

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

HARSHAW Justin, 296250,)

2009CP4004442

JEANETTE W. McBRIDE
C.C.P. & S.S.

2010 NOV 18 PM 2:49

RICHLAND COUNTY
FILED

Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)

This matter comes before this Court by way of an application for post-conviction relief filed June 24, 2009. Respondent made its *Return and Motion to Dismiss* on or about August 23, 2010, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and/or any available relevant records attached thereto, this Court issued a Conditional Order of Dismissal (COD) 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 Conditional Order of Dismissal was served on this Applicant on or about September 30, 2010.

[Image inserted on next page]

SCANNED

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRCP, the Director of the South Carolina Department of Corrections has designated W. Hampugh (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

Justin Harshaw

STATE OF SOUTH CAROLINA) AFFIDAVIT OF PERSONAL SERVICE
COUNTY OF)

On this 30 day of September, 2010, I served the signed Conditional Order of Dismissal on Inmate 296250, SCDC Inmate No. _____, by delivering personally and leaving a copy of the same at Turbeville Correctional Institution, Turbeville, South Carolina. Deponent is not a party to this action.

s/ W. Hampugh
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 30th day of September, 2010
Charlene J. H. Stief (L.S.)

Notary Public for South Carolina

My Commission Expires: May 30, 2018

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Turbeville Correctional Institution, Turbeville, Clarendon County, South Carolina, this 30 day of September, 2010.

s/ Justin Harshaw
Inmate Signature
SCDC No. 296250

List case number here

2009-cp-40-4442

In a document captioned "Reply to Conditional Order of Dismissal" and dated September 7, 2010, the Applicant argues that:

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
JUSTIN HARSHAW #296250,)	
APPLICANT,)	2009-CP-400-4442
)	
)	
V.)	
)	REPLY TO CONDITIONAL ORDER
)	OF DISMISSAL
STATE OF SOUTH CAROLINA,)	
RESPONDENT.)	

THIS MATTER NOW COMES BEFORE THE COURT PURSUANT TO AN APPLICATION FOR POST CONVICTION RELIEF FILED JUNE 24, 2009.

I. PROCEDURAL HISTORY

THE APPLICANT IS PRESENTLY CONFINED IN THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS PURSUANT TO ORDERS OF COMMITMENT OF THE RICHLAND COUNTY CLERK OF COURT. THE APPLICANT WAS INDICTED AT THE DECEMBER 2001 TERM OF THE GRAND JURY FOR RICHLAND COUNTY FOR ONE (1) COUNT OF ASSAULT AND BATTERY WITH INTENT TO KILL (2001-GS-40-9361), AND ONE (1) COUNT OF ATTEMPTED ARMED ROBBERY (2001-GS-40-9360). THE APPLICANT WAS REPRESENTED BY JACK SWERLING, ESQ. ON SEPTEMBER 4, 2003, THE APPLICANT PLED GUILTY AS INDICTED AND WAS SENTENCED BY THE HONORABLE G. THOMAS COOPER, Jr., TO TWENTY YEARS CONFINEMENT. PLEA COUNSEL, MR. SWERLING FAILED TO FILE A NOTICE OF INTENT TO APPEAL AS AGREED UPON BETWEEN CLIENT AND COUNSEL.

IN MAKING ITS DECISION THE COURT HAD BEFORE IT THE RECORDS OF THE RICHLAND COUNTY CLERK OF COURT REGARDING THE SUBJECT CONVICTIONS, THE APPLICANT'S RECORDS FROM THE SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, AND THE GUILTY PLEA TRANSCRIPT.

IN APPLIANT'S CURRENT APPLICATION FOR POST CONVICTION RELIEF, THE APPLICANT ALLEGES THAT HE IS BEING HELD IN CUSTODY UNLAWFULLY FOR THE FOLLOWING REASONS:

- 1) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL; AND
- 2) VIOLATION OF PROCEDURAL DUE PROCESS OF LAW.

THE APPLICANT HAS FURTHER ADDED LANGUAGE ALLEGING COUNSEL WAS DEFICIENT FOR FAILING TO FILE A NOTICE OF INTENT TO APPEAL.

