

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) FOR THE FOURTH JUDICIAL CIRCUIT  
 COUNTY OF DARLINGTON )

Curtis Nealey, ) Case No.: 2019-CP-16-00806  
 S.C.D.C. No. 337988, )

Applicant, )

CONDITIONAL ORDER OF DISMISSAL

v. )

State of South Carolina, )

Respondent. )

2019 NOV -5 AM 10:15  
 SECTION 1153C  
 CLERK OF COURTS  
 DARLINGTON, S.C.

FILED

This matter comes before the Court by way of an application for post-conviction relief filed by Curtis Nealey (Applicant) on July 29, 2019. Respondent made its Return, requesting the application be summarily dismissed.

**I. PROCEDURAL HISTORY**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Darlington County Clerk of Court. Applicant was indicted at the June 2009 term of the Darlington County Grand Jury for two counts of assault and battery with intent to kill (2009-GS-16-00869; -00874), possession of a weapon during the commission of a violent crime (2009-GS-16-00870), criminal domestic violence of a high and aggravated nature (2009-GS-16-00872), and kidnapping (2009-GS-16-00873). Tonya Coleman-Little and J. Richard Jones, Esqs. represented Applicant. Patti McKenzie, Esq., of the Fourth Circuit Solicitor’s Office, prosecuted the case. On November 9, 2009, Applicant proceeded to trial before the Honorable J. Michael Baxley and a jury. The jury found Applicant guilty as indicted on November 10, 2009. Judge Baxley sentenced Applicant to imprisonment for concurrent terms of 20 years for ABWIK, 5 years for the weapon, 10 years for CDVHAN, 30 years for kidnapping.

Applicant filed a timely notice of appeal and a direct appeal was perfected by Joseph L. Savitz, III, Esq. filing a brief pursuant to Anders v. California, 386 U.S. 738 (1967), which raised the following issue:

The trial judge committed reversible error by instructing the jury that “[i]nferred malice may ... arise when the deed is done with a deadly weapon,” as this charge violated State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), which was decided one month prior to Nealey’s trial.

The South Carolina Court of Appeals dismissed Applicant's appeal by unpublished opinion. State v. Nealey, Op. No. 2011-UP-574 (S.C. Ct. App. filed Dec. 20, 2011). The Remittitur was issued on January 6, 2012.

#### **First PCR Application: 2012-CP-16-00070**

Applicant filed his first application for post-conviction relief on January 17, 2012 (2012-CP-16-00070). He alleged the following grounds for relief in his application (excerpted verbatim):

1. Ineffective assistance of trial counsel, in that:
  - a. “Trial counsel failed to present developed medical reports for impeaching testimony factually refuted by the medical reports.”
  - b. “Trial counsel failed to present evidence and/or testimony from a Forensic Toxicologist to establish the physical and mental condition of State Witness Dorothy Perkins – when witness Perkins was documented to have been under the influence of alcohol and prescription medication. This failure to rebut the testimony of State Witness Dorothy Perkins was damaging and prejudicial to Applicant’s defense.”
  - c. “Trial counsel failed to adequately cross-examine State Witness Dorothy Perkins for the purpose of suppressing, limiting precluding testimony, and introducing prior statements evidencing inconsistencies and contradictions to testimony given under oath at Applicant’s trial.”
  - d. “Trial counsel erred by their failure to object to the State’s improper eliciting of detrimental character evidence involving criminal domestic violence against Applicant at Applicant’s trial.”
  - e. “Trial counsel failed to adequately cross-examine State Witness Victoria Perkins, and law enforcement Officers, for the purpose of establishing

inconsistent and contradicting testimonies which proved damaging and prejudicial to Applicant's defense."

