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October 15, 2017

Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

RECEIVED

OCT 18 2017

S.C. SUPREME COURT

Re: Rondell Leon Carter, 2016-CP-22-00014

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal and Grant of Appeal pursuant to Austin v State, in the above Georgetown County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Johnny James, Esq.; Rondell Leon Carter 238344

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

RECEIVED

OCT 18 2017

S.C. SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

Honorable Roger E. Henderson, Circuit Judge

Case No.: 2016-CP-22-00014

Rondell Leon Carter 238244.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Johnny James, Esq. Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this October 15, 2017.



James K Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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RECEIVED

OCT 18 2017

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

Honorable Roger E. Henderson, Circuit Court Judge

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Case No.: 2016-CP-22-00014

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Rondell Leon Carter 318851.....Petitioner

v.

State of South Carolina.....Respondent

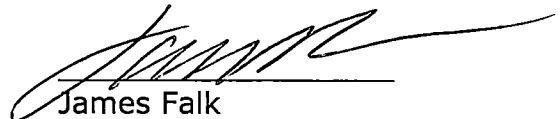
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NOTICE OF APPEAL

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The Petitioner Rondell Carter appeals the Honorable Roger E Henderson's August 15, 2017 Order Granting an Appeal Pursuant to Austin v State. Undersigned counsel received notice of entry of the order on October 6, 2017. A copy of the order on appeal is attached to this notice.

Respectfully submitted



James Falk  
Falk Law Firm  
PO Box 1058  
Charleston, SC 29402  
Attorney for Petitioner

October 15, 2017

*Other counsel of Record*  
Johnny James, Esq  
S.C. Attorney General's Office  
Columbia, SC 29211

STATE OF SOUTH CAROLINA  
COUNTY OF GEORGETOWN

) IN THE COURT OF COMMON PLEAS  
) FOR THE FIFTEENTH JUDICIAL CIRCUIT  
)

Rondell Leon Carter,  
S.C.D.C. No. 238244,

) Case No.: 2016-CP-22-00014  
)  
)

Applicant,

v.

) **ORDER GRANTING RELIEF**  
) **PURSUANT TO AUSTIN V. STATE,**  
) **GRANTING PARTIAL MOTION TO DISMISS**  
)  
)

State of South Carolina,

Respondent.

This matter comes before the Court by way of an application for post-conviction relief filed by Rondell Leon Carter (Applicant) on January 6, 2016. Respondent made its Return and Partial Motion to Dismiss on or about February 13, 2017. The Court convened an evidentiary hearing into the matter on May 23, 2017, at the Horry County Courthouse in Conway, South Carolina. Applicant was present and represented by James K. Falk, Esquire. Johnny Ellis James Jr. and Valerie Garcia Giovanoli, of the South Carolina Office of the Attorney General, represented Respondent.

No testimony was taken at the hearing. The Court had before it a copy of the trial transcript, Applicant's appellate records, the records of the Georgetown County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and the pleadings.

PH. ED.  
2017 AUG 22 AM 11:11  
ALISA Y. WHITE  
CLERK OF COURT  
GEORGETOWN COUNTY, SC

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Georgetown County Clerk of Court. Applicant was indicted at the May 2009 term of the Georgetown County Grand Jury for burglary, first degree (2009-GS-22-00555).

two counts of kidnapping (2009-GS-22-00556, -00559), possession of a weapon (2009-GS-22-00557), and two counts of armed robbery (2009-GS-22-00560, -00561); Applicant was further indicted at the June 2011 term for two counts of assault and battery with intent to kill (2011-GS-22-00645, -00701). James R. Felts, Esquire, and Gerald E. Harmon, Esquire, represented Applicant, and Erin Bailey, of the Fifteenth Circuit Solicitor's Office, prosecuted the case.

Applicant proceeded to trial on June 27, 2011, before the Honorable Benjamin H. Culbertson and a jury. Judge Culbertson granted Applicant's motion to quash one of the ~~ABWIK~~-indictments (-00701) at the beginning of trial. The jury found Applicant guilty as indicted on all other charges on June 29, 2011. Pursuant to S.C. Code Ann. § 17-25-45, and based upon a prior conviction for voluntary manslaughter, Judge Culbertson sentenced Applicant to life incarceration.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Robert M. Pachak. By opinion decided April 17, 2013, the South Carolina Court of Appeals affirmed Applicant's convictions. State v. Carter, Op. No. 2013-UP-157 (S.C. Ct. App. filed April 17, 2013). The Remittitur was issued on June 10, 2013.

