

RECEIVED

Mar 13 2023

S.C. SUPREME COURT

EXHIBIT

A

From: [Summer Etheredge](#)
To: [Flynn, Sean](#)
Subject: RE: [External] RE: Edward Kirk
Date: Tuesday, January 10, 2023 12:20:40 PM
Attachments: [image001.png](#)

Hey,

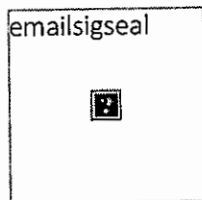
After researching this, it looks like a transcript wasn't ordered until after the 5 year retention period which was too late. You can try and reach out to SGJ, but I can not confirm or deny if they would have it.

Let me know what you come up with.

Thanks!

SUMMER ETHEREDGE, Legal Assistant
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-2567
P.O. Box 11549 | Columbia, SC 29211

Rembert C. Dennis Building
1000 Assembly Street
Columbia, SC 29201
[Scag.gov](#)



From: Flynn, Sean <sflynn@sccid.sc.gov>
Sent: Tuesday, January 10, 2023 12:13 PM
To: Summer Etheredge <SummerEtheredge@scag.gov>
Subject: RE: [External] RE: Edward Kirk

Do you think maybe the State Grand Jury office might have that transcript?

From: Flynn, Sean
Sent: Tuesday, January 10, 2023 12:11 PM
To: Summer Etheredge <SummerEtheredge@scag.gov>
Subject: RE: [External] RE: Edward Kirk

Thank you very much. Hmmm no GP or trial transcript? Page 2 of 3 of the Order says "Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman". Was this hearing not

transcribed somehow?

From: Summer Etheredge <SummerEtheredge@scag.gov>

Sent: Tuesday, January 10, 2023 11:57 AM

To: Flynn, Sean <sflynn@sccid.sc.gov>

Subject: [External] RE: Edward Kirk

Good morning!

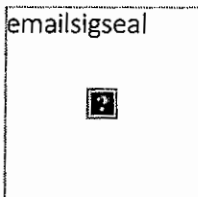
Please see the requested attached documents. There was no transcript for this case.

Should you need anything further, please advise.

Thanks!

SUMMER ETHEREDGE, Legal Assistant
South Carolina Attorney General's Office
Post-Conviction Relief | Office 803-734-2567
P.O. Box 11549 | Columbia, SC 29211

Rembert C. Dennis Building
1000 Assembly Street
Columbia, SC 29201
Scag.gov



From: Flynn, Sean <sflynn@sccid.sc.gov>

Sent: Monday, January 9, 2023 1:35 PM

To: Summer Etheredge <SummerEtheredge@scag.gov>

Subject: Edward Kirk

Good afternoon,

Attached is the document request for the above named individual. Thank you for your time and help regarding this matter. Please let me know if you need anything further from me to complete this request. I look forward to hearing back from you.

Sean Flynn
Administrative Coordinator
SCCID/Appellate Division
(803) 734-1330

EXHIBIT

B

From: [White, Della](#)
To: [Gilliam, Taylor](#)
Cc: [Leverett, Scott](#)
Subject: FW: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161
Date: Monday, March 13, 2023 8:39:22 AM

Please see below.

From: Transcripts <transcripts@sccourts.org>
Sent: Thursday, January 12, 2023 4:26 PM
To: White, Della <dwhite@sccid.sc.gov>; Transcripts <transcripts@sccourts.org>
Subject: RE: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

I cant find anything regarding the matter with Mr. Kirk. If the court reporter produced the transcript, it has probably been destroyed at this point per Rule 607.
You may want to contact the AG's office and see if they can send you a copy of the transcript.

Thank you.

Tammie M. Holmes
Court Reporter Manager
South Carolina Judicial Branch
1220 Senate Street, Ste. 200
Columbia, SC 29201
tholmes@sccourts.org
803-734-1825

From: White, Della <dwhite@sccid.sc.gov>
Sent: Thursday, January 12, 2023 4:08 PM
To: Transcripts <transcripts@sccourts.org>
Subject: RE: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

No, the AG's office would have ordered it. We need it for the PCR case.

Hope this helps. Please let me know. Thank you.

From: Transcripts <transcripts@sccourts.org>
Sent: Thursday, January 12, 2023 4:00 PM
To: White, Della <dwhite@sccid.sc.gov>; Transcripts <transcripts@sccourts.org>
Subject: [External] RE: Edward Kirk 2015-GS-40-04155, 4156, 4161

Good afternoon Della.

