

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Case No. 2013-CP-02-1153

Artrell Hickson, #343019,

Appellant,

v.

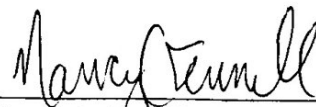
State of South Carolina,

Respondent,

NOTICE OF APPEAL

Artrell Hickson appeals the Order of the Honorable Edgar W. Dickson dated September 1, 2021, a copy of which is attached. This appeal is pursuant to an Order Granting Belated Appellate Review of Appellant's Initial PCR Action. Appellant received written notice of entry of this Order on October 1, 2021.

November 1, 2021



Nancy C. Fennell

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Attorney for Appellant

Artrell Hickson, #343019,

2013-CP-02-1153

Applicant,

ORDER OF DISMISSAL

v.

FILED 1.9.17

State of South Carolina,

Respondent.

Robert H. White
CLERK OF COURT
Anita Kinsey
Deputy Clerk

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed May 21, 2013. Respondent filed its Return on July 1, 2013, requesting an evidentiary hearing be convened on Applicant's ineffective assistance of counsel allegations. A hearing was held on September 11, 2015, at the Aiken County Courthouse. Applicant was present and represented by Aimee Zmroczek, Esquire. Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office represented Respondent.

At the PCR hearing, Applicant testified on his own behalf. Also testifying was Applicant's trial counsel, Kelley Brown, Esquire. This Court had before it the Aiken County Clerk of Court records, the appellate records, Applicant's South Carolina Department of Corrections records, the PCR application, the Return, and the trial transcript.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Aiken County Clerk of Court. Applicant was true bill indicted at the December 2009 term of the Aiken County Grand Jury for Armed Robbery (2009-GS-02-2294) and at the April 2010 term of the Aiken County Grand Jury for Possession of a Firearm During the Commission of or Attempt to Commit a Violent Crime (2010-GS-02-0670). Kelley

Judge A. Early, III. On September 22, 2010 Applicant was found guilty. Judge Early sentenced Applicant to twenty-eight years imprisonment for Armed Robbery and five years imprisonment for Possession of a Firearm During the Commission of or Attempt to Commit a Violent Crime with all sentences to run concurrently.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected by Jerry M. Screen, Esquire. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Hickson, Op. No. 2012- UP- 667 (Ct. App. filed December 19, 2012). The Remittitur was issued on February 11, 2013.

ALLEGATIONS

In his current application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel.
 - a. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States and South Carolina law was violated by trial counsel's failure to MOTION TO QUASH during pretrial the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause.
 - b. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States and South Carolina law was violated by trial counsel's failure to MOTION TO SUPPRESS during pretrial evidence emanating from the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause."
 - c. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United

the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause."

- d. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to call alibi witnesses Crystal Harris, Charles Smalls, and Tommy Parker, for the defense during applicant's criminal trial.
- e. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to advise applicant as to the pros and cons of offering testimony and negligently advising applicant not to testify and for failing to explain to the applicant without his testimony his attempt to corroborate his alibi witness testimony would be seriously compromised."
- f. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to request a Neil -vs- Biggers Hearing due to the alleged victim's bank employee never picked the applicant out of any type of photo array or line-up procedures prior to his arrest."
- g. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to motion to strike Sabrina Oakman and Candice Patrice Bryant, trial testimony due to these witnesses reading before the jury their entire voluntary statement whereas, the statements were never offered into evidence and the trial judge neglected to make a ruling for the admission or exclusion in regards to the evidence."

III. APPLICABLE LAW

In a post-conviction relief action, Applicant bears the burden of proving the allegations in the application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that

cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, courts measure an attorney's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court has reviewed the Clerk of Court records regarding the subject convictions, the trial transcript, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, and the legal arguments made by the attorneys. Pursuant to S.C. Code Ann. § 17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

to be not credible. In contrast, this Court finds Counsel's testimony to be credible and persuasive. These credibility findings have been applied to the Court's findings and conclusions set forth below.

Ineffective Assistance of Counsel

Applicant asserts several allegations of ineffective assistance of counsel. These allegations are meritless and should be dismissed. This Court finds that Applicant was not deprived of effective assistance of counsel. Trial Counsel's decisions and conduct were appropriate under the circumstances, and did not fall below professional norms of reasonableness.

