

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

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Montavis K. Gaines, Jr., #323168, )  
CLERK OF COURT )  
SALUDA CO. S.C. ) Case No.: 2017-CP-41-86

Applicant, )

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )

Respondent. )

This matter comes before this Court by way of an application for post-conviction relief filed by Montavis K. Gaines, Jr. (Applicant) on April 3, 2017, an amendment thereto filed April 17, 2017, and Applicant's "objection to order of dismissal" filed November 27, 2017. Respondent made its "Return and Motion to Dismiss Third Application for Post-Conviction Relief" on July 18, 2017, requesting the application be summarily dismissed.

### PROCEDURAL HISTORY

The records before this Court indicate Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Saluda County Clerk of Court. During its November 2006 term, the Saluda County Grand Jury indicted Applicant for armed robbery (2006-GS-41-419), criminal conspiracy (2006-GS-41-420), and assault and battery with intent to kill (2006-GS-41-421). Michael Ray Ellisor, Esquire represented Applicant on these charges. Assistant Solicitors H. Franklin Young and Ervin J. Maye, both of the Eleventh Circuit Solicitor's Office, prosecuted the case. On July 24-26, 2007, Applicant proceeded to trial before the Honorable William P. Keesley and a jury. Following deliberations, the jury convicted Applicant as indicted for armed robbery and criminal

conspiracy and also convicted Applicant of the lesser-included offense of assault and battery of a high and aggravated nature (ABHAN). Judge Keesley sentenced Applicant to a term of imprisonment of twenty years for armed robbery, five years for criminal conspiracy, and ten years for ABHAN. The sentences were to be served concurrently.

Applicant filed a timely notice of appeal, and Appellate Defender Katherine H. Hudgins, of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, represented Applicant. Following the submission of an *Anders*<sup>1</sup> brief, Applicant filed a *pro se* brief. In this *pro se* brief, Applicant argued the trial court erred in allowing the solicitor to exercise a peremptory challenge in a discriminatory manner. He also argued the trial court abused its discretion in admitting identification testimony that was suggestive in nature and defective under *Neil v. Biggers*<sup>2</sup>. Applicant subsequently filed an amendment to his *pro se* brief. In the amendment, Applicant argued the trial court erred by failing to conduct a suppression hearing on the reliability of certain witness testimony when the witness did not identify Applicant as the perpetrator. Thereafter, on October 2, 2009, the South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. *State v. Gaines*, Op. No. 2009-UP-446 (S.C. Ct. App. filed Oct. 2, 2009). The Remittitur was issued on October 21, 2009.

#### 2009-CP-41-176

Applicant filed his first application for post-conviction relief on November 6, 2009. In that application, he alleged he was being held unlawfully for the following reasons:

1. "Ineffective assistance of trial counsel."
  - a. "Ineffective assistance of trial counsel."

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<sup>1</sup> *Anders v. California*, 386 U.S. 738 (1967).

<sup>2</sup> *Neil v. Biggers*, 409 U.S. 188, 188 (1972).

Respondent made its return on March 3, 2010, requesting an evidentiary hearing be held. On March 17, 2010, Applicant filed an amendment to his application adding the following allegations:

1. "Trial counsel was ineffective in not discovering an agreement or promise of leniency between the solicitor's office and Jerome Rhoads;" and
2. "The prosecutor engaged in misconduct in not disclosing such an agreement."

Subsequently, Applicant filed a second amendment to his application on January 31, 2011, which raised the same issues raised in the first amendment with additional facts.

On January 31, 2012, an evidentiary hearing into the matter was convened before the Honorable Eugene C. Griffith, Jr. Applicant was present at the hearing and represented by Richard R. Gleissner, Esquire. Assistant Attorney General Kaelon E. May, of the South Carolina Attorney General's Office, represented Respondent. After hearing all of the testimony and evidence presented, Judge Griffith issued a written order on April 5, 2012, filed April 11, 2012, denying and dismissing the application with prejudice.

On April 24, 2012, Applicant filed a motion to reconsider pursuant to Rule 59(e), SCRPC, in which Applicant contended the post-conviction relief court failed to include a claim counsel was ineffective in failing to use a prior written statement of a witness to impeach the witness. Applicant further challenged the post-conviction relief court's finding that a claim relating to the testimony of the officers was withdrawn. Applicant also asked the post-conviction relief court to reconsider its finding there was no agreement for Rhoads' testimony. The motion was denied by order filed May 24, 2012.

