

STATE OF SOUTH CAROLINA  
In the Supreme Court

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CERTIORARI TO LEXINGTON COUNTY  
Court of Common Pleas  
Perry H. Gravely, Circuit Court Judge

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Appellate Case No. 2016-001450

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JOSHUA LAMAR FORREST,

vs.

STATE OF SOUTH CAROLINA,

**RECEIVED**  
SEP 22 2017  
S.C. SUPREME COURT  
Petitioner,

Respondent.

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**RETURN TO PETITION FOR WRIT OF CERTIORARI**

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## **RESPONDENT'S ISSUES PRESENTED**

**Did the PCR Court properly grant the State's motion to dismiss Petitioner's second application for post-conviction relief because it was filed more than eight years after his guilty plea, and because all of his allegations could have been raised in his 2007 application for relief?**

## STATEMENT OF THE CASE

Petitioner is confined in the South Carolina Department of Corrections. Petitioner was indicted at the July 1998 term of the Lexington County Grand Jury for the armed robbery of an "R&B Video" on Platt Springs Road in Lexington, South Carolina (1998-GS-32-02369). Petitioner attended to the charges *pro se*, and Angela G. Avenger, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On November 17, 2005, Petitioner pled guilty to the lesser-included offense of attempted armed robbery. During the plea proceeding, the State noted that Petitioner was "waiving his right to an attorney" upon calling the case, and the Honorable Edward Miller realized the fact during the middle of the proceeding:

**THE COURT:** How many days have you been in jail on this case?

**[PETITIONER]:** Three.

**THE COURT:** Three days. In the last 24 hours, have you had any drugs – well, wait. Mr. Forrest, you don't have a lawyer?

**[PETITIONER]:** No, sir.

**THE COURT:** You understand you have a constitutional right to a lawyer? If you can't afford one, one will be appointed for you. Do you want a lawyer?

**[PETITIONER]:** No, sir.

**THE COURT:** Okay.

Appx. 3, 7. Judge Miller did not again return to the issue of Petitioner's *pro se* status and sentenced Petitioner to imprisonment for a term of ten years, suspended upon time served and three years' probation. Petitioner was to be supervised in Aiken County while on probation.

Petitioner was subsequently arrested on December 5, 2005, for the shooting murder of Mario T. Radish, which occurred the prior day. Appx. 44. A probation arrest warrant was issued for Petitioner on December 22, 2005, for that charge, as well as on the belief "that he failed to

refrain from entering any establishment whose primary business was the sale and drinking of alcoholic beverages.” Id. The warrant was served on January 9, 2006. Id. Petitioner proceeded to a hearing before the Honorable Doyet A. Early, III, on December 7, 2006, regarding the probation violation after his first trial on the murder charge ended in a hung jury. Appx. 45. Petitioner was represented by his murder trial attorney Sherry Stoney, Esq. Id. Judge Early, on the basis of the alcohol violation, revoked probation in full. Id., Appx. 89.

Petitioner filed his first application for post-conviction relief from the attempted armed robbery conviction on August 17, 2007 (2007-CP-32-2906). Appx. 45. He alleged the following grounds for relief in his application:

1. “Violation of Due Process of Law”
  - a. “Never violation Probation Conditional Order”
2. “(14) Amendment to the United States Constitution”

Appx. 63. Upon Respondent’s filing of an amended return made on March 31, 2008, reinterpreting Petitioner’s allegations as ineffective assistance of probation counsel, the Court issued an order filed May 22, 2009, changing venue to Aiken County, as Petitioner’s only allegations regarded the probation revocation (2009-CP-02-01238). Appx. 34, 46.

On June 24, 2009, during the pendency of the above PCR and following a jury trial, Petitioner was found guilty of murder and of possession of a weapon during the commission of a violent crime. Appx. 34, 45. Judge Early, pursuant to S.C. Code Ann. § 17-25-45, and taking into consideration Petitioner’s guilty plea to attempted armed robbery, sentenced Petitioner to life imprisonment without parole. Id. Petitioner did not object to the use of the attempted armed robbery conviction as an enhancement to his sentence.