RESPONDENT NOW URGES THE COURT TO DENY APPLICANT A HEARING UPON THE INEFFECTIVE OF ASSISTANCE OF TRIAL COUNSEL CLAIM AND ONLY AGREES TO GRANT A HEARING UPON THE ISSUE OF A BELATED APPEAL. WHITE V. STATE, 263 S.C. 110, 108 S.E. 2d 35 (1974), ARGUING THAT APPLICANT SHOULD NOT BE ALLOWED TO BRING ANY OTHER CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. FOR THE REASONS BELOW APPLICANT BELIEVES HE IS ENTITLED TO A HEARING THAT COUNSEL WAS WHOLLY INEFFECTIVE IN FAILING TO MOTION THE COURT TO QUASH THE INDICTMENT WHERE THE INDICTMENT FOR ATTEMPTED ARMED ROBBERY CONTAINED LANGUAGE CHARGING APPLICANT WITH TWO SEPERATE CHARGES IN THE BODY OF A ONE (1) COUNT INDICTMENT. THE INDICTMENT FOR ATTEMPTED ARMED ROBBERY ALSO CONTAINS LANGUAGE CHARGING APPLICANT FOR LARCENY.

AT A COURT OF GENERAL SESSIONS, CONVENED ON DECEMBER 12, 2001 THE GRAND JURORS OF RICHLAND COUNTY PRESENT UPON THIER OATH:

ATTEMPTED ARMED ROBBERY

THAT JUSTIN JAVON HARSHAW DID IN RICHLAND COUNTY ON OR ABOUT OCTOBER 19, 2001 ATTEMPT TO COMMIT ROBBERY BY FELONIOUSLY TAKING FROM THE PERSON OR PRESENCE OF KENNY BURNS BY MEANS OF FORCE OR INTIMIDATION GOODS OR MONIES OF KENNY BURNS SUCH GOODS OR MONIES BEING DESCRIBED AS U.S. CURRENCY, WITH THE INTENT TO DEPRIVE THE OWNER PERMANENTLY OF SUCH PROPERTY, WHILE ARMED WITH A PISTOL, DIRK, SLINGSHOT

METAL KNUCKLES, RAZOR, OR OTHER DEADLY WEAPON, OR WHILE ALLEGING, EITHER BY ACTIONS OR WORDS, THAT HE WAS ARMED WHILE USING A REPRESENTATION OF A DEADLY WEAPON OR ANY OBJECT WHICH A PERSON PRESENT DURING THE COMMISSION OF THE ROBBERY REASONBLY BELIEVED TO BE A DEADLY WEAPON.

PURSUANT TO STATE V. PARKER, 343 S.E.2d 255 (2001), TWO SEPERATE OFFENSES CANNOT, ORDINARILLY, BE CHARGED IN A SINGLE COUNT INDICTMENT UNLESS ONE OFFENSE IS A LESSER-INCLUDED OFFENSE OF THE OTHER.

IT IS THE APPLICANT'S POSITION THAT LARCENY IS NOT A LESSER-INCLUDED OFFENSE OF THE CRIME OF ATTEMPTED ARMED ROBBERY AND THERE SHOULD NOT HAVE BEEN INCLUDED IN THE LANGUAGE OF THE INDICTMENT CHARGING APPLICANT FOR ATTEMPTED ARMED ROBBERY. IN SO DOING DIVESTED THE CIRCUIT COURT OF SUBJECT MATTER JURISDICTION TO ACCEPT APPLICANT'S PLEA TO THE CHARGE OF ATTEMPTED ARMED ROBBERY. AS SUCH A HEARING MUST BE AFFORDED TO THE APPLICANT ON THE ISSUE THAT PLEA COUNSEL WAS WHOLLY INEFFECTIVE IN NOT MOVING THE CIRCUIT TO QUASH THE INDICTMENT PRIOR TO THE PLEA AND FOR ALLOWING THE APPLICANT TO PLEAD TO SUCH AN INDICTMENT. ESPECIALLY CONSIDRING THAT COUNSEL IS MORE THAN COMPETANT IN THE FIELD OF CRIMINAL LAW AND CONSIDERING THE AMOUNT OF MONEY COUNSEL WAS BEING PAID TO FAIRLY REPRESENT ME ON THESE CHARGES.

AN INDICTMENT SUFFICIENTLY CHARGES A PARTICULAR OFFENSE WHEN IT APPRISES THE DEFENDANT OF THE ELEMENTS OF THE OFFENSE INTENDED TO BE CHARGED AND INFORMS THE DEFENDANT OF THE CIRCUMSTANCES HE MUST BE PREPARED TO DEFEND. CODE SECTION 17-19-20.