Arrest Warrants

Applicant alleges that Trial Counsel is ineffective for failing to move to quash the arrest warrants for Applicant's charges because the warrants were conclusory and insufficient to establish probable cause. Applicant further alleges that Trial Counsel was ineffective for failing to move to suppress evidence stemming from these arrest warrants and for failing to move to dismiss the charges because of the insufficient warrants. These allegations are meritless and should be denied and dismissed with prejudice.

This Court finds that Applicant has failed to present any evidence to prove that his arrest warrants were not supported by probable cause. Furthermore, this Court notes that Applicant was true bill indicted at the December 2009 term of the Aiken County Grand Jury. Applicant has failed to meet his burden of proof that Trial Counsel was ineffective in any way for failing to object to these warrants or anything stemming from the warrants, and this allegation is denied and dismissed with prejudice.

Applicant failed to present his alibi witnesses at the PCR hearing, therefore he cannot claim ineffective assistance of counsel for failing to call said witnesses at the trial. See Dempsey v. State, 363 S.C. 365, 369, 610 S.E.2d 812, 814 (2005) (an applicant cannot show prejudice due to the failure of trial counsel to call alleged alibi witnesses at trial if the applicant does not present said witnesses at the PCR hearing on his behalf). Applicant's mere speculation what the witnesses' testimony would have been cannot, by itself, satisfy the applicant's burden of showing prejudice. Glover v. State, 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Therefore, this allegation is denied and dismissed with prejudice.

Failure to advise Applicant to testify at trial

Applicant alleges that Trial Counsel was ineffective for failing to advise him to testify at trial. This allegation is meritless. The trial judge fully discussed Applicant's right to testify on the record, allowed him additional time to speak with his attorney, and Applicant stated that he wished to remain silent. Applicant was aware that this right was his alone to waive and not Trial Counsel's decision. Therefore, this allegation is denied and dismissed with prejudice.

Failure to request a Neil v. Biggers hearing

Applicant's argument that Trial Counsel was ineffective for failing to request a Neil v. Biggers hearing is also meritless. This was an armed robbery where the three suspects covered their faces, law enforcement did not present the Victims with any photo lineups to identify, nor did the Victims ever identify the suspects. This Court finds that there was no basis on which to request a Neil v. Biggers hearing, thus Trial Counsel cannot be found ineffective for this reason. Neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

Applicant alleges that Trial Counsel was ineffective for failing to move to strike the statements that were read before the jury at the trial. This allegation is meritless. Trial Counsel did object to the State's witness, Ms. Bryant, reading her statement into the record and was overruled, so Applicant cannot claim ineffective assistance of counsel for failing to object. This Court feels that pursuant to the Rule of Completeness it was proper for Ms. Bryant to read her **statement to clarify what was elicited under cross examination.**

In regard to the statement of Ms. Oakman, another of the State's witnesses, while Trial Counsel did not object, this Court feels that it was proper under the Rule of Completeness due to the information that was elicited under cross examination, and Trial Counsel did not act below the standards of professional norms. Furthermore, Applicant has failed to meet his burden in proving that he was prejudiced by Trial Counsel's actions. Thus, neither prong of the Strickland test is met, and this allegation is denied and dismissed with prejudice.

Failure to object to jury instructions

Applicant also raised the issue of the trial judge's instructions to the jury, specifically the comment made about a "true and just verdict." Trial Counsel was not ineffective for failing to object to the trial judge's jury instructions as the instructions were not objectionable. The use of the phrase "fair and impartial" does not rise to the level of the improper charge in State v. Daniels where the jury was instructed to reach a verdict that was just and fair "to all parties." State v. Daniels, 401 S.C. 251, 255, 737 S.E.2d 473, 475 (2012). Therefore, this allegation is denied and dismissed with prejudice.

Applicant's argument that Trial Counsel was ineffective for failing to cross-examine his co-defendant about his plea deal is meritless. Trial Counsel asked if he was testifying to help himself out and co-defendant Kearsse admitted as such. Trial Counsel was not required under standards of professional norms to do anything more. Furthermore, there is nothing that could have been further elicited from his cross-examination testimony that would have changed the jury's verdict. Since this action would not have changed the outcome of the trial, it cannot be prejudicial. Neither prong of the Strickland test is met, and this allegation must be denied and dismissed with prejudice.