Petitioner amended his pending PCR application on July 20, 2009, after the change of venue and after his murder conviction and LWOP sentence, to assert (1) the Court lacked subject

matter jurisdiction to revoke probation; and (2) probation revocation counsel failed to object to the lack of jurisdiction or advise Petitioner of his right to appeal. Appx. 34. Petitioner did not raise any allegations with respect to Stoney's treatment of the enhancing conviction during sentencing. Id.

An evidentiary hearing into the matter was convened on July 14, 2010, before the Honorable W. Jeffrey Young in Aiken County. Appx. 35. Petitioner was present at the hearing and represented by Kenneth Hanson, Esq. Id. Petitioner testified on his own behalf. Id. Petitioner's probation revocation counsel Sherri H. Stoney, Esq.; Marie Boulton, of the South Carolina Department of Probation and Parole; and Anthony White, of SCDPP, also testified. Id. By written order dated October 1, 2010, and filed October 8, 2010, Judge Young denied and dismissed the application. Id.

Petitioner filed a timely notice of appeal on February 11, 2011, and a petition for writ of certiorari was filed by Breen Richard Stevens, Esq., on Petitioner's behalf. Respondent filed its Return on December 19, 2011. By Order dated July 24, 2012, the case was transferred to the South Carolina Court of Appeals, which granted certiorari by order dated September 4, 2013. In an unpublished opinion filed January 28, 2015, the Court of Appeals affirmed the ruling of the PCR court. Forrest v. State, Op. No. 2015-UP-052 (S.C. Ct. App. filed Jan. 28, 2015). The Remittitur was issued on February 18, 2015.

While Applicant's PCR from his murder was pending, Petitioner filed his second application for post-conviction relief from the attempted armed robbery conviction on April 11, 2014—the subject of this appeal. Appx. 23-32. He alleged the following grounds for relief in his application:

1. "Denied the right to assistance of counsel altogether."
  - a. "Applicant pled guilty without any assistance of counsel."

Appx. 25. Respondent made its return and motion to dismiss on November 31, 2014, arguing the application was successive to Applicant's 2007 application, and was filed well after the statute of limitations expired. Appx. 33-38. The parties proceeded to a hearing on the motion on April 21, 2016, before the Honorable Perry H. Gravely in Lexington, South Carolina. Appx. 42-60. Applicant was represented by David K. Allen, Esq. Id. The undersigned, Johnny Ellis James Jr., of the South Carolina Attorney General's Office, represented Respondent. Id. By order dated May 9, 2016, and filed June 1, 2016, Judge Gravely dismissed the matter with prejudice. Appx. 61-69. Petitioner filed a motion to alter/amend the judgment on June 7, 2016, which was denied by order filed June 22, 2016. Appx. 72-76.

This appeal follows.

## STANDARD OF REVIEW

The post-conviction relief court's findings of fact and conclusions of law receive great deference during appellate review. Caprood v. State, 338 S.C. 103, 109, 525 S.E.2d 514, 517 (2000). The proper standard of review of a post-conviction relief decision is whether "any evidence of probative value" exists to sustain the lower court's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). However, appellate courts will reverse the decision of the post-conviction relief court when it is controlled by an error of law. Goins v. State, 397 S.C. 568, 573, 726 S.E.2d 1, 3 (2012).

"When reviewing an order granting summary judgment, an appellate court employs the same standard applied by the trial court under Rule 56, SCRPC." Roe v. Bibby, 410 S.C. 287, 292, 763 S.E.2d 645, 648 (Ct. App. 2014) (quotations omitted). "Rule 56 provides the trial court shall grant summary judgment if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (quotations omitted). When considering on appeal a motion for summary dismissal of an application for PCR, the Court must assume facts presented by an applicant are true and view those facts in the light most favorable to the applicant. Pelzer v. State, 378 S.C. 516, 520, 662 S.E.2d 618, 619 (Ct. App. 2008).