Respondent made its return on May 8, 2012, and an evidentiary hearing into the matter was convened on July 15, 2013, before the Honorable R. Ferrell Cothran, Jr. Applicant was present at the hearing and represented by Tristan M. Shaffer, Esq. Karen C. Ratigan, Esq., of the South Carolina Attorney General's Office, represented Respondent. Applicant testified on his own behalf, and Wendy Bell and Tonya Copeland-Little, Esq., also testified. By written order dated August 20, 2013, and filed September 9, 2013, Judge Cothran denied and dismissed the application. Applicant timely filed a motion to alter/amend pursuant to Rule 59(e), SCRCP, and Respondent made its return on October 1, 2013. Judge Cothran denied the motion by written order filed March 23, 2015.

Applicant filed a timely notice of appeal and a petition for writ of certiorari was filed by John H. Strom, Esq. on Applicant's behalf, who raised the following issues:

1. The PCR court erred in finding that trial counsel provided effective assistance of counsel where Petitioner's right to a fair trial was adversely affected because trial counsel failed to call a toxicologist at trial to support the defense theory that Perkins' fell off of Petitioner's motorcycle because she was extremely intoxicated while under the influence of prescription anti-depressants and alcohol.
2. Defense counsel provided ineffective assistance of counsel by failing to object to the trial court's improper charge on inferred malice, thus preserving it for appellate review, where this Court's decision in State v. Belcher prohibiting such instructions in ABIK cases had been filed a month before Petitioner's trial.

Respondent filed its Return on May 18, 2016. On April 13, 2017, the Supreme Court of South Carolina denied certiorari as to the first issue, but granted certiorari as to the second issue. After further briefing from both parties, the Supreme Court dismissed certiorari as improvidently granted. Nealey v. State, Op. No. 2018-MO-004 (S.C. Sup. Ct. filed Feb. 7, 2018). The Remittitur was issued on February 23, 2018.

## Federal Habeas Petition: 1:18-777-RBH-SVH

Applicant subsequently filed a *pro se* Petition for Habeas Corpus under 28 U.S.C. § 2254 on March 20, 2018 (C.A. No. 1:18-777-RBH-SVH). In his Petition, Applicant set forth the following grounds for relief:

1. "Petitioner denied effective assistance of trial counsel as guaranteed by the 6<sup>th</sup> Amendment, U.S. Constitution."
  - a. "Counsel failed to consult, procure and present expert witness to testify regarding effects of alcohol and tricyclic on State's key witness;"
  - b. "Counsel failed to use available impeachment evidence in order to challenge prosecution's key witness;"
  - c. "Counsel failed to object to unconstitutional jury charge that allowed inference of malice."
2. "Denial of Effective Assistance of Appellate Collateral Counsel"
  - a. "Counsel failed to reply to the Respondent's Brief, where there were several incorrect or misstatements of facts, after being requested to do such, well before the allotted time expired."

Respondent filed its Return and Motion for Summary Judgment on June 15, 2018. The Honorable Shiva V. Hodges, United States Magistrate Judge, issued on September 19, 2018, a Report and Recommendation that Respondent's motion for summary judgment be granted. Nealey v. Warden, Lee Corr. Inst., 1:18-777-RBH-SVH, 2018 WL 6933419 (D.S.C. 2018). The Honorable R. Bryan Harwell, United States District Judge, denied Applicant's Petition on December 20, 2018, and accepted the Report and Recommendation for summary judgment. Nealy v. Warden, Lee Corr. Inst., 1:18-777-RBH-SVH, 2018 WL 6695713 (D.S.C. 2018). Applicant did not appeal the decision of the district court.

## 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 appellate counsel, in that:<sup>1</sup>
  - a. “Counsel failed to reply to the State’s Brief, where there were several erroneous statements of fact, after being informed of the mistakes and being requested to reply to them well before the allotted time expired, he still failed to.”
  - b. “Appellate counsel failed to ask for a continuance, after just being appointed to Applicant during appeal replies.”
  - c. “Applicant states he tried on multiple occasions to contact counsel, but after several failed tries, Applicant had his daughter ‘Taylor Nealey’ contact Counsel.”
  - d. “Applicant states after being denied assistance, he filed a *pro se* Brief/reply, which the courts refused.”
  - e. “Applicant states this prejudiced him, because had Appellate Counsel [replied], the outcome of his Belcher claim would have been different, the courts would have had Applicant’s reply Brief, instead of relying on the States erroneous reply.”