THE COURT OF APPEALS APPLIES THE INDICTMENT SUFFICIENCY TEST WITH A PRACTICAL EYE TO DETERMINE IF THE DEFENDANT WAS PREJUDICED BY THE CONTENT OF THE INDICTMENT. CODE SECTION 17-19-20.

A SINGLE COUNT INDICTMENT CHARGING APPLICANT WITH ATTEMPTED ARMED ROBBERY WAS INSUFFICIENT WHEN IT ALSO CONTAINED LANGUAGE APPRISING APPLICANT OF LARCENY. SEE INDICTMENT. BECAUSE LARCENY OR GRAND LARCENY HAS THE ELEMENT OF "IN EXCESS OF ONE THOUSAND DOLLARS" IT IS NOT A LESSER-INCLUDED OFFENSE OF ATTEMPTED ARMED ROBBERY, WHICH HAS NO MONETARY ELEMENT.

THE TEST FOR DETERMINING IF A CRIME IS A LESSER-INCLUDED OFFENSE IS WHETHER THE GREATER OF THE TWO OFFENSES INCLUDES ALL THE ELEMENTS OF THE LESSER OFFENSE.

A TRIAL COURT ACQUIRES SUBJECT MATTER JURISDICTION TO HEAR A CRIMINAL CASE BY WAY OF A LEGALLY SUFFICIENT INDICTMENT OR A VALID WAIVER THEREOF. STATEV. JOHNSTON, S.C. 459 S.E.2d 423 (1999). THE SCOPE OF THE JURISDICTION CONFERRED BY AN INDICTMENT IS LIMITED TO THE CHARGED OFFENSE AND ANY LESSER-INCLUDED OFFENSES. STATE V. GUNN, 313 S.C. 124, 437 S.E.2d 75 (1993); STATE V. - TYNDALL, 336 S.C. 8, 518 S.E.2d 278 (Ct.App.1999). DISTINCT OFFENSES MAY BE CHARGED IN SEPERATE COUNTS OF THE SAME INDICTMENT. STATE V. JONES, 325 S.C. 310 479 S.E.2d 517 (Ct. App. 1996)(CITING STATE V. WHITENER, 228 S.C. 244, 89 S.E. 2d 701 (1955)). HOWEVER TWO SEPERATE OFFENSES CANNOT, ORINARILY, BE CHARGED IN A SINGLE-COUNT INDICTMENT UNLESS ONE IS A LESSER-INCLUDED OFFENSE OF THE OTHER. STATE V. FENNELL, 263 S.C. 216, 209 S.E.2d 433 (1974).

AN INDICTMENT SUFFICIENTLY CHARGES A PARTICULAR OFFENSE WHEN "IT APPRISES THE DEFENDANT OF THE ELEMENTS OF THE OFFENSE INTENDED TO BE CHARGED AND INFORMS THE DEFENDANT OF THE CIRCUMSTANCES HE MUST BE PREPARED TO DEFEND." LOCKE V. STATE, 341 S.C. 54, 56 S.E.2d 324, 325 (200) (CITING GRANGER V. STATE, 333 S.C. 2, 507 S.E.2d 322 (1998)). AN INDICTMENT MUST: (1) ENUMERATE ALL ELEMENTS OF THE CHARGED OFFENSE, REGARDLESS OF WHETHER IT IS A STATUTORY OR COMMON LAW OFFENSE, AND (2) RECITE THE FACTUAL CIRCUMSTANCES UNDER WHICH THE OFFENSE OCCURED. SEE S.C. CODE ANN; SECTION 17-19-20 (1985); STATE V. EVANS, 322 S.C. 78, 470 S.E.2d

97 (1996). THE SOUTH CAROLINA SUPREME COURT HAS INSTRUCTED THE LOWER COURTS TO APPLY "THE INDICTMENT SUFFICIENTCY TEST WITH THE PRATICLE EYE" TO DETERMINE IF THE DEFENDANT WAS PREJUDICED BY THE CONTENT OF THE INDICTMENT. STATE V. ADAMS, 277 S.C. 115, 125 S.E.2d 315 (1991).

HERE THE INDICTMENT SUB JUDICE APPEARS TO BE SUFFICIENT AS THE TEXTUAL PORTION OF THE INDICTMENT SETS FORTH THE ELEMENTS OF BOTH ARMED ROBBERY AND GRAND LARCENY WHILE ALSO, SOMEWHAT, PROVIDING AN ACTUAL BASIS FOR THE OFFENSES. HOWEVER, SEPERATE OFFENSES CANNOT BE CHARGED IN A SINGLE COUNT INDICTMENT UNLESS ONE IS A LESSER-INCLUDED OFFENSE OF THE OTHER. FENNELL, 263 S.C. AT 219, 209 S.E.2d AT 434.