All Other Allegations

As to any and all allegations that were raised in the application and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

V. CONCLUSION

This Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Applicant failed to demonstrate Trial Counsel's performance was unreasonable under prevailing professional norms. Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625; Stalk v. State, 383 S.C. 559, 563, 681 S.E.2d 592, 594 (2009). Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

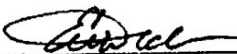
The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d

or post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel 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 application for Post-Conviction Relief is denied and dismissed with prejudice; and
2. Applicant shall remain in the custody of the South Carolina Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 21st day of December, 2016.


EDGAR W. DICKSON
Presiding Judge
Second Judicial Circuit

Orangeburg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
I, Robert J. Harte, Clerk of Court of Common Pleas and General Sessions for Aiken County, South Carolina do hereby certify that the foregoing constitutes a true and correct copy of the original documents which have been filed in my office this

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

Artrell Hickson, SCDC # 343019,

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS 2021
) FOR THE SECOND JUDICIAL CIRCUIT
)
)

) Case Nos.: 2019-CP-02-01521 and
) 2020-CP-02-00640
)
)

) **ORDER GRANTING MOTION TO MERGE**
) **PCR ACTIONS AND GRANTING BELATED**
) **APPELLATE REVIEW OF INITIAL PCR**
) **ACTION PURSUANT TO AUSTIN v. STATE¹**
)
)

This matter is before this Court by way of two post-conviction relief (PCR) applications filed by Applicant Artrell Hickson: first, case no. 2019-CP-02-01521 filed on June 19, 2019; and second, case no. 2020-CP-02-00640 filed on March 16, 2020, both requesting belated appellate review of Applicant's initial post-conviction relief action. In response to these two applications, Respondent the State of South Carolina made a return and motion to merge these actions into one, with the 2019 case being the surviving docket number and the 2020 action being treated as an amendment to the surviving action. Respondent also requested a hearing to determine if Applicant was entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin.

A hearing was convened before this Court on September 7, 2021, in this Court's virtual courtroom on the Cisco WebEx platform. Applicant was present and represented by his counsel, Nancy Fennell. Respondent was represented by Senior Assistant Deputy Attorney General Megan Harrigan Jameson of the South Carolina Attorney General's Office. Applicant's prior post-conviction relief counsel, Aimee Zmroczek, was also present. At the start of the hearing,

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

FILED Sept. 10 20 21

Robert J. Harte CNP
C.C.P. & G.S.

Charles Guiffre Plaintiff
Deputy Clerk

Respondent renewed its motion to merge the two applications, which was granted upon consent of Applicant.

Following the hearing, this Court determines Applicant did not make a knowing, voluntary, and intelligent waiver of his right to appeal his initial post-conviction relief action and grants him the right to seek belated appellate review of this initial post-conviction relief action pursuant to Austin. Pursuant to S.C. Code Ann. § 17-27-80, this formal order follows:

PROCEDURAL HISTORY

The records before this Court establish Applicant is presently confined in the South Carolina Department of Corrections. In June of 2009, Applicant Artrell Hickson and his brother, Javier Hickson, were arrested following an investigation into the armed robbery of the Graniteville branch of Security Federal Bank. In December of 2009, the Aiken County grand jury indicted Applicant and his brother for one count each of armed robbery. In April of 2010, the Aiken County grand jury additionally indicted Applicant and his brother for one count each of possession of a firearm during the commission of a violent crime. On September 20, 2010, a jury trial was commenced in the Aiken County court of general sessions with the Honorable Doyet A. Early, III, circuit court judge, presiding. Applicant was represented by Kelley P. Brown, Esquire. Second Circuit Solicitor J. Strom Thurmond, Jr., and Assistant Solicitor Susanna Ringler prosecuted the case. At the conclusion of trial, the jury convicted Applicant and his brother as indicted. The trial judge sentenced Applicant and his brother to concurrent terms of imprisonment of twenty-eight years for the armed robbery convictions and five years for the firearm convictions.

Subsequently, Appellant filed a timely notice of appeal and was represented on appeal by Jerry M. Screen, Esquire. Following briefing, the South Carolina Court of Appeals affirmed

Applicant's convictions and sentences. State v. Hickson, Op. No. 2012- UP- 667 (Ct. App. filed December 19, 2012). The Remittitur was issued on February 11, 2013.