Applicant filed a timely notice of appeal, and Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Commission on Indigent Defense—Division of Appellate Defense, perfected an appeal on Applicant's behalf. In his petition for writ of certiorari,

Applicant argued trial counsel erred in failing to object to portions of the police officers' identification testimony that referred to their familiarity with Applicant based on past encounters with him because this constituted prejudicial prior bad act evidence that should not have been admitted into evidence at trial. By Order filed December 3, 2014, the South Carolina Court of Appeals denied Applicant's petition. The Remittitur was issued on January 5, 2015.

**2013-CP-41-10**

Applicant filed his second application for post-conviction relief on January 16, 2013. In this application, he alleged the following grounds for relief:

1. "Prosecutorial Misconduct, Brady's violation;" and
  - a. "Prosecutorial misconduct: Brady's Violation, Prosecutor failure to disclosed potentially exculpatory [sic] evidence related to the charged offenses."
2. "Ineffective assistance of counsel."
  - a. "Ineffective assistance of counsel for failure to object or file motions against Applicant's ill-legal [sic] sentences."

Respondent made its return and motion to dismiss on October 7, 2013, requesting the application be summarily dismissed as untimely and as successive. On February 6, 2014, the Honorable Benjamin H. Culbertson issued a Conditional Order of Dismissal, provisionally denying and dismissing the application. Subsequently, Applicant filed a document titled: "Objection to response to consider conditional order of dismissal." Thereafter, Judge Culbertson issued a Final Order of Dismissal, denying and dismissing the application, on September 12, 2014.

Applicant then filed a motion to consolidate the appeal with the appeal from his first post-conviction relief action, which was still pending, and an explanation pursuant to Rule 243(c), SCACR. By Order filed October 23, 2014, the South Carolina Supreme Court dismissed Applicant's appeal for failing to show there was an arguable basis for asserting the determination by the lower court was improper. Accordingly, Applicant's motion to consolidate the second

post-conviction relief appeal with his then-pending petition for a writ of certiorari was denied as moot. The Remittitur was issued on November 10, 2014.

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Applicant subsequently filed a petition for writ of habeas corpus, as well as a motion to hold petition in abeyance, with the United States District Court for the District of South Carolina on December 4, 2014. In his petition, Applicant set forth the following grounds for relief:

1. "The State, and its agents, along with State's witness Rhoads conspired to deny Petitioner his constitutional right to due process, by denying him a fair and impartial trial;"
2. "The two prosecuting attorneys, knowingly, gave perjured testimony, and conspired to deny "any existence of a deal," when questioned;"
3. "[Trial] counsel was ineffective for failing to object to officer's testimony identifying Petitioner, by the way he walked, from a previous encounter;" and
4. "Trial counsel was ineffective for failing to discover (Sweet Heart) leniency plea agreement between Rhoads and State, and use to impeach Rhoads."

Respondent filed its return and motion for summary judgment on March 30, 2015. Thereafter, the Honorable Kaymani D. West, United States Magistrate Judge, issued a report and recommendation on February 3, 2016, recommending Respondent's motion for summary judgment be granted and the petition be denied. Subsequently, the Honorable J. Michelle Childs, United States District Judge, denied Applicant's petition on March 9, 2016, and accepted the report and recommendation for summary judgment. Judge Childs also denied a certificate of appealability to the Fourth Circuit.

On May 16, 2016, Applicant appealed the District Court's decision by filing an informal preliminary brief with the Fourth Circuit Court of Appeals. The Fourth Circuit denied Applicant's motion for certificate of appealability and dismissed his appeal by unpublished opinion, finding Applicant did not make the requisite showing that reasonable jurists would find the district court's assessment of the merits of the constitutional claims debatable or wrong.

*Slack v. McDaniel*, 529 U.S. 473, 484 (2000); see *Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003), or that the dispositive procedural ruling of the district court was debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

### CURRENT APPLICATION

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

1. "Ineffective assistance of PCR counsel"
  - a. "The Court in Aice acknowledged that there may be unique circumstances [sic], where a PCR Counsel's assistance could be challenged in a successive application;"
  - b. "Applicant contends his PCR application should not be summarily dismissed as successive because his case presents unique circumstance warranting review of prior PCR counsel's assistance under *Martinez v. Ryan* 566 U.S.1, 132 S.Ct. 1309, 182 L.Ed.29 272 (2012);" and
  - c. "Applicant request an evidentiary hearing pursuant to § 17-27-80 of the S.C. Code of Law on the claim of Ineffective assistance of prior PCR counsel."