Do you know when this transcript was ordered?

Thank you.

Tammie M. Holmes
Court Reporter Manager
South Carolina Judicial Branch
1220 Senate Street, Ste. 200
Columbia, SC 29201
tholmes@sccourts.org
803-734-1825

From: White, Della <dwhite@sccid.sc.gov>
Sent: Thursday, January 12, 2023 2:32 PM
To: Transcripts <transcripts@sccourts.org>
Subject: Edward Kirk 2015-GS-40-04155, 4156, 4161

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good afternoon,

We are looking for a Guilty Plea transcript dated June 28, 2016 before Jocelyn Newman in Richland Co. in the above case.

Thank you,

Della White
South Carolina Commission on Indigent Defense
1330 Lady Street
Columbia, South Carolina 29201

This communication and any attachment thereto is intended only for use by the addressee(s) named herein, and may contain legally privileged and/or confidential information. If you are not the intended recipient of this e-mail, you are hereby notified that any dissemination, utilization, distribution or copying of this e-mail, and any attachments thereto, is strictly prohibited. If you have received this e-mail in error please notify the Commission on Indigent Defense immediately and permanently delete the original and any copy of any e-mail and any printout thereof. SCCID may be reached by using the email address of the sender, or at 803-734-1343.

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or

# EXHIBIT

C

FORM 5

STATE OF SOUTH CAROLINA )

COUNTY OF RICHLAND )

EDWARD KIRK )

Full name and prison number (if any) of Applicant. )

v. )

State of South Carolina )

IN THE COURT OF COMMON PLEAS

2021CP400 2769

APPLICATION FOR

POST-CONVICTION RELIEF

2021 JUN -8 AM 9:30

RICHLAND COUNTY

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legally handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention \_\_\_\_\_ McCormick Correctional Institution
2. Name and location of Court which imposed sentence Richland County Judicial Center
3. Name(s) of co-defendant(s) (if any) \_\_\_\_\_
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 2015 G540 04155 (Pointing and Presenting)
  - (b) 2015 G540 04156 (Arm Robbery)
  - (c) 2015 G540 04161 (Kidnapping)
5. The date upon which sentence was imposed and the terms of the sentence:
  - (a) 6/28/16
  - (b) 6/28/16

(c) 2015 G540 04161 (6/28/16)

6. Check whether a finding of guilty was made:
- (a) after a plea of guilty \_\_\_\_\_
  - (b) after a plea of not guilty \_\_\_\_\_
  - (c) after a plea of nolo contendere \_\_\_\_\_
7. Did you appeal from the judgment of conviction or the imposition of sentence?  
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
    - i. South Carolina Court of Appeals
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (b) the result in each such Court to which you appealed:
    - i. The Applicant recently found out his pro se appeal was not filed
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (c) the date of each such result:
    - i. n/a
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
  - (d) if known, citations of any written opinion or orders entered pursuant to such results:
    - i. n/a
    - ii. \_\_\_\_\_
    - iii. \_\_\_\_\_
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) \_\_\_\_\_
  - (b) \_\_\_\_\_
  - (c) \_\_\_\_\_
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(A) Was the Applicant denied Appellate Counsel on direct review

(B) Was plea counsel ineffective for failure to file a timely appeal on direct review

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(A) The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them.

(B) The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant.

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) \_\_\_\_\_
- (b) \_\_\_\_\_
- (c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? n/a
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? n/a
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? n/a
- (d) any other petitions, motions or applications in this or any other Court? n/a

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
  - i. n/a
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (b) the name and location of the Court in which each was filed:
  - i. n/a
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
  - iv. \_\_\_\_\_
- (c) the disposition thereof:
  - i. n/a
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

- iv. n/a
  - (d) the date of each such disposition:
    - i. n/a
    - ii. n/a
    - iii. n/a
    - iv. n/a
  - (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
    - i. n/a
    - ii. n/a
    - iii. n/a
    - iv. n/a
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?  
n/a
15. If you answered "yes" to (14) identify:
  - (a) which grounds have been presented:
    - i. n/a
    - ii. n/a
    - iii. n/a
  - (b) the proceedings in which each ground was raised:
    - i. n/a
    - ii. n/a
    - iii. n/a
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
  - (a) n/a
  - (b) n/a
  - (c) n/a
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? \_\_\_\_\_
- (b) your trial, if any? \_\_\_\_\_
- (c) your sentencing? \_\_\_\_\_
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? was denied Appellate Counsel
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? \_\_\_\_\_

