

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY  
Edgar W. Dickson, Circuit Court Judge

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2013-CP-38-0183

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FREDERICK L. HOWELL, #310890,

Appellant,

v.

STATE OF SOUTH CAROLINA,

Respondent.

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NOTICE OF APPEAL


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Frederick L. Howell, #310890, appeals the Final Order of Dismissal denying his Application for Post-Conviction Relief filed February 6, 2014 and served on counsel by letter dated March 21, 2014 and received by counsel March 26, 2014, issued by the Honorable Edgar W. Dickson, Chief Administrative Judge, First Judicial Circuit.

**RECEIVED**

MAR 31 2014

**S.C. SUPREME COURT**

  
Jonathan D. Waller

The Law Office of Jonathan Waller, LLC  
1720 Main Street, Suite 104  
Columbia, SC 29201  
803-256-0011 (phone)  
866-213-8870 (fax)  
[jonathanwallerlaw@gmail.com](mailto:jonathanwallerlaw@gmail.com)

ATTORNEY FOR PETITIONER

This 28<sup>TH</sup> day of March, 2014.

Other Counsel of Record:  
Megan Harrigan, Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211  
(803) 734-3319

STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM ORANGEBURG COUNTY  
Edgar W. Dickson, Circuit Court Judge

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2013-CP-38-0183

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FREDERICK L. HOWELL, #310890,

Appellant,

v.

STATE OF SOUTH CAROLINA,

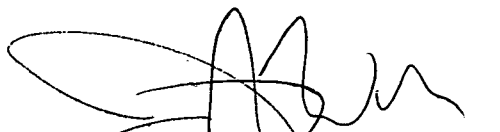
Respondent.

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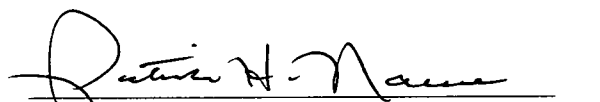
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that one copy of the Appellant's Notice of Appeal in the above-entitled case has been served upon opposing counsel, Megan Harrigan, Assistant Attorney General, by mailing in an envelope properly addressed with postage prepaid on this 28<sup>TH</sup> day of March 2014.

  
Jonathan D. Waller

SWORN TO BEFORE me this 28<sup>th</sup> day  
of March, 2014.

  
Notary Public for South Carolina  
My Commission Expires: 08/17/2015

THE LAW OFFICE OF JONATHAN WALLER, LLC  
1720 MAIN STREET, SUITE 104  
COLUMBIA, SC 29201

March 28, 2014

Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
Post Office Box 11330  
Columbia, SC 29211

RECEIVED

MAR 31 2014

Re: Frederick Howell vs. State of South Carolina  
C/A No: 2013-CP-38-00183

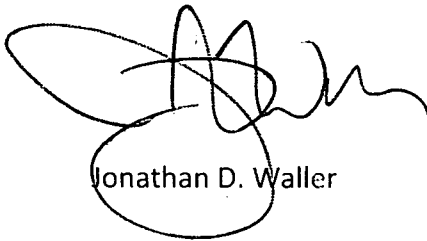
S.C. SUPREME COURT

Dear Mr. Shearouse:

Please find enclosed one (1) original and two (2) copies each of Applicant's Notice of Appeal and Certificate of Service in the above referenced case. I would appreciate you filing the original and returning the clocked copies in the enclosed envelope.

If you have any questions, please do not hesitate to ask. My telephone number is 803-256-0011.

Sincerely,



Jonathan D. Waller

Enclosures

Cc: Megan Harrigan

July 31, 2013  
Received

STATE OF SOUTH CAROLINA )  
COUNTY OF ORANGEBURG )  
  
Frederick L. Howell, #310890, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

0183  
Case No. 2013-CP-38-0201

**CONDITIONAL ORDER OF DISMISSAL**

This matter comes before this Court by way of an application for post-conviction relief filed February 3, 2013. In its return, the Respondent requested the application be summarily dismissed.

