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STATE OF SOUTH CAROLINA)
COUNTY OF YORK)

IN THE COURT OF COMMON PLEAS APR 26 2013
SIXTEENTH JUDICIAL CIRCUIT

Willie J. Asbury, #200788,)
Applicant,)

2012-CP-46-2911

S.C. SUPREME COURT
FILED-RECEIVED
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC
2013 MAR 28 PM 2:52

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed August 13, 2012. The Respondent (the State) made its Return and Motion to Dismiss on February 20, 2013, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated March 4, 2013, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant replied to the Conditional Order of Dismissal on March 7, 2013 and filed it on March 11, 2013.

In a document titled "Applicant(sic) Affidavit in Opposition to Respondent Motion for Summary Judgment", the Applicant first argues none of the grounds in his original PCR case has been fully adjudicated and thus, this application is not successive. The Applicant also argues he is entitled to an evidentiary hearing because his allegations are not refuted by the record. The Applicant further argues he is in possession of after-discovered evidence that the solicitor and his

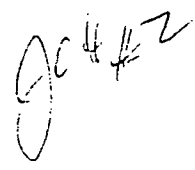
trial counsel conspired with one another to ensure the Applicant's conviction. He lastly argues Martinez v. Ryan, 132 S.Ct. 1309 (2012) entitles him to claim ineffective assistance of PCR counsel. This Court has reviewed the Applicant's response to the State's motion to dismiss in its entirety, in conjunction with the original pleadings, and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court finds the Applicant's assertion that the issues in his first PCR application have not been fully adjudicated without merit. The Applicant had a full evidentiary hearing in his 1998 case, which the presiding judge denied. [He then had a full appeal of the PCR judge's rulings.] Thus, his allegations were fully adjudicated. Additionally, the Applicant filed a Petition for Writ of Habeas Corpus in the District Court for the District Court of South Carolina, and it was fully adjudicated. Accordingly, the Applicant's issues have been presented and fully adjudicated at least twice.

This Court next finds the Applicant's argument that he is entitled to an evidentiary hearing because his allegations are not refuted by the record meritless. As explained in the procedural history in the Conditional Order of Dismissal, the record explicitly shows this application is successive to his 1998 PCR case. This current application is also filed well beyond the statute of limitations.

This Court also finds his claim of after-discovered evidence meritless. First, the Applicant provides no proof that the solicitor and trial counsel conspired with one another to ensure the Applicant's conviction. Further under § 17-27-45(c), the Applicant has failed to show when he discovered this alleged evidence or that he filed within a year of when he discovered or should have discovered this evidence by due diligence.

Further, the Applicant's assertion that Martinez v. Ryan allows him to file a successive PCR



application to allege ineffective assistance of counsel against PCR counsel is meritless. Martinez has no bearing on an Applicant's ability to raise ineffective assistance of collateral counsel claims in a subsequent, successive state PCR application. Rather, Martinez sets forth a narrow exception to the procedural default rules imposed on federal habeas corpus petitions when considered under the so-called "cause and prejudice" standard. See Coleman v. Thompson, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."). The Martinez Court used this standard as the foundation for its decision, finding that attorney error amounting to ineffective assistance of counsel during an initial-review collateral proceeding may be sufficient "cause" to excuse a prisoner's procedural default in a federal habeas corpus proceeding. See Martinez, *supra* at 6 ("Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.").

With this framework in mind, it is clear Martinez has no application to successive state PCR actions, as the fundamental "cause and prejudice" standard on which Martinez relies is exclusive to federal habeas corpus actions. Further, the Martinez Court specifically noted that their decision was **not** addressing ineffective assistance of counsel claims raised in subsequent state PCR actions, opining "[t]his is not the case, however, to resolve whether [an exception to the constitutional rule that there is no right to counsel in collateral proceedings] exists as a constitutional matter." Id. Therefore, Applicant's contention that Martinez allows him to bring this untimely and successive

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state PCR application is misguided and erroneous.

The Applicant has shown no reason why these issues were not raised in his first PCR application. Further, S.C. Code § 17-27-90 states “[a]ll 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.” Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

The Applicant has also shown no reason why these issues were not raised within the statute of limitations for filing a PCR application pursuant to S.C. Code. § 17-27-45(a). S.C. Code Ann. §17-27-45(a) reads 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 upon an appeal, whichever is later.

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). The Applicant was convicted of the offense(s) he challenges in this Application on September 9, 1993. The Remittitur was sent following the Applicant's unsuccessful appeal on December 4, 1997. Therefore, the Applicant had to file his application by December 5, 1998. This Application was filed on August 13, 2012, which was over thirteen (13) years after the statutory filing period had expired.

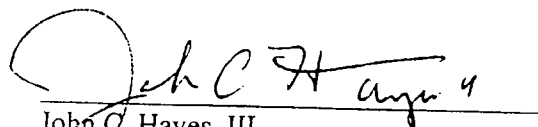
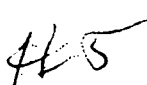
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Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

This Court hereby notifies the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 25th day of March, 2013.


John C. Hayes, III
Chief Administrative Judge
Sixteenth Judicial Circuit 

York, South Carolina.

Date: April 24th, 2013

Daniel Shearouse, Clerk of Court
S.C. Supreme Court
P.O. Box 11330
Columbia, South Carolina 29211

Re: P. C. R. Appeal
CIA NO. 2012-CP-46-2411

Dear Honorable Clerk:

Enclosed please find one (1) copy of Appellant
order of dismissal, filed in the above cited
action.

I failed to include the order of dismissal
when I mailed the notice of appeal on April
23rd, 2013.

My apology for any inconvenience, your assist-
ance in this matter would be greatly appreciated.

Respectfully submitted,

Willie Asberry

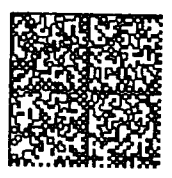
William Asbury 302388 W.A. 188
BACI-4460 Broad River Rd.
Columbia, South Carolina 29910

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South Carolina Supreme Court
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