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
  - i. Anna Good
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Plea and sentencing
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

Reduction of sentence and/or trial

20. Are you now under sentence from any other court that you have not challenged?

n/a

STATE OF SOUTH CAROLINA )

County of )

VERIFICATION )

Edward Kirk

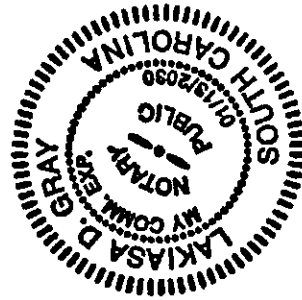
I, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

*Edward Kirk*

SWORN to and subscribed before me this 26<sup>th</sup>  
day of May, 2021

*Lakisha D. Gray* (L.S.)  
Notary Public

My Commission Expires: 01/13/30



2021 JUN -8 AM 9:30  
JEANETTE A. BURKE  
CLERK S.C.S.

REC'D JUN 8 2021

APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

Edward Kirk

I, \_\_\_\_\_, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

*Edward Kirk*

Applicant

SWORN or affirmed to and subscribed before me this  
*21st* day of *May*, 2021

*Lakiasa D. Gray*  
Notary Public

My Commission Expires: *01/13/30*



2021 JUN -8 AM 9:30  
JEANETTE M. BRIDE  
S.E.C. & S.S.

FILED IN 2021 JUN 8 AM 9:30

# EXHIBIT

D

|                             |                                               |
|-----------------------------|-----------------------------------------------|
| STATE OF SOUTH CAROLINA )   | IN THE COURT OF COMMON PLEAS                  |
| COUNTY OF RICHLAND )        | FOR THE FIFTH JUDICIAL CIRCUIT                |
| Edward Kirk, Jr., #368801 ) | 2021-CP-40-2769                               |
| Applicant )                 |                                               |
| v. )                        | <b>RETURN &amp; PARTIAL MOTION TO DISMISS</b> |
| State of South Carolina, )  | <b>(Counsel Appointed)</b>                    |
| Respondent )                |                                               |

---

In response to Applicant, Edward Kirk, Jr.’s action for post-conviction relief (PCR) commenced June 8, 2021, Respondent, the State of South Carolina, makes the following return and moves to dismiss the application as untimely pursuant to S.C. Code Ann. § 17-27-45. Respondent respectfully offers the following in support of its return and motion to dismiss:

**I. PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson of the Fifth Circuit Solicitor’s Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to recommendation by the state to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

## II. CURRENT APPLICATION

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
  - a. "The Applicant had filed a pro se appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
  - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

Attached to this return and incorporated herein are the Richland County Clerk of Court records, Applicant's SCDC records, and the records of this PCR action. Respondent reserves the right to amend this return upon receipt of any relevant materials.

## III. RESPONSE TO *WHITE* CLAIM

Respondent interprets Applicant's claims as requesting relief pursuant to *White v. State*, 263 S.C. 110, 208 S.E.2d 35 (1974). Respondent submits the allegation that counsel was ineffective for failing to file a direct appeal is without merit. As an initial matter, this application for post-conviction relief was filed outside of the one-year statute of limitation outlined in the Uniform Post-Conviction Procedure Act. S.C. Code §17-27-45(A) (1976). However, the one-year limitations period in which to file a petition for post-conviction relief does not apply where the defendant alleges he was denied a direct appeal due to ineffective assistance of counsel. *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002). Therefore, Respondent submits Applicant's allegations

should be dismissed unless he can establish a legitimate basis to prove he did not timely file based on a belief an appeal was pending.

The decision of the South Carolina Supreme Court, in *White* holds even though the post-conviction relief court finds the applicant had never voluntarily and intelligently abandoned his appeal, the court has no jurisdiction to grant a belated appeal. However, where an accused establishes in a post-conviction relief hearing that he was unconstitutionally deprived of his statutory right to a direct appeal, the South Carolina Supreme Court, upon an appeal of the post-conviction relief decision, will review the trial record and pass upon all issues properly raised and argued as if the direct appeal has been perfected. *Id.* at 119, 108 S.E.2d at 39-40.

