Order of Dismissal. Mr. Elliott filed a Motion to Reinstate Appeal dated March 13, 2011. The Supreme Court subsequently denied that motion and issued the Remittitur on April 6, 2011. The Applicant filed the instant PCR on May 4, 2011 – *less* than thirty days within discovery counsel failed to timely appeal the July 1, 2008 Order.

Second, as to the holding of successiveness, the Supreme Court in *McCoy v. State*, 401 S.C. 363, 737 S.E.2d 623 (2013) specifically held that “where an applicant alleges facts that would *establish an exception to either* the statute of limitations or the prohibition against successive PCR applications and those *facts are not conclusively refuted by the record* before the PCR Court, a *question of fact is raised which can only be resolved by a hearing,*” *Id* at 369, 737 S.E.2d at 626 (Emphasis Applicant’s).

Third, as to the alleged ineffectiveness of PCR Counsel not warranting a successive PCR hearing or the granting of an *Austin* appeal, the Applicant contends that where the instant PCR is based upon counsel’s failure to timely file an appeal, this matter may not be determined without a hearing and the presence of Mr. Elliott. Applicant suggests that a hearing is necessary to demonstrate and determine the Applicant, via counsel’s negligence, was prevented from seeking appellate review of a denial of his PCR. Our Supreme Court has consistently held since *Odom v. State*, 337 S.C. 256, 523

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<sup>6</sup> That counsel failed to timely file a notice of appeal to the July 1, 2008 Order of Dismissal

S.E.2d 753 (1999) that an “*Austin* appeal is used when an *applicant is prevented from seeking appellate review* of a denial of his or her PCR application, *such as when the attorney fails to seek timely review*,” (Emphasis Applicant’s).

The COD, p. 3 factually stated, “[t]he undersigned judge dismissed the application by order of July 1, 2008.” This COD fails to recognize that a Second Order was filed July 1, 2008.<sup>7</sup> That order held in part:

“[H]owever, the *pro se* motion also contains other allegations, and *the court does not know if the Applicant would intend simply to pursue an appeal* (in which case the Office of Indigent Defense would provide appellate counsel) *or to pursue other issues before filing an appeal.*” (Applicant’s Emphasis).

Applicant submits that this Honorable Court conducted further hearings with Applicant and counsel on July 16, 2009, after which this court requested briefs from the parties. Applicant submitted a brief on October 14, 2009. On January 22, 2010, this Court contacted the attorneys to ask if further materials should be reviewed. Applicant submits that this Court and the parties proceeded as if the July 2008, motions were being acted upon and that no party had an idea that the July 1, 2008 Order ended the case within thirty (30) days if no appeal was filed.

Applicant submits that he was prevented from appealing PCR 2005-CP-32-0833. Applicant suggests being prevented from appealing requires some analysis of this Court’s December 21, 2010 vacated Order of Dismissal. This Court made three (3) findings regarding the timeliness and successiveness of the 2005 application.

- 1) “This Court would be compelled to deny timely motions, *though the court would be amendable to withdrawing its determination* that dismissal of the PCR application is required by the statute of limitations as to the first ground concerning the parole eligibility issue.” (Emphasis Applicant’s).

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<sup>7</sup> 2011-CP-32-1727 PCR Application, Exhibit A

December 21, 2010 Order of Dismissal, p. 5.

- 2) “So, *the court acknowledges that there is less than one year between June 2004 and March 2005 and agrees that it should withdraw the ruling previously made* on that ground <sup>8</sup> as to the Lexington County claims,” (Emphasis Applicant’s).

*Id.* at 7, and

- 3) “The court, in an abundance of caution, *would be inclined to modify its July 1, 2008 Order of Dismissal as it relates to successive applications based on the language of §17-27-90 and find a sufficient reason that the ground of relief was not asserted in the earlier PCR case* as to the Lexington convictions,” (Emphasis Applicant’s).

*Id.*

The Applicant suggests that the facts upon which this Court made those December 21, 2010 findings remain concrete to this date, with the addition that counsel failed to timely file a Notice of Appeal to allow Applicant the opportunity to appeal and allow then Supreme Court to make similar findings on certiorari, reverse the PCR Court and require a ruling on the merits of 2005-CP-32-0833.