## ARGUMENT

### I. THE PCR COURT PROPERLY GRANTED RESPONDENT'S MOTION TO DISMISS BECAUSE PETITIONER HAD MULTIPLE PRIOR OPPORTUNITIES TO RAISE THE FARETTA ISSUE TO THE COURTS, AND BECAUSE HE DID NOT FILE UNTIL AFTER THE STAUTE OF LIMITATIONS RAN.

The PCR Court's "Final Order of Dismissal" correctly finds that Petitioner's allegations are procedurally barred. In appealing that order, Petitioner overwhelmingly focuses his attention on the merits of his claim that he was not properly warned of the dangers of self-representation as required under Faretta v. California, 422 U.S. 806 (1975). However, Petitioner offers little to no argument against the Court's application of the statute of limitations or the bar against successive applications.

**A. The allegations are successive as Petitioner could have raised the Faretta issue from his 2005 conviction on three different occasions prior to the underlying PCR claim: in his 2007 application, during sentencing at the end of his 2009 murder trial, and in his 2009 application for relief from the murder conviction.**

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

Any new ground raised in a subsequent application is limited to those grounds that “could not have been raised ... in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* In a PCR action, the applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

**1. Petitioner’s 2007 application was heard outside of the county in which he was convicted because of his own failure to raise any allegations challenging the validity of the guilty plea.**

Petitioner filed his first PCR action regarding the attempted armed robbery conviction in Lexington County on August 17, 2007. Notwithstanding the potential applicability of the statute of limitations to that action, there is no evidence in the record to show the impossibility of raising his *Faretta* allegations in that application. Petitioner, both before the PCR Court and now on appeal, argues that the 2007 application was somehow inadequate to the task of raising this issue because it was ultimately adjudicated in Aiken County and addressed only issues regarding Petitioner’s probation revocation there. The 2007 PCR was only adjudicated in Aiken County *because* Petitioner did not raise any issues regarding his guilty plea. Petitioner cannot, by his own pleading, render a PCR proceeding deficient such that an exceptional successive action must be permitted.

**2. Petitioner knew his 2005 conviction could be used to enhance a subsequent sentence before the resolution of his 2007 PCR.**

Petitioner also intones that the 2007 application was inadequate because he was unaware the conviction for attempted armed robbery could be used to enhance his sentence in his subsequent murder conviction. First, this argument is little different from that advanced by the petitioner in *Aice v. State* that a successive application should be permitted to consider stronger

claims of great merit. Aice is firmly on point in rejecting that proposition—“as long as it was *possible* to raise the argument in his first PCR application, an applicant may not raise it in a successive application.” Aice, 305 S.C. at 450, 409 S.E.2d at 394 (emphasis added). Second, as Petitioner himself notes, he received his LWOP sentence prior to the resolution of his 2007 application, and prior to his amendment in July 2009. Again notwithstanding the potential applicability of the statute of limitations, Petitioner knew of the enhancing effect of his prior conviction when he amended his 2007 application, yet still did not attempt to challenge the validity of the guilty plea in his July 2009 amendment.

**3. Ineffective Assistance of PCR Counsel is neither a valid ground for relief, nor a valid ground to justify a successive application.**

Petitioner also vaguely suggests the ineffectiveness of prior post-conviction relief counsel for amending the PCR to deal only with issues that were moot in light of the LWOP sentence. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Furthermore, Aice is again on point and held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ for slowing a successive PCR application under § 17-27-90.” Aice, 350 S.C. at 452, 409 S.E.2d at 394. The responsibility for failing to raise the present allegations in the 2007 application falls squarely on Petitioner’s shoulders.

**4. Petitioner also could have challenged the use of his attempted armed robbery conviction for the purposes of sentence enhancement during sentencing after his murder trial or in the PCR therefrom.**

Additionally, Petitioner’s 2007 application is not the only time where he could have challenged the validity of his attempted armed robbery conviction, at least for the purposes of

sentence enhancement. Where the State proves the existence of a prior conviction, a defendant may still challenge its use for enhancement by proving the conviction was constitutionally defective or otherwise invalid by a preponderance of the evidence. See State v. Spratt, 383 S.C. 212, 678 S.E.2d 266 (Ct. App. 2009) (remanding to consider evidence regarding whether defendant waived his right to counsel in the uncounseled guilty plea relied upon for enhancement purposes); Robinson v. State, 380 S.C. 201, 205, 669 S.E.2d 588, 590 (2008) (holding that plea counsel was deficient for failing to challenge the prior conviction used to enhance a sentence).