Following a trial, counsel is required to make certain the defendant is made fully aware of the right to appeal. *Turner v. State*, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (internal citations omitted). In the absence of an intelligent waiver by the defendant, counsel must either initiate an appeal or comply with the procedure in *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). *Id.* However, the standard for a guilty plea differs. Absent extraordinary circumstances, such as when there is reason to think a rational defendant would want to appeal (for example, because there are non-frivolous grounds for appeal) or when the defendant reasonably demonstrated an interest in appealing, there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea. *Id.*

Respondent submits Applicant cannot show any “extraordinary circumstances” were present at the time of the plea, which would trigger plea counsel’s duty to consult with Applicant about his right to appeal. Applicant’s allegations as pled are additionally conflicting and contradictory. Applicant claims he both filed a *pro se* notice of appeal requesting the appointment of appellate counsel, in addition to alleging he asked plea counsel to timely file for direct review.

It is therefore unclear to Respondent exactly in what way Applicant believes counsel was ineffective for failing to file an appeal when Applicant stated he filed a *pro se* notice of appeal himself. However, the allegation regarding a belated direct appeal may raise a question of fact which is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing solely on this allegation. *Sharper v. State*, 305 S.E.2d 247.

#### IV. PARTIAL MOTION TO DISMISS

Respondent submits Applicant's allegations, except for claim that he is entitled to belated appellate review of direct appeal issues pursuant to *White v. State*, 263 S.C. 110, S.E.2d 35 (1974), should 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:

(A) 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.

(B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

(C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45.

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). Additionally, 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 pled guilty on June 28, 2016, and did not pursue a direct appeal. Therefore, the PCR application should have been filed on June 28, 2017. However, this application was filed on June 8, 2021, almost three years after the statutory filing period had expired. Moreover, Applicant has completely failed to provide any specific facts to support his claims. Respondent requests that this Court summarily dismiss the remaining allegations, except for the claims of a belated direct appeal, for failure to file within the time mandated by the Uniform Post-Conviction Procedure Act.

A *White* claim alleges that an applicant wanted or would have wanted an appeal of his conviction or sentence and did not receive appellate review of his conviction or sentence due to a failure of his counsel. *White*, 263 S.C. 110, 208 S.E.2d 35. If a factual dispute exists as to whether an applicant knowingly and intelligently waived his right to appeal his conviction or sentence, he has the right to an evidentiary hearing on that issue. *Id.* at 119, 208 S.E.2d at 39. Further, *Wilson* holds an applicant has the right to that evidentiary hearing, on a *White* claim, even if the PCR application was filed beyond the statute of limitations. *Wilson*, 348 S.C. at 218, 559 S.E.2d at 582.

Should the Court find that Applicant did not timely file his PCR application based on an error with Applicant’s direct appeal, Respondent requests Applicant establish circumstances sufficient to support equitable tolling for his application. Our courts have held that “statutes of

limitations are not simply technicalities, but are fundamental to a well-ordered judicial system.”

*Moates v. Bobb*, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). *Moates* explained:

Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs. One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his rights. Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation.

*Id.*

In rare circumstances, the statute of limitations will be equitably tolled to allow a petitioner the opportunity to exercise his or her rights when they were denied the chance to do so. This doctrine has been specifically extended into the context of post-conviction relief cases, as well. Equitable tolling has been deemed available where: (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim. *Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619-20 (Ct. App. 2008). *Pelzer* further explained the doctrine should be limited to very exclusive circumstances. “[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 620.

This Court has held that the statute of limitations should be equitably tolled for the filing of a post-conviction relief application in limited circumstances. *See Ferguson v. State*, 382 S.C.

615, 677 S.E.2d 600 (2009) (finding the statute of limitations should be equitably tolled when a mentally incompetent PCR applicant was prevented from timely filing by his mental incompetency, and the applicant should proceed with his PCR action only if the application was filed within one year of the applicant regaining competency); *Mose v. State*, 420 S.C. 500, 803 S.E.2d 718 (2017) (allowing equitable tolling where the applicant notarized and relinquished control of his application to prison authorities for mailing seventeen days prior to the filing deadline, but due to circumstances outside applicant's control, the application was not filed until three days past the deadline). Consequently, equitable tolling has also been allowed where “extraordinary circumstances prevented the plaintiff from filing despite his or her diligence” and where “the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.” *Pelzer*, 378 S.C. at 521, 662 S.E.2d at 621.