The COD, pg. 3, found that the Supreme Court’s March 2, 2011 Order vacating this court’s December 21, 2010 Order of Dismissal placed this case in the posture that the Order of July 2008 had dismissed the case summarily. Applicant submits that particular holding placed the onus to file a notice of appeal on counsel. Applicant suggests it is a duty that prevented Applicant from an appeal of the July 1, 2008 Order.

The COD, pp. 4 –8, seek to distinguish *Austin* from *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991) and the case at hand. Applicant submits that *Austin* was predicated upon the denial of the opportunity to appeal the dismissal of his first PCR application. The Court in *Aice* distinguished this situation from the general rule on the

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<sup>8</sup> Referencing the July 1, 2008 Order of Dismissal.

basis that “Austin never received a full ‘bite’ at the apple.” However, the Court refused to allow the applicant in *Aice* to gain more than “one procedural ‘bite’ at the apple,” *Aice*, 305 S.C. at 452, 409 S.E.2d at 395.

The Applicant submits that the Supreme Court found that if the grounds raised in a subsequent application could have been raised and were not, the Court would not engage in further exploration of why they were not raised. “[I]t is sufficient that they could have been raised but were not,” *Aice v. State, Id.* at 452, 409 S.E.2d at 394. However, as this Court pointed out in its December 21, 2010 Order, “this court acknowledges that there is less than one year between June 2004 and March 2005 and agrees it should withdraw the ruling previously made,” p.7, thus the issue raised in the instant PCR and PCR 2005-CP-32-0833 could not have been raised in PCR 1995-CP-32-2656. Not existing at the time of the 1995 PCR, the issue raised in the 2005 PCR was entitled to a “bite” at the apple, thus entitled to appeal.

Applicant further submits that a PCR that is summarily dismissed is still entitled to appeal that court’s denial. The Supreme Court in *Dennison v. State*, 371 S.C. 221, 639 S.E.2d 35 (2006) held that appointed counsel was required to file an appeal of the denial of the post-conviction application, even if counsel did not have a good faith explanation as to why the trial court’s denial was improper. *Dennison* is *specific concerning counsel’s duties to file a notice of appeal* citing the South Carolina Rules of Civil Procedure and Appellate Court Rules.

Applicant asserts counsel’s description of his actions in the Motion to Reinstate Appeal sufficiently detail counsel’s failure to timely file a Notice of appeal to the July 1, 2008. It is uncontested counsel failed to file a notice of appeal. It must also be

uncontested that even an applicant who challenges an Order of Dismissal is entitled to petition the Supreme Court for certiorari review.<sup>9</sup> Applicant also asserts that the apparent basis of the Supreme Court vacating the December 21, 2010 Order was that Applicant's motions were *pro se* and thus not properly before the circuit court on the hybrid representation rule. It is this same logic that dictates Applicant could not file a notice of appeal *pro se*.

The COD p.6 found Applicant has "already had his 'full bite at the apple.'" The "full bite" theory is misapplied here where the COD omits the fact that PCR 2005-CP-32-0833 was filed March 14, 2005, where the action taken by the DPPPS in June 2004 was after Applicant's 1995-CP-32-2656 PCR was made final by the denial of certiorari,<sup>10</sup> not before, as the COD incorrectly stated.

Applicant suggests that in the preservation of issues, PCR counsel, since 2009, is *specifically responsible* for filing a Rule 59(e), see *Bostick v. Stevenson* 589 F.3d 160 (4<sup>th</sup> Cir. 2009).

The COD, p.6 found the failure to file a Rule 59(e) motion does not affect an applicant's ability to appeal. The Applicant suggests that if the losing party has raised an issue in the lower court, but the court failed to rule upon it, the party *must* file a motion to alter or amend the judgment in order to preserve the issue for appellate review, *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

The COD further held "the now vacated order filed on December 22, 2010 clearly showed the case had been in a procedural posture to allow the undersigned judge to

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<sup>9</sup> Rule 223(c), SCACR; S.C. §17-27-100 (Supp. 2001); Rule 71.1(g), SCRCR; *Knight v. State*, 284 S.C. 138, 325 S.E.2d 535 (1985); Any party aggrieved by an order, judgment or sentence may appeal. S.C. Code 18-1-30 (1985); Rule 201(b), SCACR; *Burns v. Gardner*, 328 S.C. 608, 493 S.E.2d 356 (Ct. App. 1997).

