

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF YORK
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP4602725

Fate T McClurkin	South Carolina State Of
------------------	-------------------------

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk: **ORDER**

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

s/ Roger L. Couch
 Circuit Court Judge

2135
 Judge Code

8/9/2013
 Date

For Clerk of Court Office Use Only

This judgment was entered on **August 14, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **August 14, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

Fate T McClurkin Kershaw C I Pa-47 4848 Goldmine Hwy
Kershaw, SC 29067

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Rutledge Johnson PO Box 11549 Columbia, SC
29211

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Petitioner is entitled to a "bite of the apple," "the apple" being presentation of the allegations of the referenced second amendment to his application for post-conviction relief.

The issue Petitioner alleges was not properly pursued in his initial application is that the second amendment was not raised at the merits hearing on his initial application. The second amendment raised, as issues, trial counsel's failure to discover that a co-defendant had pled guilty and that trial counsel failed to object to portions of the Solicitor's opening and closing statements. The second amendment alleges that the co-defendant's guilty plea, allegedly discovered after Applicant's trial, is after-discovered evidence. A review of the post-conviction relief judge's order on Petitioner's initial application establishes that the order took into consideration all of Petitioner's testimony² regarding all issues Petitioner presented at his hearing. None of the referenced testimony (the order refers to Petitioner's testimony as "allegations") touches on the issues Petitioner now claims trial counsel should have raised. Not only was Petitioner afforded a full bite at the apple, but it was Petitioner, not trial counsel who failed to present to the Court those matters set forth in his second amendment.

In his order, the post-conviction relief trial judge took note of Petitioner's application and its first and second amendments (Order of Judge Lee S. Alford, dated August 2, 2005). Therefore, the order addressed all averments of Petitioner. If the order of August 2, 2005 did not dispose of any issue properly raised by the application and its amendments, this should have been called to the Court's attention by a Rule 59(e) SCRPC motion. Failure to do so works as abandonment of any concerns Petitioner had or now has as to said application and its amendments.

Trial counsel testified, at the post-conviction relief hearing, that he repeatedly objected to the Solicitor's opening and closing statements at trial. This testimony was noted positively in the

² The undersigned has not read the transcript of the post-conviction relief hearing.

post-conviction relief judge's order, and, as to the arguments, he found that even if trial counsel was deficient in objecting to the arguments, the possible error in failing to object resulted in no prejudice to Petitioner.

As to co-defendant Bozzy Taylor, his file reflects that he pled guilty to companion charges to Petitioner, i.e. crimes committed May 2, 1996, at 1313 Russell Street, Rock Hill, South Carolina. It is worthy of note that Petitioner did not, in his second amended application, assert that he did not know of Bozzy Taylor's plea of August 15, 1996, entered and disposed of almost three and one-half years before Petitioner's trial. Based on this time frame, it is difficult for the Court to even consider that Applicant was unaware of his co-defendant's plea. In any event, Petitioner presented no evidence on the matter at his post-conviction relief hearing, according to Judge Alford's order, when he knew his second amendment made allegations regarding trial counsel's failure to discover the Taylor plea or the State's failure to disclose the plea. This after Petitioner had made it an issue by virtue of the Second amendment.

It is worthy of note, also, that in Petitioner's testimony at his post-conviction relief hearing, according to Judge Alford's recitation of Petitioner's presentation, Petitioner did not mention Bozzy Taylor's plea, and there is nothing in Judge Alford's order that reflects any attempt by Petitioner to have Taylor appear and testify at the hearing.

Petitioner cites Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (S. Ct. 1991) as support for his claim of right to a successive application for post-conviction relief.

Aice holds that § 17-27-90, South Carolina Code of Laws, 1976, as amended, allows for successive applications for post-conviction relief only when:

... the Court finds a ground for relief asserted which for *sufficient reason* was not asserted or was inadequately raised in the original, supplement or amended application. 305 S.C. at 450.

RL
P 3

The Supreme Court goes on to hold that the phrase "sufficient reason" is to be interpreted very narrowly, citing from Rule 50(3), Supreme Court Rules which has no counterpart in Rule 71.1 SCRC. Rule 50(3) referenced Section 8 of § 17-27-90, S.C. Code of Laws, 1976, as amended, which reads now as it did in 1991. The Aice court references Section 8 of § 17-27-90, S.C. Code of Laws, as amended, as follows:

Under Section 8 of the Act, successive applications for relief are not to be entertained, and the burden shall be on the applicant to establish that any new ground raised in a subsequent application *could not have been raised* by him in the previous application. 305 S.C. at 450.

In its analysis of the above, The Supreme Court stated:

Therefore, as long as it was possible to raise the argument in his first PCR application, an applicant may not raise it in a successive application. 305 S.C. at 450.

The Aice court held that, if a ground could have been raised in an initial application, it cannot be later raised in a successive application.

Petitioner's case differs from Aice, as Petitioner asserts he raised, in his initial application, the issues he now seeks to have resurrected. A review of the record reveals this to be true. However, like Aice, Petitioner, here, seeks a successive "bite" at the apple. Interestingly, Aice, like Petitioner, sought a successive post-conviction application under the rubric that initial post-conviction relief trial counsel was ineffective in failing to raise or present to the Court issues that Aice argued were of great merit, thus rendering his conviction fundamentally unfair. These issues had not been raised by Aice until such time as he sought certiorari of the order denying his post-conviction relief application.

Here, as in Aice, Petitioner's claims do not entitle him to a successive post-conviction application, as Petitioner has not presented to the Court any sufficient reason why the grounds he

now seeks to pursue, which were raised in the above-referenced application for post-conviction relief, should be allowed to be raised in a successive post-conviction relief application. Also, Petitioner has not presented any sufficient reason why the grounds now alleged were not adequately presented to the post-conviction relief judge, even though the post-conviction judge noted in his order Petitioner's second amendment.

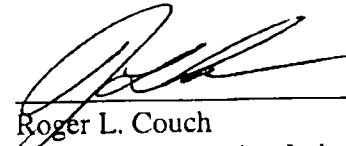
Petitioner's Petition for Habeas Corpus is dismissed for the following reasons:

1. Inquiry into habeas corpus is limited to the legality of a prisoner's present detention, and the only remedy which can be granted is release from custody, whether absolute or conditional. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (S. Ct. 1998) *citing* McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (S. Ct. 1965).
2. A matter which is cognizable under the Post-conviction relief Act may not be raised by a Writ of Habeas Corpus. Simpson v. State, 329 S.C. 43, 495 S.E.2d 429 (S. Ct. 1998).
3. Here, Petitioner seeks to be allowed a successive Post-Conviction Relief application, not release from confinement either absolutely or conditionally.
4. The matters Petitioner wishes to raise in a successive application have, in part, been raised in a previous application for post-conviction relief.
5. Petitioner has not made any showing, let alone a prima facie showing, that post-conviction relief counsel was ineffective in arguing trial counsel's ineffective handling of the Solicitor's opening and closing statements, or to any issue relative to the guilty plea of Petitioner's co-defendant.

Therefore, Petitioner's Petition for a Writ of Habeas Corpus is denied and dismissed.

IT IS SO ORDERED.

August 9 2013
Spartanburg, South Carolina.



Roger L. Couch
Chief Administrative Judge