Accordingly, Petitioner could have raised his Faretta allegation at the end of his murder trial, after the State proved the conviction for enhancement purposes, as a basis for challenging the validity of the enhancing conviction. Neither he nor counsel in that trial did so. The issue was not raised on appeal, either substantively or as the issue cited by appellate counsel in the Anders brief actually submitted. Petitioner could have thereafter raised that failure as an independent allegation of ineffective assistance of counsel in his application for relief from the murder conviction, filed August 23, 2011. He did not do so, nor did PCR counsel ever amend his application in order to do so.

As a consequence, Petitioner's allegation is not only firmly successive to his prior post-conviction relief action, but it is an allegation that could have been raised at numerous other points in the proceedings in which the enhancement occurred.

**B. The application, and its sole allegation therein, is also well outside the statute of limitations, and no exceptions are applicable.**

In addition to being successive, the application is late by roughly seven-and-a-half years. The Uniform Post-Conviction Procedure Act requires as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the

sending of the remittitur to the lower court from an appeal or the filing of the final decision on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(A). The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

Applicant was pled guilty on November 17, 2005, and did not appeal. The current application was not filed until April 11, 2014—well after the one-year statutory filing period expired. Petitioner quotes as an exception, but does not meaningfully argue, the case of Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002). Wilson is wholly inapplicable where, as is the case here, an applicant has previously filed for post-conviction relief and received a hearing. As emphasized above, Petitioner cannot achieve exceptional relief from the Court by way of his own failure to raise the present allegation in his prior application. Petitioner received his one bite of the apple—that he bit from the mealy brown side of the apple does not entitle him to a second, third, or fourth chomp.

**II. PETITIONER'S REQUEST ON APPEAL FOR RELIEF FROM HIS SENTENCE ARISING OUT OF HIS MURDER CONVICTION IS NOT APPROPRIATE AS THE MURDER WAS NOT THE CONVICTION CHALLENGED IN THE PCR PROCEEDING NOW ON APPEAL.**

Petitioner primarily requests the Court remand this matter for resentencing on Applicant's *murder* conviction. Where a PCR court finds a defect in the original proceedings, the appropriate relief is a new trial on the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969).

The murder is not the conviction subject to collateral attack in the matter presently before the Court on appeal. As such, modification or vacation of any element of that criminal proceeding would be highly inappropriate even if the Court were to carve out an *extraordinary* exception to grant Petitioner relief on the underlying merits of his claim against the attempted armed robbery conviction. The only appropriate relief in that circumstance would be vacation of the attempted armed robbery conviction and a new trial on the original indictments for two counts of armed robbery and one count of disorderly conduct.

**CONCLUSION**

Because the PCR Court properly held that Petitioner's application is untimely, successive, and because the Faretta allegation could have been raised many times before across multiple proceedings, this Court should deny this Petition for a Writ of Certiorari. Should this Court grant the petition, the State seeks permission to more fully brief the issues herein.

Respectfully submitted,

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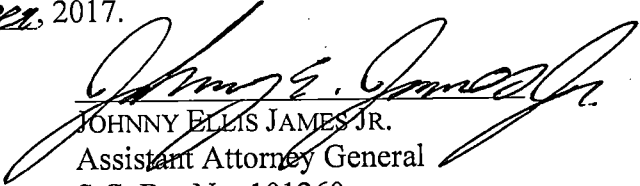
PROOF OF SERVICE

I, Johnny Ellis James Jr., certify that I have served the within **Return to Petition for Writ of Certiorari** on Petitioner by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

LaNelle C. Durant, Esquire  
P.O. Box 11589  
Columbia, South Carolina 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 22 day of September, 2017.

  
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