**PROCEDURAL HISTORY**

This Court has before it a copy of the records of the Orangeburg County Clerk of Court, the Applicant's records from the South Carolina Department of Corrections, appellate records and prior PCR records. Applicant was true bill indicted at the June 2005 term of the Orangeburg County Grand Jury for Burglary in the First Degree (2005-GS-38-0710). Applicant was represented by Richard Gustafson, Esquire. On August 18, 2005, the Applicant appeared before the Honorable James C. Williams, Jr., where he pled guilty as indicted. Judge Williams sentenced Applicant to confinement for twenty-two years.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected. The South Carolina Court of Appeals affirmed Applicant's conviction and sentence. (State v. Howell, Op. No. 07-UP-102 (S.C. Ct. App. filed March 6, 2007.)) Applicant's Petition for Rehearing was denied on April 24, 2007. Applicant filed a Petition for Writ of Certiorari in the

ATTEST: TRUE COPY  
*Wynne B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY, SC

South Carolina Supreme Court. The Petition was withdrawn and dismissed by an Order dated July 19, 2007. The Remittitur was sent on July 24, 2007.

The Applicant filed his first application for post-conviction relief on May 31, 2007 (C.A. No. 2007-CP-38-0690). In his application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel
  - a. "Failure to challenge the burglary first indictment"
  - b. "Defense counsel failed to procure alibi witnesses."
  - c. "Failed to adequately investigate and introduce evidence."
2. Subject-matter jurisdiction.
  - a. "Failure to challenge the burglary first indictment."

An evidentiary hearing into the matter was convened on June 8, 2009 at the Orangeburg County Courthouse. The Applicant was present and represented by Clarissa W. Joyner, Esquire. By written Order filed January 5, 2010, the Honorable Diane S. Goodstein denied and dismissed the application with prejudice.

The Applicant filed a second application for post-conviction relief on January 28, 2010 (C.A. No. 2010-CP-38-0147). In this application, Applicant alleged that he was being held in custody unlawfully based on claims of:

1. Ineffective assistance of post-conviction relief counsel;
2. Newly Discovered Evidence (Finger Print Analysis); and
3. Fraud upon the court (Falsified and fabricated evidence).

By written Order filed on August 17, 2012 the Honorable Edgar W. Dickson dismissed the application as it was successive, beyond the statute of limitations, and for failure to state a claim of which relief could be granted. Applicant appealed the dismissal of this second application, which was dismissed by the South Carolina Supreme Court on January 25, 2013. The Remittitur was sent on February 13, 2013.

On November 20, 2012, Applicant filed a federal Petition for Habeas Corpus. Howell v. Warden of Liber Corr. Inst., C.A. No. 4:12-2808-JFA-TER. Respondent filed its Return on April 15, 2013. This action is currently pending.

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "PCR counsel failed to file and serve notice of appeal"
2. "Appeal was not knowingly and intelligently waived"
3. "Ineffective assistance of PCR counsel."

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This Court finds that the current application for post-conviction relief must be summarily dismissed because it is successive to his prior two applications for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application under this chapter must be raised in his original, supplemental or amended Application. Any ground finally adjudicated or not so raised, knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding 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.

Successive applications are disfavored and the burden is on Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief and thus the current application is successive and barred under S.C. Code § 17-27-90. Applicant has failed to establish a sufficient reason why he could not have raised his current allegation regarding a lack of appeal of the denial of his first application for post-conviction relief in his second application; therefore, he has failed to meet the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice, 305 S.C. 448, 409 S.E.2d 392.

This Court finds, further, that this Application for Post-Conviction Relief 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. 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 he challenges in this Application on August 18, 2005. This Application was filed on February 3, 2013, which was more than seven years after the statutory filing period had expired.

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). In addition, S.C. Code Ann. §17-27-70(c) (1985) 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." Therefore, this Court finds that the application for post-conviction relief is summarily dismissed for failure to file within the time mandated by statute and for being successive.

