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Greenville, South Carolina 29601
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FEB 20 2015

January 25, 2015

S.C. Supreme Court

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

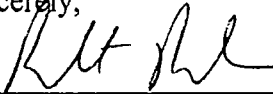
RE: Joshua Ray Greer v. The State of South Carolina 2012-CP-42-1605

Dear Ms. Kitchings:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

- (1) Proof of service of the notice of appeal on the respondent.
- (2) A copy of the order granting belated appeal.
- (3) A motion to proceed in forma pauperis.
- (4) A copy of the letter to the Court Reporter requesting the transcript.

Sincerely,

s/ 

Brandt Rucker
Attorney for Appellant Joshua Ray
Greer
522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925
Attorney for Appellant

cc:
Other Counsel of Record:

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2012-CP-42-1605

State of South Carolina

Respondent,

v.

Joshua Ray Greer, #311472

Appellant.

Notice of Appeal

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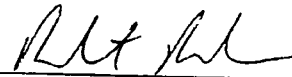
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S.C. Supreme Court

Joshua Ray Greer appeals the order of the Honorable Roger L. Couch dated December 12, 2014. Appellant received written notice of entry of this order on December 22, 2014.

January 15, 2015

Sincerely,

s/ 

Brandt Rucker

Attorney for Appellant Joshua Ray
Greer

522 North Church Street

Greenville, South Carolina 29601

(864) 271-9925

Attorney for Appellant

cc:

Other Counsel of Record:

Suzanne White
Office of the South Carolina Attorney General
P.O. Box 11549
Columbia, S.C. 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

The Honorable Roger L. Couch, Circuit Court Judge

Case No. 2012-CP-42-1605

State of South Carolina

Respondent,

v.

Joshua Ray Greer, #311472

Appellant.

Proof of Service

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S.C. Supreme Court

I certify that I have served the Notice of Appeal, and the Proof of Service on the State of South Carolina by depositing a copy of those documents in the United States Mail, postage prepaid, on January 16, 2015, addressed to its attorney of record, Suzanne White Office of the South Carolina Attorney General, P.O. Box 11549, Columbia, S.C. 29211.

January 16, 2015

Sincerely,

s/ 

Brandt Rucker

Attorney for Appellant Joshua Ray
Greer

522 North Church Street
Greenville, South Carolina 29601
(864) 271-9925

Attorney for Appellant

cc:

Other Counsel of Record:

Suzanne White
Office of the South Carolina Attorney General
P.O. Box 11549

Columbia, S.C. 29211

STATE OF SOUTH CAROLINA)
)
 COUNTY OF SPARTANBURG)
)
 Joshua Ray Greer, #311472,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 SEVENTH JUDICIAL CIRCUIT

2012-CP-42-1605

**ORDER OF DISMISSAL GRANTED
 APPELLATE REVIEW PURSUANT TO
AUSTIN V. STATE**

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed March 12, 2012¹. Respondent made its Return and Motion to Dismiss on October 10, 2012, and on June 13, 2013, requesting that the application be summarily dismissed. 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 filed July 8, 2013, 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. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated October 4, 2013, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned, "Applicant's Sufficient Legal Cause Shown to PCR Case Matter, etc.," dated August 9, 2013, but filed on October 8, 2013, Applicant requests that the Court grant him an evidentiary hearing on his claims. Applicant alleges that his application is not successive, as he could not have raised claims of ineffective assistance of post-conviction relief counsel in his prior application. Applicant alleged that he informed PCR Counsel Franklin

¹ Applicant also filed a document on March 4, 2013, captioned, "Emergency Release." As the claims included in this document are virtually identical to the application, this Court considers that document to be an amendment to the current application.

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Milton Mann, Esquire, that he wished to appeal the denial of relief. The matter was scheduled for an evidentiary hearing on September 16, 2014, at the Spartanburg County Courthouse. Applicant was present and testified on his own behalf. He was represented by J. Brandt Rucker, Esq. Respondent was represented by J. Clayton Mitchell, Esq. Applicant's prior PCR Counsel, Mann also testified at the hearing.

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Correction pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the November 2002 term of the Spartanburg County Grand Jury for Murder (2002-GS-42-2200). He was later indicted at the June 2003 term of the Spartanburg County Grand Jury for Armed Robbery (2003-GS-42-2201). Jason Chehoski, Esquire, represented Applicant. On September 20, 2005, Applicant proceeded to trial and the jury found him guilty of both charges. The Honorable Wyatt T. Saunders sentenced him to a confinement for a period of thirty (30) years for Murder and twenty (20) years consecutive for Armed Robbery.

A timely notice of appeal was filed. Joseph L. Savitz, III, Esquire, submitted a brief on Applicant's behalf. The Court of Appeals affirmed the conviction on November 7, 2007. State v. Greer, No. 2007-UP-512 (S.C. Ct. App. November 7, 2007). The remittitur was issued on November 27, 2007.

