

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Maité Murphy, Circuit Court Judge

2013-CP-38-01016

Timothy Charley, #265146,

Appellant,

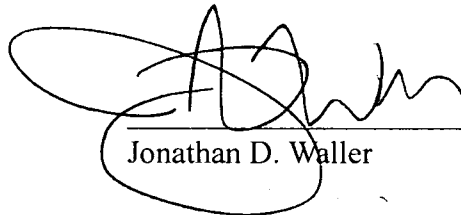
v.

STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Timothy Charley, #265146, appeals the Final Order of Dismissal denying his Application for Post-Conviction Relief filed June 24, 2014 and served on counsel by letter dated July 10, 2014 and received by counsel July 11, 2014, issued by the Honorable Maité Murphy, Presiding Judge, First Judicial Circuit.



Jonathan D. Waller

RECEIVED

JUL 16 2014

S.C. SUPREME COURT

The Law Office of Jonathan Waller, LLC
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ATTORNEY FOR PETITIONER

This 14 day of July, 2014.

Other Counsel of Record:
Megan Harrigan, Assistant Attorney General
Post Office Box 11549
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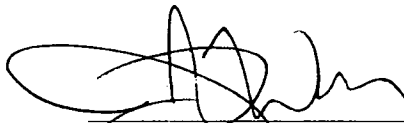
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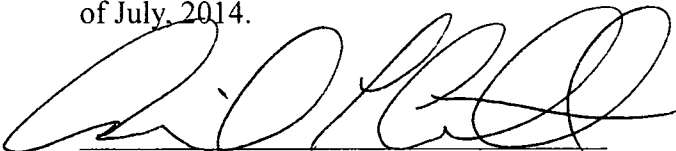
CERTIFICATE OF SERVICE

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 14 day of July 2014.



Jonathan D. Waller

SWORN TO BEFORE me this 14th day
of July, 2014.



Notary Public for South Carolina
My Commission Expires: 2-27-23

STATE OF SOUTH CAROLINA)
COUNTY OF ORANGEBURG)

Timothy Charley, #265146,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT

2012-CP-38-01016

**ORDER GRANTING RESPONDENT'S
MOTION TO DISMISS**

ATTEST: TRUE COPY

Wingja B. Clark

CLERK OF COURT
ORANGEBURG COUNTY, SC

FILED IN 2012 MAY 10 10 58 AM

This matter comes before the Court by way of an application for post-conviction relief filed on June 28, 2012. The Respondent filed its Return and Motion to Dismiss on October 9, 2012, seeking to dismiss this application as successive to Applicant's two previous post-conviction relief actions, barred by the Statute of Limitations as set forth in S.C. Code Ann. § 17-27-45, and for failure to state a claim upon which relief can be granted Under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. The Honorable Diane S. Goodstein, acting in her capacity as Chief Administrative Judge for the First Judicial Circuit, signed a Conditional Order of Dismissal on November 13, 2012, filed on December 5, 2012, which provisionally dismissed the application but allowed Applicant twenty days from the date of service to provide sufficient reason why the dismissal should not become final. The Conditional Order of Dismissal was served upon Applicant on December 21, 2012. Thereafter, Judge Goodstein ordered that counsel be appointed and that the Respondent's motion to dismiss be scheduled for a hearing pursuant to Rule 711, SCRPC, and Administrative Order 2008-10-06-01, finding that Applicant had made a response to the Court's Conditional Order of Dismissal.

A hearing on Respondent's Motion to Dismiss was convened on November 1, 2013

before the Honorable Diane S. Goodstein. Applicant was present at the hearing and represented by counsel, Jonathan Waller. Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office appeared on behalf of the State. At this hearing, Applicant moved to orally amend his application to include the new allegation that he was denied the right to appellate review from his guilty plea; Respondent had no prior notice of this allegation. At the conclusion of the hearing, Judge Goodstein granted the State's motion to dismiss all prior grounds but allowed Applicant to amend his application to include his new ground for relief. An Order to this affect was entered on February 26, 2014.

On May 22, 2014, Respondent filed an Amended Return and Motion to Dismiss, seeking the dismissal of Applicant's new claim that he was denied an appeal of his guilty plea. A subsequent hearing was held before this Court on May 27, 2014. Applicant was present and represented by counsel, Jonathan Waller. Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office appeared on behalf of the State. At the start of the hearing, Respondent renewed its Motion to Dismiss. After hearing arguments from both parties, this Court orally granted Respondent's Motion to Dismiss. This Order follows.

PROCEDURAL HISTORY

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. Applicant was indicted during the July 2004 term of the Orangeburg County Grand Jury for Armed Robbery (2004-GS-38-1055). He was represented by Crystal Chapman, Esquire. On September 9, 2004, Applicant pled guilty before the Honorable James C. Williams, Jr., who sentenced Applicant to fifteen years imprisonment. Applicant did not appeal his conviction or sentence.