Applicant subsequently filed an amendment to his application on April 17, 2017, adding the following allegations:

1. "Prior P.C.R. counsel deemed unqualified under the uniform post-conviction procedur [sic] Act, and failed to competently to [sic] represent him – Applicant allegation he was denied a state-created right to qualified counsel."

Before this Court are the records from the Saluda County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the records from Applicant's direct appeal, the records from Applicant's prior post-conviction relief actions and the appeals therefrom, the records of Applicant's federal habeas action, and the records of this current post-conviction relief action.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), this Court makes the following findings of fact and conclusions of law:

### *Failure to State a Claim*

Applicant alleges he is entitled to relief on grounds his prior post-conviction counsel was unqualified and, thus, was ineffective. This Court finds ineffective assistance of post-conviction relief 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 post-conviction relief 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 post-conviction relief counsel. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991).

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 Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999).

Here, Applicant received a hearing in his first post-conviction relief action and timely appealed to the South Carolina Supreme Court therefrom. Upon post-conviction relief appellate

counsel's submission of a petition and Respondent's timely response, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple."

Therefore, Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court shall dismiss the application for failing to state a cognizable claim upon which relief can be based.

#### *Successive*

This Court further finds the application must also be summarily dismissed because it is successive to Applicant's previous post-conviction relief applications. Applicant claims his newly raised, but defaulted, claims are attributable to ineffective assistance of post-conviction relief counsel. Applicant cites *Martinez v. Ryan*<sup>3</sup> to excuse the default of his newly raised claims of ineffective assistance of post-conviction relief counsel. He also cites *Robertson v. State*, 418 S.C. 505, 795 S.E. 2d 29 (2016), for an additional reason why he did not present his claims to the state and federal courts before this third 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:

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<sup>3</sup> 566 U.S. 1 (2012).

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).

Ineffective assistance of post-conviction relief counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991). Once a post-conviction relief 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 post-conviction relief counsel. *Aice*, 305 S.C. at 452, 409 S.E.2d at 395.

The South Carolina Supreme Court held the post-conviction relief rules "contemplate an adjudication on the merits of the original petition, one bite at the apple as it were." *Aice*, 305

S.C. at 452, 409 S.E.2d at 395 (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” *Id.* at 451, 409 S.E.2d at 395. *Aice* further held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” *Id.* at 452, 409 S.E.2d at 394.

Moreover, *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013), is controlling for non-capital successive post-conviction relief applications. The *Robertson* court merely extended *Kelly* to capital cases. In *Kelly*, the South Carolina Supreme Court specifically addressed the limitations on successive post-conviction relief applications following *Martinez*:

In *Martinez*, the “precise question” addressed by the United States Supreme Court is “whether ineffective assistance in an initial review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default *in a federal habeas proceeding*.” *Martinez*, 132 S.Ct. at 1315. (Emphasis added). The Court held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar *a federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” *Martinez*, 132 S.Ct. at 1320. (Emphasis added). The Court went on to set forth the requirements that must be met to overcome the procedural default in a federal habeas action. *Martinez*, 132 S.Ct. at 1318–19.

**Like other states, we hereby recognize that the holding in *Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.**

*Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013) (Emphasis added).

Applicant’s contention prior post-conviction relief counsel was ineffective is not a sufficient reason to warrant a successive post-conviction relief application. Thus, Applicant has failed to show that a successive application is appropriate, and this Court shall dismiss the matter as successive to Applicant’s previous post-conviction relief application.

### *Statute of Limitations*

This Court further finds the application must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act (“the 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 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). 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, section 17-27-70(c) of the South Carolina Code authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Applicant was convicted on July 26, 2007, and the remittitur from his direct appeal was issued on October 21, 2009. Applicant, therefore, was required to file this current action on or before October 22, 2010. The current application was not filed until April 3, 2017—well after the one-year statutory filing period expired. Indeed, this application was filed nearly *seven years* after the requisite filing period. Therefore, this Court shall summarily dismiss the application as barred by the statute of limitations.


## CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Saluda County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Kelly Oppenheimer, Esquire  
Post-Conviction Relief Division – 11<sup>th</sup> Circuit  
Post Office Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Saluda County Clerk of Court and opposing counsel within twenty (20) days, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 31<sup>st</sup> day of October, 2018.

  
ALISON R. LEE  
Chief Judge for Common Pleas  
Eleventh Judicial Circuit

Columbia, South Carolina