**First PCR Application: 2013-CP-22-00721**

Applicant filed his first application for post-conviction relief on July 18, 2013 (2013-CP-22-00721). He alleged the following grounds for relief in his application:

1. "Improper chain of custody"
2. "Inadmissible, Improper mishandling of evidence"
3. "Ineffective Assistance of trial counsel"
4. "403 objections to victim injuries, Improper Investigation, Improper testimony"

Respondent made its return on February 27, 2014, and an evidentiary hearing into the matter was convened on February 5, 2015, before the Honorable G. Thomas Cooper. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, of the South

Carolina Attorney General's Office, represented Respondent. At the evidentiary hearing, Applicant proceeded on the following allegations:

1. Ineffective Assistance of Trial Counsel
  - a. Failure to call Thurmond Seward and Matthew Cobb as defense witnesses.
  - b. Failure to cross-examine Herman McCray on his plea deal.
2. Ineffective Assistance of Appellate Counsel
  - a. Failure to argue the trial judge erred in instructing the jury on accomplice liability.
  - b. Failure to argue the trial judge erred in admitting evidence without a sufficient chain of custody.

Applicant testified on his own behalf, and James R. Felts, Esquire, also testified. By written order dated April 27, 2015, and filed May 14, 2015, Judge Cooper denied and dismissed the application. Applicant did not appeal Judge Cooper's order.

## II. CURRENT APPLICATION

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

1. Ineffective assistance of PCR counsel, in that:
  - a. Counsel failed to file an appeal from the first PCR
2. Ineffective assistance of trial counsel, in that:
  - a. "its the same issues that was raised in my first P.C.R. hearing."
3. Ineffective assistance of appellate counsel, in that:
  - a. "its the same issues that was raised in my first P.C.R. hearing."
4. Prosecutorial misconduct, in that:
  - a. "its the same issues that was raised in my first P.C.R. hearing."

Applicant requests relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Before this Court are the Georgetown County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the final order of Applicant's previous PCR action, and the pleadings of the present PCR action. The Court has reviewed this record in its entirety, but as previously indicated, took no testimony.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### Austin v. State

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application because his prior PCR counsel, Tristian M. Shaffer, Esquire, failed to timely file a notice of intent to appeal. Pursuant to Austin v. State, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

At the outset of the hearing, counsel for Respondent indicated to this Court that prior to the hearing, but after the matter was placed on the roster, it received from an affidavit from Mr. Schaffer in support of Applicant's Austin claim. On the basis of that affidavit, Respondent conceded on the record that Applicant did not knowingly and intelligently waive his right to appeal from the Order filed May 14, 2015, denying his prior PCR.

Accordingly, this Court agrees and finds that Applicant did not knowingly and voluntarily waive his right to appeal the first PCR application. This Court grants Applicant relief pursuant to Austin v. State review of the Order of Dismissal filed May 14, 2015, denying his first PCR application (2013-CP-22-00721).

#### **Ineffective Assistance of PCR Counsel**

At the hearing, after the State conceded the Austin issue and sought a grant of its motion to dismiss on the remaining issues, Applicant notified the Court of his concern that prior PCR counsel failed to properly preserve all issues for appeal in the prior PCR hearing. Respondent argued that, outside of the Austin context, ineffective assistance of PCR counsel was not a claim cognizable under the Uniform Post-Conviction Procedure Act, and in support cited to Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

The Court finds that ineffective assistance of PCR counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (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). 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 PCR counsel. Aice at 452, 409 S.E.2d at 395.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin "is limited to its particular factual situation" and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his "one full bite at the apple." Id.; Aice, 305 S.C. at 452, 409 S.E.2d at 394; see also Odöm v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his first PCR action. It is clear that, but for the failure to file a notice of intent to appeal, Applicant enjoyed a complete adjudication on the merits of his original application. Applicant's allegations of ineffective assistance of PCR counsel, beyond the Austin context, fall outside any exception to the rule barring such claims. Therefore, to whatever extent the application and Applicant's concerns may be construed as a broader allegation of ineffective assistance of PCR counsel,<sup>1</sup> the Court dismisses it as not cognizable under the Uniform Post-Conviction Procedure Act.

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<sup>1</sup> See Rule 8(f), SCRPC ("All pleadings shall be so construed as to do substantial justice to all parties.").