CONCLUSION

FOR THE FORGOING REASONS APPLICANT BELIEVES THAT HE IS ENTITLED TO BRING FORTH THIS CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL RESULTING IN THE CIRCUIT COURT BEING DIVESTED OF SUBJECT MATTER JURISDICTION TO ACCEPT APPLICANT'S PLEA OF GUILTY. FURTHERMORE, PREMISES CONSIDERED, THE RESPONDENT SHOULD NOT BE ALLOWED TO APPLY STATE V. GENTRY, SUPRA, TO THIS CASE. GENTRY, WAS NOT APPLIED RETRO- ACTIVELY. APPLICANT WAS CONVICTED IN 2003. GENTRY, DID NOT COME DOWN FROM THE SOUTH CAROLINA SUPREME COURT UNTILL 2005. THE APPLICANT RESPECTFULLY REQUESTS AN EVIDENTIARY IN ORDER TO DEVELOPE THE RECORD ON THIS CLAIM.

S/ Justin Harshaw

JUSTIN HARSHAW #296250

This Court has reviewed the Applicant's response to the COD 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.

The Applicant's claims regarding his indictment are without merit. The indictment for *Attempted Armed Robbery (2001GS4009360)* is not defective despite the Applicant's claims that it may share some language with grand larceny. Indictments are sufficient when they allege time and place, as required by law, and charge the crime substantially in the language of the statute or the common law which prohibits the crime or so plainly that the offense charged may be easily understood and, if the offense is statutory, that the offense is contrary to the statute involved. S.C. Code Ann. § 17-19-20 (2003). All indictments must be viewed with a "practical eye" to determine whether they fulfill their function to notify the accused of the charge he must answer, notify the court of what judgment and sentence to pronounce, and present a bar to subsequent prosecution. See State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005).


This Court further notes that because summary dismissal is only partial (the Applicant's claim of belated direct appeal is to be set for a hearing) counsel was appointed, Mark Schnee, Esquire. This Court is issuing this Final Order of Dismissal as it relates to the non-belated appeal claims. All the claims so far (except the belated appeal claim) are untimely and ripe for summary dismissal as no genuine issue of material fact exists. The Attorney General shall set the belated

appeal issue for hearing amongst the other pending PCR cases here in our Fifth Circuit.

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

The Attorney General shall coordinate with appointed counsel, Mark Schnee, Esquire, and set the belated appeal issue for hearing within the queue for the other pending PCR cases here in our Fifth Circuit.

AND IT IS SO ORDERED this 17th day of November, 2010.


The Honorable Alison Renee Lee
Fifth Judicial Circuit

Columbia, South Carolina.

STATE OF SOUTH CAROLINA)

IN COURT OF COMMON PLEAS

COUNTY OF RICHLAND)

Justin Harshaw)

Plaintiff)

CASE NO.

2009--CP-400-4442

v.)

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina)

Defendant.)

FILED
2010 NOV 18 PM 2:49
ANETTE W. McBRIDE
C.C.P. & C.S.
RICHLAND COUNTY

Plaintiff's Attorney: Justin Harshaw, Bar No. Address: Justin Harshaw Post Office Box 252 Turbeville, South Carolina 29162 phone: fax: e-mail: other:	Defendant's Attorney: Brian T. Petrano, Bar No. Address: Post Office Box 11549 Columbia, South Carolina 29211 phone: 803-734-3737 fax: 803-734-4113 e-mail: other:
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MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:
 Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached
 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 Plaintiff / Defendant Date submitted 11/9/10

SECTION III: Motion Fee

PAID - AMOUNT:
 EXEMPT: Rule to Show Cause in Child or Spousal Support
 (check reason) Domestic Abuse or Abuse and Neglect
 Indigent Status State Agency v. Indigent Party
 Sexually Violent Predator Act Post-Conviction Relief
 Motion for Stay in Bankruptcy
 Motion for Publication Motion for Execution (Rule 69, SCRPC)
 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:
 Other:

JUDGE'S SECTION

<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
--	---

CLERK'S VERIFICATION

Date Filed: _____
 Collected by: _____
 MOTION FEE COLLECTED: _____