

Reply to: Columbia
Atesh@RichardsonPlowden.com
Direct Dial: (803) 576-3726

November 6, 2014

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

PCR

Re: Phillip A. Brown, SCDC #118100
Civil Action No.: 2011-CP-40-07160

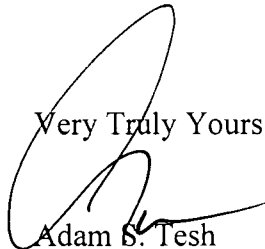
Dear Mr. Shearouse:

Enclosed for filing are the original and two (2) copies of Petitioner's Notice of Appeal in his post-conviction relief matter. Please file the original and return the time-stamped copies in the enclosed envelope.

By copy of this letter, I am serving the same on counsel for Respondent as well as the South Carolina Office of Appellate Defense.

With kindest regards, I am

Very Truly Yours,



Adam S. Tesh

JTN/
Enclosures

cc: Megan E. Harrigan, Esq. (w/encl.)
Office of Appellate Defense (w/encl.)

RECEIVED
NOV 07 2014
S.C. SUPREME COURT

bcc: Phillip A. Brown SCDC #118100

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning, Circuit Court Judge

Case No.: 2011-CP-40-7160

RECEIVED

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Phillip A. Brown, SCDC
#118100,.....Petitioner,

S.C. SUPREME COURT

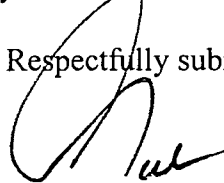
v.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Petitioner Phillip A. Brown, SCDC, #118100, hereby appeals the Order of the Honorable L. Casey Manning., signed on October 20, 2014, which denies post-conviction relief to Petitioner. The undersigned counsel for Petitioner received notice of entry of the order on or about November 6, 2014. A copy of the Order on appeal is attached hereto.

Respectfully submitted,



Adam S. Tesh
RICHARDSON PLOWDEN & ROBINSON, P.A.
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
(803) 779-0016 facsimile

November 6, 2014

ATTORNEY FOR APPLICANT/PETITIONER

Other Counsel of Record:
Megan E. Harrigan
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
))
Phillip A. Brown, SCDC #118100,)
))
Applicant,)
))
v.)
))
State of South Carolina,)
))
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No. 2011-CP-40-07160

ORDER OF DISMISSAL

2014 SEP 24 PM 12:19
JENNIFER E. HARRIGAN
C.C.P. S.C. 153
RICHLAND COUNTY

This matter comes before the Court by way of an application for post-conviction relief filed on October 26, 2011. Respondent filed a Return and Motion to Dismiss on November 1, 2011, seeking to summarily dismiss this application 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.

A hearing on Respondent’s Motion to Dismiss was convened on July 17, 2014, at the Richland County Courthouse. Applicant was present at the hearing and represented by counsel, Adam S. Tesh. Assistant Attorney General Megan E. Harrigan of the South Carolina Attorney General’s Office appeared on behalf of Respondent. After listening to the argument from both parties, this Court is granting Respondent’s motion to dismiss this application with prejudice.

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 from the Richland¹ County Clerk of Court. Applicant was indicted by the Kershaw County Grand Jury for Murder, Burglary in the First Degree, and Armed Robbery (1982-GS-28-00153). The State notified Applicant and his attorneys of its intention to seek the death penalty. On June 23, 1983,

¹ Applicant was indicted by the Kershaw County Grand Jury for Kershaw County offenses. However, on June 13, 1983, the Honorable Dan F. Laney, acting in his capacity as Chief Administrative Judge for the Fifth Judicial Circuit, signed an Order transferring venue to Richland County upon Applicant’s motion and a subsequent hearing.

Applicant appeared before the Honorable Walter T. Cox, where he pled guilty as indicted. Judge Cox sentenced Applicant to life imprisonment for murder, to a consecutive life sentence for burglary, and to a concurrent twenty-five year sentence for Armed Robbery. No direct appeal was taken.²

On July 13, 1993, Applicant filed a Petition for Habeas Corpus and a subsequent Petition for Writ of Mandamus on May 17, 1993. A hearing was held on July 12, 1994, where the court granted the Respondent's Motion to dismiss the action. The South Carolina Supreme Court affirmed the court's dismissal of his habeas action in a publish opinion issued May 13, 1996.

Phillip A. Brown v. SCDC, 322 S.C. 189, 191, 47- S.E.2d 848, 849 (1996).

Thereafter, Applicant filed an initial application for post-conviction relief on February 19, 2009. The State moved to summarily dismiss this action as untimely. On August 27, 2010, the Honorable Alison R. Lee, acting in her capacity as Chief Administrative Judge of the Fifth Judicial Circuit, signed a Conditional Order of Dismissal, provisionally dismissing the application but allowing Applicant twenty days to show why the dismissal should not become final. This Conditional Order of Dismissal was served on Applicant on September 14, 2010. After receiving no response from Applicant, a Final Order of Dismissal was entered on November 10, 2010.

In the interim, on April 14, 2010, Applicant, alongside counsel, appeared for a parole hearing. At the conclusion of the hearing, the parole board decided to conditionally award parole to Applicant upon the satisfaction of several conditions. Once notification of conditional parole was delivered to the victim's family, the Kershaw County Sheriff's Office, and the Fifth Circuit Solicitor's Office, the victim's family and the sheriff's office informed the parole board that they

² Thereafter, Mr. Brown escaped from incarceration and committed several additional offenses for which he received a consecutive twenty-two year sentence. See Applicant's SCDC records; Phillip A. Brown v. SCDC, 322 S.C. 189, 191, 47- S.E.2d 848, 849 (1996).

were never notified of the parole hearing in violation of as required under S.C. Code Ann. § 24-21-610. A subsequent parole hearing was held on September 8, 2010, at which time the parole board rescinded its conditional grant of parole and denied Applicant parole. Applicant appealed this decision to the South Carolina Administrative Law Court.