In the present case, Respondent submits there are no extraordinary circumstances present to warrant tolling of the statute of limitations. Applicant had a full year to submit a post-conviction petition, and ignorance of the statute of limitations is not an excuse for late filing. *See Leamon v. State*, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005). However, should Applicant establish he is entitled to equitable tolling of the statute of limitations, Respondent requests Applicant, through counsel, provide specific claims and facts to support the remaining vague allegation in his application. Should it be necessary, Respondent further requests an evidentiary hearing to fully resolve the remaining issues and will file an amended return to address the merits of Applicant’s underlying claims. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983).

#### **V. ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY**

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been

appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to *Love v. State*, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, Respondent will request a continuance in the matter. *See id.* at 245, 834 S.E.2d at 203 (Kittredge, J., dissent) (“If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.”).

Pursuant to section 17-27-150 of the South Carolina Code, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Further, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. As noted above, Respondent reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State. *See Love*, 428 S.C. 231, 834 S.E.2d 196.

## **VI. ALL OTHER CLAIMS**

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

VII. REQUEST FOR AN EVIDENTIARY HEARING

WHEREFORE, Respondent requests an evidentiary hearing solely to address the issue of whether Applicant is entitled to belated appeal pursuant to *White*.

Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

YASMEEN E. KLEIN  
Assistant Attorney General

By: Yasmeen E. Klein  
ATTORNEYS FOR RESPONDENT  
Office of the Attorney General  
Post Office Box 11549  
Columbia, SC 29211

August 13 2021

# EXHIBIT

E

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Edward Kirk, Jr., #368801

Applicant,

v.

State of South Carolina,

Respondent.

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT  
)

) CASE NO. 2021-CP-40-2769  
)

) **CONSENT ORDER GRANTING  
) BELATED APPELLATE REVIEW  
) PURSUANT TO WHITE v. STATE**  
)

RICHLAND COUNTY  
FILED  
2022 DEC 16 AM 9:55  
COURT CLERK  
COURT REPORTER

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed June 8, 2021. Respondent made its Return on August 18, 2021. An evidentiary hearing on the matter was scheduled for November 15, 2021, at the Richland County Courthouse. Prior to the commencement of the hearing, counsel for the Applicant, Jonathan Waller, Esquire, and counsel for the Respondent, D. Russell Barlow, II, Esquire, of the South Carolina Office of the Attorney General, informed the court that the parties had reached a consent resolution to the matter and presented the proposed resolution to the court. This Order follows.

The Court had before it the Richland County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's application, and Respondent's return.

**PROCEDURAL HISTORY**

Applicant is presently confined in the South Carolina Department of Corrections (SCDC). During the August 2015 term, the Richland County Grand Jury indicted Applicant for armed robbery (2015-GS-40-4155), pointing and presenting firearms at a person (2015-GS-40-4156), and kidnapping (2015-GS-40-4161). Anna R. Good, Esquire, represented Applicant. April Sampson

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of the Fifth Circuit Solicitor's Office prosecuted the case.

Applicant pled guilty on June 28, 2016, before the Honorable Jocelyn Newman. Judge Newman sentenced Applicant pursuant to a recommendation by the State, to sixteen years imprisonment for armed robbery, five years for pointing and presenting a firearm, and sixteen years for kidnapping, to run concurrently. Applicant alleges he submitted a *pro se* appeal.

### ALLEGATIONS

In his application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. "Was the Applicant denied Appellate Counsel on direct review"
  - a. "The Applicant had filed a *pro se* appeal to the South Carolina Court of Appeals. The Applicant also wrote a letter to the South Carolina Commission on indigent defense requesting for the appointment of counsel on direct appeal. The Applicant had not received any response from them."
2. "Was plea counsel ineffective for failure to file a timely appeal on direct review"
  - a. "The Applicant had informed plea counsel to file a notice of appeal upon information and belief the Applicant family member had recently informed him that the South Carolina Court of Appeals had informed them that there was no appeal pending for the Applicant."

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant alleges Counsel failed to file an appeal of his guilty plea after Applicant requested Counsel to do so. The State has consented to Applicant receiving a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974). Therefore, based on the foregoing, this Court finds Applicant is entitled to a belated direct appeal pursuant to White, and grants relief in the form of a belated appeal only.

The Court notes Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate

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review. See Rule 203, SCACR. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

1. The Court grants Applicant a belated appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35, (1974); and
2. Applicant shall be remanded to the custody of the State.

**AND IT IS SO ORDERED** this 17 day of November, 2022.



D. CRAIG BROWN  
Presiding Judge  
Fifth Judicial Circuit

Columbia, South Carolina.

*DCB  
11/17/22*