Applicant requests relief as follows:

- “Sentences vacated, convictions reversed and remanded for a new trial”

Before this Court are the Darlington County Clerk of Court records regarding the subject convictions, Applicant’s records from the South Carolina Department of Corrections, the opinions of the Court from each of Applicant’s prior appeals, the final orders of Applicant’s previous PCR and habeas actions, and the records of this current PCR action.

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

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to S.C. Code Ann. §§ 17-27-70 and -80, this Court informs the parties of its intent to dismiss the application based upon the following findings:

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<sup>1</sup> Applicant only makes reference to “appellate counsel,” but given the similarity of the claims to those set forth in the federal habeas petition, Respondent interprets Applicant to mean only PCR appellate counsel.

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

The Court finds Applicant's claim he is entitled to relief on grounds that his prior PCR appellate counsel, John H. Strom, Esq., was ineffective is not cognizable in an action for post-conviction 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 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 PCR action and timely appealed therefrom. Applicant further enjoyed to exhaustion the federal habeas corpus procedures. 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 PCR counsel do not fall within any exception to the rule barring such claims, and the Court shall dismiss the allegations as not cognizable under the Uniform Post-Conviction Procedure Act.

### Successive

To the extent Applicant directs his allegations at his original appellate counsel, the Court finds the application must be summarily dismissed because it is 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).

As noted in the prior section, 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, 305 S.C. at 452, 409 S.E.2d at 395. The South Carolina Supreme Court held the PCR 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. Applicant’s contention that prior PCR counsel was ineffective is not a sufficient reason to warrant a successive PCR application. Thus, Applicant has failed to show that a successive application is appropriate.

Applicant’s current allegations were or could have been 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 the Court shall dismiss the application as successive to Applicant’s previous PCR application.

#### **Statute of Limitations**

To the extent Applicant directs his allegations at his original appellate counsel, the Court finds the application 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. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

Applicant was convicted on November 10, 2009, and the remittitur from his direct appeal issued on January 6, 2012. The current application was not filed until July 29, 2019—well after the one-year statutory filing period expired. Therefore, the Court shall summarily dismiss the application as barred by the statute of limitations.

*[Conclusion and signature on following page]*


#### IV. CONCLUSION


Pursuant to S.C. Code Ann. § 17-27-70(b), the 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 Darlington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Johnny E. James, Jr., Esquire  
PCR Division – 4<sup>th</sup> Circuit  
P.O. Box 11549  
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Darlington County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, 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 28<sup>th</sup> day of October, 2019.

  
\_\_\_\_\_  
PAUL M. BURCH  
Chief Administrative Judge  
Fourth Judicial Circuit

  
\_\_\_\_\_, South Carolina

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS )

COUNTY OF DARLINGTON )

Curtis Nealey, #337988 )

CASE NO. )

Plaintiff )

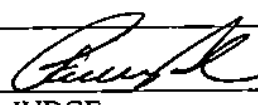
2019-CP-16-0806 )

v. )

MOTION AND ORDER INFORMATION )  
FORM AND COVER SHEET )

State Of South Carolina )

Defendant. )

Plaintiff's Attorney: Curtis Nealey, #337988, Bar No. Address: Lee Correctional Institution 990 Wisacky Highway Bishopville, South Carolina 29010 phone: fax: e-mail: other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Estimated Time Needed: Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	
<b>SECTION III: Motion Fee</b>	
<input type="checkbox"/> PAID - AMOUNT: <input checked="" type="checkbox"/> EXEMPT: <input checked="" type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input checked="" type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b>	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input checked="" type="checkbox"/> Other: <i>Exempt</i>	 JUDGE CODE: <i>2048</i> Date: <i>10/28/19</i>
<b>CLERK'S VERIFICATION</b>	
Date Filed: _____ Collected by: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____	

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