2008-CP-42-4438

Applicant subsequently filed an application for post-conviction relief (PCR) on August 21, 2008. The State filed its Return on February 20, 2009. An evidentiary hearing was convened on May 26, 2009, at the Spartanburg County Courthouse, at which Applicant was present and



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represented by Franklin Milton Mann, Jr., Esquire. Applicant raised the following issues in his first PCR:

1. Ineffective assistance of counsel;
2. Failure to conduct pre-trial investigation;
3. Failure to provide expert witnesses in preparation of defense;
 - a. DNA analysis expert
 - b. Psychiatric expert
 - c. Crime scene and fingerprint expert
 - d. Private investigator
4. Newly/After Discovered Evidence; and
5. Denial of fundamental fairness and equal protection due to the court's failure to instruct the jury on a lesser included offense or a defense of actual innocence.

The Honorable J. Mark Hayes, II denied and dismissed Applicant's application by Order on July 24, 2009. Applicant did not appeal the denial of his PCR application. Applicant did file a *pro se* notice of appeal with the Spartanburg County Clerk of Court.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In Applicant's current application for post-conviction relief, he alleges that PCR counsel was deficient by not filing a notice of appeal on his behalf. This Court has reviewed the testimony presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed and considered the Clerk of Court's records regarding the subject convictions, Applicant's prior PCR action, Applicant's appellate records, Applicant's records from the South Carolina Department of Corrections, the new application for post-conviction relief, Applicant's response to the Conditional Order of Dismissal, the transcripts and exhibits from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code § 17-27-80 (2009), this Court makes the following findings of fact based upon all of the probative evidence presented.

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In a post-conviction relief act, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. Strickland v. Washington, 477 U.S. 668, 104 S. Ct. 2052, 2064 (1984); Butler, 286 S.C. at 441, 334 S.E.2d at 813.

Applicant alleges that he was denied the right to appeal the dismissal of his previous post-conviction relief application. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 115 (1991), a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of his prior application.

This Court finds that PCR counsel was ineffective in failing to file a notice of appeal from the PCR judge's order of dismissal. Applicant testified that he wished to have a denial of his PCR action appealed. He testified that he filed a *pro se* notice of appeal on August 20, 2009, after the Order of Dismissal was filed on July 28, 2009. Applicant testified that he had a GED and has no legal knowledge. Applicant's PCR counsel Mann also testified at this hearing. Counsel Mann testified that he would not have filed a notice of appeal if Applicant had requested one be filed. He stated that his representation was over after the PCR hearing concluded and that since Applicant can file a PCR application, he could also file a notice of appeal. Counsel Mann testified further that he did not recall discussions with Applicant regarding an appeal.

This Court finds that any allegation other than the belated PCR appeal allegation is successive and therefore denied. Successive applications for post-conviction relief are clearly disfavored. See S.C. Code Ann. § 17-27-90 (2003); Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991); Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980).

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This Court also finds that Applicant is entitled to a belated appeal due to his prior PCR attorney's failure to perfect an appeal on his behalf. Where a post-conviction relief judge determines the applicant did not freely and voluntarily waive his appellate rights, the applicant may petition the South Carolina Supreme Court for review of post-conviction relief issues pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).²

This Court finds that Applicant did not voluntarily waive his right to appeal the PCR court's denial and dismissal of his application. See Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002). Applicant's denial of an appeal can be remedied by a petition for belated review. Therefore, this Court denied and dismisses the Applicant pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Applicant has proven by a preponderance of the evidence that he did not knowingly and voluntarily waive the direct appeal of the denial of his first PCR application. Any grounds for relief that are not specifically addressed in this Order are denied for failure to meet the requisite burden of proof.




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² Even where the post-conviction relief judge makes this finding, he may not grant relief on this basis as the applicant must petition the supreme court for a belated review. Davis v. State, 288 S.C. 290, 342 S.E.2d 66 (1985).


IT IS THEREFORE ORDERED

1. With the exception of permitting a belated appeal from the denial of the first application for PCR as stated below, this second application for post-conviction relief is hereby denied and dismissed with prejudice;
2. Within thirty (30) days of service of this Order, counsel for the Applicant must file a Notice of Appeal to secure the appropriate appellate review of the Applicant's first post-conviction-relief action. Counsel and the Applicant are direct to Kelly State, 308 S.C. 348, 417 S.E.2d 868 (1992) and Rule 243, SCACR for the appropriate procedure for a belated appeal; and
3. That the Applicant remain in the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 9th day of December, 2014.



ROGER L. COUCH
Presiding Judge
Seventh Judicial Circuit

 _____, South Carolina.

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