While the Administrative Law Court action was pending, Applicant filed this current application for post-conviction relief on October 26, 2011, alleging that his parole was unlawfully revoked without minimal due process. Respondent made its Return and Motion to Dismiss on November 1, 2011. On March 20, 2012, Judge Lee, acting in her capacity as chief administrative judge for the Fifth Judicial Circuit, signed a Conditional Order of Dismissal, provisionally denying the application but granting Applicant a hearing as to whether his parole had been unlawfully revoked. This hearing was held on March 4, 2013, before Judge Lee. Applicant was present and represented by counsel, Adam S. Tesh. Respondent was represented by Assistant Attorney General Robert D. Corney. After listening to argument from both parties, Judge Lee stayed the present action for the pendency of the Administrative Law Court action, of which this issue is also the sole issue to be determined.

On October 14, 2011, the Administrative Law Court dismissed Applicant's appeal, determining that his parole had been denied, not revoked. This Order was upheld by the South Carolina Court of Appeals in an unpublished opinion filed June 5, 2013. Subsequent petitions for rehearing and reinstatements were denied and a Remittitur was issued on January 13, 2014.³

A subsequent hearing on was held on July 17, 2014 before this Court. Applicant was present alongside counsel and Respondent was represented by Assistant Attorney General Megan E. Harrigan. At the start of the hearing, Respondent's renewed its Motion to Dismiss.

³ A complete copy of all documents pertaining to the Administrative Law Court action was introduced as Respondent's Ex. No. 1 (without objection from Applicant) so as to provide this Court with a complete record of Applicant's numerous cases and filings.

After hearing argument from Respondent, Applicant conceded and stated that he understands that he is procedurally estopped from proceeding forward on this application in light of the rulings in his Administrative Law Court action finding that he was denied parole. After the record in its entirety and the documents and argument set forth at the hearing, this Court is granting Respondent's motion to dismiss this application with prejudice.⁴

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 as improperly filed pursuant to S.C. Code Ann. § 17-27-20. Under § 17-27-20,

(A) Any person who has been convicted of, or sentenced for, a crime and who claims:

- (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
- (2) That the court was without jurisdiction to impose sentence;
- (3) That the sentence exceeds the maximum authorized by law;
- (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
- (5) That his sentence has expired, his probation, *parole or conditional release unlawfully revoked*, or he is otherwise unlawfully held in custody or other restraint; or
- (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may

⁴ On August 26, 2014, Applicant filed a "Rule 59(e) Motion to Alter or Amend," which is signed by him personally and not counsel, although counsel Tesh did sign a coversheet and submit the document to this Court and the Richland County Clerk of Court for filing. This Court declines to address the issues in this motion, finding that the Motion was premature as there has been no entry of judgment. Rule 59, SCRCP. Applicant has also filed a *pro se* motion to substitute counsel. This Court finds that Applicant is represented by seasoned and competent legal counsel and denies this motion.

institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(B) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them.

S.C. Code Ann. § 17-27-20 (emphasis added). Applicant is collaterally estopped from arguing that his parole was unlawfully revoked, as this issue has already been fully litigated and previous courts have determined that Applicant was rather *denied* parole. See Respondent's Ex. No. 1. Therefore, Applicant's application, solely challenging what he characterized as a unlawful parole revocation, must be denied and dismissed with prejudice.

CONCLUSION

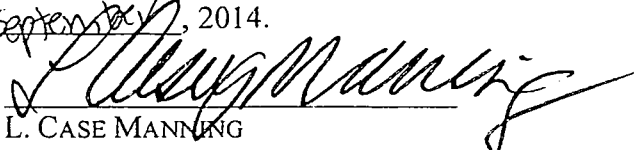
Based on all the foregoing, this Court finds and concludes that Respondent's motion to dismiss must be granted and that this application for post-conviction relief must be dismissed in full.

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 ~~September~~, 2014.


L. CASE MANNING
Presiding Judge
Fifth Judicial Circuit Court

Columbia, South Carolina.

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

JUDGM. T IN A CIVIL CASE

CASE NUMBER: 2011CP4007160

Phillip #118100 Brown

State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: _____	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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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.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Non-suit); Rule 43(k), SCRCP (Settled); Other _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; 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 : _____

INFORMATION FOR THE PUBLIC 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
		\$
		\$
		\$

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.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20 _____ and a copy mailed first class or placed in the appropriate attorney's box on this 25 September 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Phillip #118100 Brown

Adam S. Tesh

Megan E. Harrigan

Phillip #118100 Brown

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court

Jeanette W. McBride

095-546

RICHARDSON
RICHARDSON PLOWDEN
ROBINSON, P.A.
PLOWDEN
ATTORNEYS AT LAW

COLUMBIA P.O. Drawer 7788 • Columbia, SC 29202

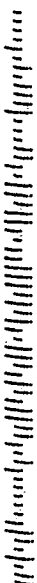
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The Honorable Daniel E. Shearouse
Clerk, South Carolina Supreme Court
Post Office Box 11330
Columbia, South Carolina 29211

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