Additionally, this Court finds this application is barred under the doctrine of *laches*. The Applicant has filed this application over seven years after he was convicted. The doctrine of *laches* bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, *laches* will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of *laches*. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one-year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. It is questionable whether the attorneys will remember the case and whether their files will be available. If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these problems would exist. Therefore, the Court intends to summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Megan E. Harrigan, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 17<sup>th</sup> day of June, 2013.



EDGAR W. DICKSON  
Chief Judge for Administrative Purposes  
First Judicial Circuit

Orangeburg, South Carolina.



STATE OF SOUTH CAROLINA  
COUNTY OF ORANGEBURG

Frederick L. Howell, #310890,  
Applicant,

v.

State of South Carolina,  
Respondent.

CLERK OF COURT  
IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

2014 FEB -6 A 11: 53.  
2013-CP-38-0183

**FINAL ORDER OF DISMISSAL**

This matter comes before the Court pursuant to an application for post-conviction relief filed February 3, 2013. Respondent made its Return and Motion to Dismiss on May 14, 2013, requesting that the Application be summarily dismissed, as successive to his previous application and filed beyond the statute of limitations. 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, signed June 17, 2013 and filed on June 25, 2013, provisionally denying and dismissing this action, while giving Applicant's counsel twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated July 31, 2013, serving the aforementioned Conditional Order of Dismissal on Applicant. Jonathan Waller, Esquire, who was appointed to represent Applicant on July 9, 2013<sup>1</sup>, was also served with the Conditional Order of Dismissal.

Through his counsel, Applicant responded to the State's Return Motion to Dismiss and this Court's Conditional Order of Dismissal in a document captioned "Response to Conditional Order of Dismissal," which was filed on October 30, 2013. In this document, Applicant set forth

<sup>1</sup> Counsel was appointed by the Orangeburg Clerk of Court in violation of South Carolina Administrative Order Number 2008-10-06-01.

reasons why he believed his application should not be summarily dismissed<sup>2</sup>. In this response, Applicant alleges he is entitled to an evidentiary hearing based upon his previous post-conviction relief attorney failing to seek appellate review of the denial of his 2007 application.

Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief. "The contention that prior post-conviction relief counsel was ineffective is not *per se* a "sufficient reason" warranting a successive post-conviction relief application under 17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991). Applicant has shown no reason why this issue could not have been raised in his prior post-conviction relief applications or within the statute of limitations for filing a post-conviction relief application pursuant to S.C. Code. § 17-27-45. Applicant's request was already addressed by his 2010 PCR application. The Court found he did not have proper grounds to seek review on his original 2007 PCR. Furthermore, Applicant does not provide any specific evidence which would support his claims of ineffective assistance of counsel. Applicant has provided no reason why his current claims are any different than the ones he previously raised. 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, this application for post-conviction relief is hereby denied and dismissed with prejudice.

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<sup>2</sup> Applicant also filed a *pro se* document captioned, "Opposition to the Signed Conditional Order of Dismissal" on August 12, 2013. Since Applicant is represented by Counsel, this Court will not take any action on these documents. See Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989) ( South Carolina does not recognize hybrid representation); see also Rule 11, SCRPC, requiring every pleading, motion, or other paper of a party represented by counsel to be signed by at least one attorney of record who is an active member of the South Carolina Bar; if a pleading, motion, or other paper is not signed, "it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant."

This Court hereby advises 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 3rd day of February, 2014.



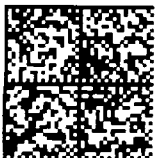
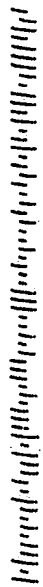
EDGAR W. DICKSON  
Chief Administrative Judge  
First Judicial Circuit

Orangeburg, South Carolina.

THE LAW OFFICE OF JONATHAN WALLER, LLC  
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Supreme Court of South Carolina  
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