First Post-Conviction Relief Action (2013-CP-02-1153)

Applicant filed his first application for post-conviction relief on May 21, 2013, alleging the following grounds for relief:

1. **Ineffective assistance of trial counsel.**
 - a. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States and South Carolina law was violated by trial counsel's failure to MOTION TO QUASH during pretrial the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause.
 - b. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States and South Carolina law was violated by trial counsel's failure to MOTION TO SUPPRESS during pretrial evidence emanating from the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause."
 - c. "The applicant's right to be free from unreasonable seizures as guaranteed by the Fourth Amendment and right to Due Process of Law as guaranteed by the Fourteenth Amendment to the United States and South Carolina law was violated by trial counsel's failure to MOTION TO DISMISS with prejudice against the State, the applicant's arm robbery and possession of a weapon during the commission of a violent crime arrest warrants because the affidavit in support of each warrant was conclusory and insufficient to establish probable cause."
 - d. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to call alibi witnesses Crystal Harris, Charles Smalls, and Tommy Parker, for the defense during applicant's criminal trial.
 - e. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and

South Carolina law was violated by trial counsel's failure to advise applicant as to the pros and cons of offering testimony and negligently advising applicant not to testify and for failing to explain to the applicant without his testimony his attempt to corroborate his alibi witness testimony would be seriously compromised."

- f. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to request a Neil -vs- Biggers Hearing due to the alleged victim's bank employee never picked the applicant out of any type of photo array or line-up procedures prior to his arrest."
- g. "The applicant's right to effective assistance of counsel as guaranteed by the Sixth Amendment and Due Process of law as guaranteed by the Fourteenth Amendment of the United States and South Carolina law was violated by trial counsel's failure to motion to strike Sabrina Oakman and Candice Patrice Bryant, trial testimony due to these witnesses reading before the jury their entire voluntary statement whereas, the statements were never offered into evidence and the trial judge neglected to make a ruling for the admission or exclusion in regards to the evidence."

Respondent made its return to the application and requested an evidentiary hearing be held. An evidentiary hearing was convened before the Honorable Edgar W. Dickson, circuit court judge, on September 11, 2015. Applicant was present alongside counsel Aimee Zmroczek, Esquire. Respondent was represented by Assistant Attorney General Daniel Gourley of the South Carolina Attorney General's Office. Following the hearing, Judge Dickson denied and dismissed the action in full. A written order of dismissal was signed by Judge Dickson on December 21, 2016, and filed with the Aiken County Clerk of Court on January 9, 2017. Applicant filed and served a motion to reconsider. Respondent filed a return in opposition to the motion. On March 14, 2017, Judge Dickson summarily denied the motion to reconsider, and this order was filed on March 17, 2017. Applicant did not file an appeal following the denial of relief. However, he is now seeking belated appellate review in these two subsequent actions.

CURRENT ACTIONS BEFORE THE COURT

Since the denial of his initial post-conviction relief application, Applicant has filed two more post-conviction relief actions, both of which are before this Court. Applicant filed a second post-conviction relief action (2019-CP-02-01521), on June 19, 2019, asserting his first PCR counsel Aimee Zmroczek failed to file an appeal of the denial of his initial PCR action and asserting he was entitled to belated appellate review. Then, while his second action was still pending, Applicant filed a third application (2020-CP-02-00640) on March 16, 2020, again asserting that initial PCR counsel failed to file an appeal from the denial of his initial PCR action and seeking belated appellate review.

In response, Respondent moved to merge these two actions into one, with the 2019 case being the surviving docket number and the 2020 action being treated as an amendment to the surviving action. Respondent also requested a hearing to determine if Applicant was entitled to belated appellate review of his initial post-conviction relief action pursuant to Austin. Attached to this return and before this Court are the records of the Aiken County Clerk of Court regarding Applicant's general sessions matter, the records from Applicant's direct appeal (including the record on appeal which contains a copy of Applicant's trial transcript), the records from Applicant's initial post-conviction relief matter, Applicant's records from the South Carolina Department of Corrections, and the records from the two current actions.

At the start of the evidentiary hearing, Respondent renewed its motion to merge the two applications, which was granted upon consent of Applicant. Accordingly, this Court finds these two actions are to be merged into one, with the 2019 case being the surviving docket number and the 2020 action being treated as an amendment to the surviving action, and instructs the Aiken

County Clerk of Court to file this order in both actions, and promptly close the 2020 action (2020-CP-02-00640).

At the evidentiary hearing, prior PCR counsel Zmroczek testified that she discussed an appeal with Applicant several times, including before and after the hearing. She elaborated that Applicant repeatedly stated he wanted to pursue an appeal from the denial of his post-conviction relief action. She stated that due to a miscommunication with her office staff, a notice of appeal was inadvertently not filed on Applicant's behalf.