<sup>10</sup> April 8, 2004, Remittitur filed April 26, 2004

consider a Rule 59(e) motion, *the court indicated no basis for altering or amending its dismissal,*” COD p. 6 (Emphasis Applicant’s). Applicant directly contends that holding is incorrect as to this court’s previous analysis of the 2005 PCR in regards to the statute of limitations and successiveness; see *ante* pp. 4 – 5.

The COD p. 6 held the Applicant filed a notice of appeal to the South Carolina Supreme Court which was also denied. Applicant submits that first, the *pro se* Rule 59(e) motion was attached to and adopted by counsel, and second, the notice of appeal was not “denied,” as suggested in the COD, but *Vacated* on a procedural ground. Counsel then moved to reinstate the appeal explaining his actions in the procedural confusion, *not*, as suggested in the COD, arguing the appeal should be granted.

The COD further held Applicant “had an opportunity to argue why an appeal should be granted, “ COD p. 6. The appeal was not considered – it was the procedural posture of the notice of appeal based upon the December 21, 2010 Order where the *pro se* motions were not properly before the circuit court. The *Austin* issue itself was not before the Supreme Court as it did not become an issue until the Supreme Court’s March 2, 2011 Order and Remittitur. Simply put, Applicant has *never* been afforded the opportunity to appeal and have the Supreme Court determine if the July 1, 2008 summary dismissal was improper – he has never been afforded the opportunity to appeal. Now, the issue of ineffective assistance in failing to file an appeal from the denial of a final order, judgment or sentence has not been presented and is the very nexus of the instant PCR.

The COD incorrectly distinguishes the 2005 PCR and Applicant’s federal habeas corpus petition. Applicant included the 2005 PCR claim in his federal application **solely** to preserve his *Houston v. Lack*, 487 U.S. 266 (1988) filing date on the claim. Applicant

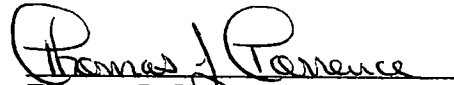
also filed a motion to hold the federal petition in abeyance pending exhaustion of the 2005 PCR in state court. The claim was withdrawn by Mr. Elliott, who was retained to represent Applicant in State and Federal courts.

## CONCLUSION

**WHEREFORE**, based upon the foregoing showing, Applicant respectfully moves this Honorable Court to not make the Conditional Order a Final Order of Dismissal, to appoint counsel, subpoena John D. Elliott, Esquire, as the Court's witness, and order and evidentiary hearing.

Respectfully submitted,

June 22, 2016



Thomas J. Torrence

#094651

Lieber Correctional Inst SB-23

P.O. Box 205

Ridgeville, South Carolina 29472

**APPLICANT, *pro se***

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

Thomas J. Torrence, # 094651, )  
 )  
Applicant, )  
 )  
vs. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

**C/A 2011-CP-32-1727**  
**CERTIFICATE OF MAILING**

**CERTIFICATE OF MAILING**

The *pro se* Applicant certifies that he has mailed a true and correct copy of **Applicant's Response and Opposition to the Court's Conditional Order of Dismissal and Renewed Motions for Appointment of Counsel and an Evidentiary Hearing** to counsel for Respondents by placing same in the U.S. Mail, first-class postage affixed thereto, this 22nd day of June 2016, addressed as follows:

Johanna Catalina Valenzuela, Esq.  
Office of South Carolina Attorney General  
P.O. Box 11549  
Columbia, S.C. 29211-1549



Thomas John Torrence  
#094651  
Lieber Correctional Inst SB-23  
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**APPLICANT, *pro se***

Thomas J. Torrence  
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June 22, 2016

The Honorable Beth A. Carrigg  
Clerk of Court  
Lexington County Judicial Center  
205 East Main Street – Suite 227  
Lexington, South Carolina 29072

**Re:** *Thomas J. Torrence v. State of South Carolina*  
**C/A 2011-CP-32-1727**

Dear Ms. Carrigg:

Please find enclosed for filing in the above referenced PCR matter the Applicant's and Opposition to the Court's Conditional Order of Dismissal and Renewed Motions for Appointment of Counsel and an Evidentiary Hearing. Also enclosed for filing is a certificate of mailing on counsel for Respondent.

Your assistance in this matter is sincerely appreciated.

With kindest regards, I remain,

Sincerely,

Handwritten signature of Thomas J. Torrence in cursive script.

Thomas J. Torrence  
Applicant

**Cc:** Johanna Catalina Valenzuela, Esq.