Applicant subsequently filed an initial application for post-conviction relief on May 7, 2009 (C.A. No. 2009-CP-38-0796), nearly five years after his guilty plea was entered. Applicant raised the following issues in his first post-conviction relief application:

1. "Written Notice Requirement."
2. "Brady Violation."
3. "Prosecutorial Misconduct."
4. "Involuntary plea."

On June 29, 2009, Respondent made its Return and Motion to Dismiss this initial application for post-conviction relief as barred by the one-year statute of limitations pursuant to S.C. Code Ann. § 17-27-45. A Conditional Order of Dismissal was signed by the Honorable James C. Williams, Jr., acting in his capacity as Chief Administrative Judge for the First Judicial Circuit, on June 29, 2009. Applicant filed two responses to the Conditional Order of Dismissal. In a "Motion of Attachment," dated June 22, 2009 and filed June 26, 2009, Applicant asserted additional grounds for relief. On July 2, 2009, Applicant filed a "Motion for Summary Judgment Rule 56 S.C.R.C.V.P.," where he asserted variances between the information contained in the arrest warrant and a police incident report. After reviewing the responses, Judge Goodstein, acting in her capacity as Chief Administrative Judge for the First Judicial Circuit, denied and dismissed the application with prejudice in a Final Order dated January 25, 2010, and filed February 26, 2010.

Thereafter, Applicant filed a second post-conviction relief application on October 29, 2010 (C.A. No. 2010-CP-38-1602). In this application, Applicant set forth the following grounds for relief:

1. Denial of Due Process.

- a. Applicant was *pro se* in prior PCR application and was not told of right to appeal.¹
2. Ineffective Assistance of Counsel.

Respondent made its Return and Motion to Dismiss on April 4, 2011, requesting the application be summarily dismissed as successive and barred by the statute of limitations. A Conditional Order of Dismissal was signed by the Honorable Edgar W. Dickson, acting in his capacity as Chief Administrative Judge of the First Judicial Circuit, on April 7, 2011, finding that the application should be dismissed based on the statute of limitations and successiveness; Applicant was given twenty days in which to respond. After receiving no response from Applicant, Judge Dickson signed a Final Order dismissing the application on September 8, 2011 and entered on September 27, 2011. Applicant did not appeal the denial of his second application for post-conviction relief.

CURRENT APPLICATION

In his current and third Application, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Fraud upon the Court."
2. "Violation to Petitioner's Due Process Amendment Rights."
3. "Violation to Petitioner's Due Process Rights to 28 U.S.C. §1915, Rule 4 and 55 of the Federal Rules of Civil Procedure."

Applicant alleges that the federal courts, particularly the United States District Court for the District of South Carolina, have violated his constitutional rights to due process in two independent and separate civil suits pending in federal court. Applicant further alleges that he was denied his federal right to have process served. The requested relief sought is sixteen-million dollars and "immediate and unconditional" release from incarceration.

¹ In the Final Order of Dismissal, Applicant was advised that he must file an appeal within 30 days and was provided reference to Rule 203 and Rule 243, SCACR.

Respondent made its Return and motion to dismiss, requesting that this third application be dismissed for: failure to state a cognizable claim for which post-conviction relief can be granted pursuant to S.C. Code Ann. § 17-27-20; successive to his two previous applications for post-conviction relief pursuant to S.C. Code Ann. § 17-27-90; and filed beyond the one year statute of limitations pursuant to S.C. Code Ann. §17-27-45. On November 13, 2012, Judge Goodstein, acting in her capacity as Chief Administrative Judge for the First Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing Applicant's third application and giving Applicant twenty days from the date of service to show why the Conditional Order of Dismissal should not become final. Applicant was personally served with this Conditional Order of Dismissal on December 21, 2012. In response to this Conditional Order of Dismissal, Applicant submitted a "Response and Motion to Amend Post-Conviction Relief" on December 27, 2012, in which he asserts that his claims constitute newly discovered evidence, allowing him to proceed forward on this successive and untimely application; however, this response fails to state what "evidence" is newly discovered. Applicant responded with a second document on December 5, 2012, captioned "Writ of Mandamus", which was also filed with the South Carolina Supreme Court.² In this second document, Applicant asks this Court to grant him default in the amount of thirty-two million dollars and immediate release from incarceration. Following these two responses, this Court requested that counsel be appointed for Applicant and that a hearing be held on Respondent's motion to dismiss.

A hearing on Respondent's Motion to Dismiss was convened on November 1, 2013 at the Dorchester County Courthouse. Applicant was present, alongside counsel Jonathan Waller, Esquire. Respondent was represented by Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office. At this hearing, the State renewed its Motion to

² This Writ was dismissed by the South Carolina Supreme Court on April 23, 2013.