Applicant next testified on his own behalf. He also testified he wanted to pursue an appeal from the denial of his post-conviction relief action and asked prior PCR counsel Zmroczek several times to file an appeal on his behalf. He stated he is seeking permission to pursue belated appellate review of the denial of his first post-conviction relief action pursuant to Austin.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court reviewed the record in its entirety and listened to the testimony provided at the evidentiary hearing. After this thorough review of the record and testimony, this Court determines Applicant has established he is entitled to seek belated appellate review of the denial of his first post-conviction relief proceeding. Specific findings of fact and conclusions of law are set forth below as required pursuant to S.C. Code Ann. § 17-27-80.

MOTION TO MERGE APPLICATIONS GRANTED

As discussed above, Applicant has filed two nearly identical applications for post-conviction relief seeking belated appellate review of the denial of his initial post-conviction relief proceeding: a second post-conviction relief action (2019-CP-02-01521), on June 19, 2019, and then, while his second action was still pending, Applicant filed a third application (2020-CP-02-00640) on March 16, 2020.

An applicant is not generally allowed to have multiple post-conviction relief proceedings in regard to the same conviction. See Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (PCR rules “contemplate adjudication on the merits of the original petition, one bite at the apple as it were.”); Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (successive applications for post-conviction relief strongly disfavored); S.C. Code Ann. § 17-27-90 (“All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application.”). Respondent moved to have the two proceedings merged and that the application for post-conviction relief filed on March 16, 2020 be considered an amendment to the application for post-conviction relief filed on June 19, 2019.

This Court grants this motion to merge the two cases, with the action filed on June 19, 2019 (docket number 2019-CP-02-01521) being the surviving case. Accordingly, this Court further orders that the application filed on March 16, 2020 (docket number 2020-CP-02-00640) be dismissed and that the filings associated therewith be considered as amendments to the 2019 application.

GRANT OF BELATED APPELLATE REVIEW

Successive applications such as the one before this court are disfavored. See S.C. Code Ann. § 17-27-90. However, Applicant alleges he was denied the right to appeal the dismissal of his previous post-conviction relief application. Inherent in this allegation is a claim that former post-conviction relief counsel was ineffective. 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). Therefore, “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90.” Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (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 provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin “is limited to its particular factual situation.” Aice, 305 S.C. at 452, 409 S.E.2d at 394.² Pursuant to Austin, an evidentiary hearing may be conducted in regards to a successive post-conviction relief application “on the issue of whether in fact the petitioner requested and was denied an opportunity to seek appellate review.” Austin, 305 S.C. at 454, 409 S.E.2d at 396. “If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding.” Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application, and may do so outside of the ordinary time limits for bringing such an appeal.

In the present case, Applicant asserts prior post-conviction relief counsel failed to file an appeal on his behalf. As summarized above, the evidence before this Court establishes Applicant did not make a knowing, voluntary, and intelligent waiver of his right to seek appellate review from the denial of his first post-conviction relief action. Accordingly, this Court finds Applicant is entitled petition the South Carolina Supreme Court for belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin.

² Aice was issued in conjunction with Austin, limiting the reach of Austin and holding “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.” 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

CONCLUSION

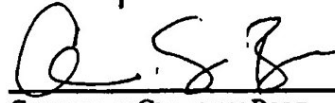
Based on the foregoing, this Court finds Applicant is entitled to seek belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin. Applicant's current PCR counsel is instructed to file a Notice of Appeal with the South Carolina Supreme Court pursuant to Rule 243, SCACR.

This Court notes Applicant must file and serve a notice of appeal within thirty days from the receipt of this order by counsel of record to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP, provides if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. Applicant's two pending PCR actions be merged, with the action filed on June 19, 2019 (docket number 2019-CP-02-01521) being the surviving case and the application filed on March 16, 2020 (docket number 2020-CP-02-00640) be dismissed and that the filings associated therewith be considered as amendments to the 2019 application;
2. Applicant remain in the custody of the South Carolina Department of Corrections; and
3. Applicant is granted the right to seek belated appellate review of the denial of his initial post-conviction relief action pursuant to Austin.

AND IT IS SO ORDERED this 10th day of September, 2021.



COURTNEY CLYBURN POPE
Presiding Judge
Second Judicial Circuit

 _____, South Carolina