### Statute of Limitations

The Court finds the remainder of Applicant's allegations must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. Specifically, the 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. Pejoquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Applicant was convicted on June 29, 2011, and the remittitur from his direct appeal issued on June 20, 2013. The current application was not filed until January 6, 2016—well after the one-year statutory filing period expired. Therefore, excepting the claim and grant of relief pursuant to Austin v. State, the Court dismisses the application as barred by the statute of limitations.

### Successive

Excepting the claim and grant of relief pursuant to Austin v. State, the Court also finds the application must be dismissed as successive to Applicant's previous PCR application. 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. 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).

Applicant's current allegations, by his own description, were raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him, and

excepting the claim and grant of relief pursuant to Austin v. State, the Court dismisses the application as successive to Applicant's previous PCR application.

#### Res Judicata

Again excepting the claim and grant of relief pursuant to Austin v. State, the Court finds the application is similarly barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.; see also Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981).

Applicant had a full opportunity to litigate all his allegations in his prior actions. His present allegations are, by his own description, the same issues that were raised in his first post-conviction relief hearing. The finality of the previous Court rulings shall be respected, and excepting the claim and grant of relief pursuant to Austin v. State, the Court dismisses the application as barred by the doctrine of *res judicata*.

[Conclusion and signature on following page]



#### IV. CONCLUSION


This Court finds that the grant of relief pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991) is proper. This Court further finds Respondent's motion to dismiss the remaining allegations is well founded, and all other allegations are dismissed as untimely, successive, and barred by the doctrine of *res judicata*.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) day sfrom his attorney's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his attorney must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

#### IT IS THEREFORE ORDERED THAT:

1. The Applicant be granted an appeal of case 2013-CP-22-00721 pursuant to Austin v. State;
2. All other allegations are denied and dismissed with prejudice; and
3. The Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 15<sup>th</sup> day of August, 2017.

  
ROGER E. HENDERSON  
Presiding Judge  
Fifteenth Judicial Circuit

, South Carolina

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

\_\_\_\_\_  
RONDELL LEON CARTER, #238244,

Applicant,

v.

STATE OF SOUTH CAROLINA,

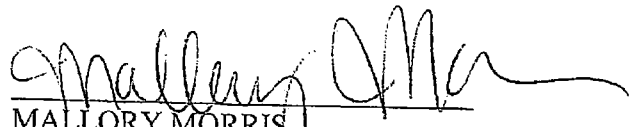
Respondent.

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**CERTIFICATE OF SERVICE**  
\_\_\_\_\_

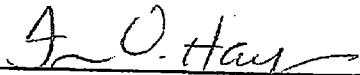
The undersigned hereby certifies that a true copy of the **Order Granting Relief Pursuant to Austin v. State, Granting Partial Motion to Dismiss** has been served upon the applicant by mailing one (1) copy in the United States mail, postage prepaid, addressed to:

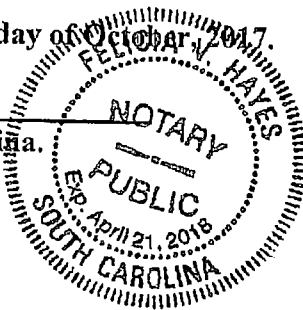
James K. Falk, Esquire  
Falk Law Firm, LLC  
PO Box 1058  
Charleston, SC 29402

This 3<sup>rd</sup> day of October, 2017.

  
MALLORY MORRIS  
LEGAL ASSISTANT FOR RESPONDENT

SWORN to before me this 3<sup>rd</sup> day of October, 2017.

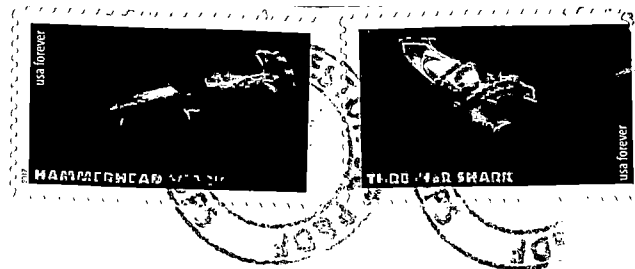
  
Notary Public for South Carolina.  
My Commission Expires:



**FALK LAW FIRM**

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Clerk of Court  
Supreme Court of South Carolina  
P.O. Box 11330  
Columbia, SC 29211

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