Dismiss Applicant's application in full, asserting that the application failed to state a cognizable claim for which post-conviction relief can be granted pursuant to S.C. Code Ann. § 17-27-20; was successive to his two previous applications for post-conviction relief pursuant to S.C. Code Ann. § 17-27-90; and was filed beyond the one year statute of limitations pursuant to S.C. Code Ann. §17-27-45.

In response to Respondent's Motion to Dismiss, Applicant, through his counsel, argued that Applicant should be allowed to proceed forward with this third post-conviction relief action, as he was never advised of his right to appellate review of his guilty plea by his trial counsel, Crystal Chapman. Applicant elaborated that counsel was suffering from significant health concerns at the time that hindered her representation of Applicant, including her failure to advise him of his right to file an appeal. Applicant asserted that this new claim should not be barred by the statute of limitations, citing Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995). Respondent replied that it had no notice of this new allegation, but that this new allegation should still be barred pursuant to S.C. Code Ann. § 17-27-90, as it could have and should have been raised in his two earlier post-conviction relief applications.

On May 22, 2014, Respondent filed an Amended Return and Motion to Dismiss, seeking the dismissal of Applicant's new claim that he was denied an appeal of his guilty plea. In this Amended Return and Motion to Dismiss, Respondent asserted that Applicant could have raised the new allegation that he was denied the right to appellate review of his negotiated guilty plea in his two prior post-conviction relief applications. Furthermore, Respondent argued that a party asserting that he is entitled to an appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) must raise the issue in his initial post-conviction relief filing or the issue is

waived. Graham v. State, 378 S.C. 1, 661 S.E.2d 337 (2008).

A subsequent hearing was held before this Court on May 27, 2014. Applicant was present and represented by counsel, Jonathan Waller. Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General's Office appeared on behalf of the State. At the start of the hearing, Respondent renewed its Motion to Dismiss. This Court heard argument from Applicant and Respondent regarding Respondent's Motion to Dismiss.

FINDINGS OF FACT AND CONCLUSION OF LAW

The Court has reviewed the pleadings, all relevant supporting documents, and the arguments at the hearing. Pursuant to S.C. Code Ann. § 17-27-70(b) (2003), the Court makes the following findings of fact and conclusions of law:

This Court finds that this application must be summarily dismissed, including the new ground for relief that Applicant was denied his right to direct appellate review, because it is successive to the previous application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (1985) states:

All 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991).

“[T]he 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. [Emphasis in original.] Id., 305 S.C. at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. Id.

This Court finds that Applicant could have raised the new allegation that he was denied the right to appellate review of his negotiated guilty plea in his *two* prior post-conviction relief applications. Furthermore, a party asserting that he is entitled to an appellate review pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) must raise the issue in his initial post-conviction relief filing or the issue is waived. Graham v. State, 378 S.C. 1, 661 S.E.2d 337 (2008). Applicant has failed to present any reasons why he could not have raised the current allegations in his previous post-conviction relief applications. Accordingly, this Court finds that this application must be summarily dismissed because it is successive to his two prior applications.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Respondent's motion to dismiss must be granted and that this application for post-conviction relief must be dismissed in full.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate

review, post-conviction relief counsel must serve and file a Notice of Appeal on an applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That Respondent's Motion to Dismiss shall be granted and this application for post-conviction relief shall be dismissed with prejudice; and
2. The Applicant shall remain remanded to the custody of the State.

AND IT IS SO ORDERED this 19 day of June, 2014.


MAITÉ MURPHY
Presiding Judge
First Judicial Circuit Court

St. George South Carolina.



ALAN WILSON
ATTORNEY GENERAL

June 23, 2014

The Honorable Winnifa Brown-Clark
Clerk of Court, Orangeburg County
Post Office Box 9000
Orangeburg, South Carolina 29115-9000

Re: Timothy Charley, #265146 v. State of South Carolina
2012-CP-38-01016

Dear Ms. Brown-Clark:

Enclosed please find the signed original Order Granting Respondent's Motion to Dismiss in the above captioned case for filing in your office. Please return a clocked copy to me once you have filed this document. If you have any questions or concerns, please contact me at (803) 734-3737 or MHarrigan@scag.gov.

Sincerely,

Megan E. Harrigan
Assistant Attorney General

MEH/ko
Enclosure

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

puh

July 14, 2014

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

RECEIVED

JUL 16 2014

S.C. SUPREME COURT

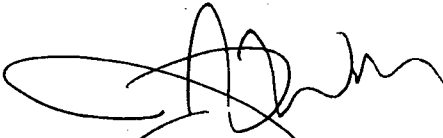
Re: Timothy Charley vs. State of South Carolina
C/A No: 2013-CP-38-01016

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

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