

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Bamberg County
Doyet A. Early, III, Judge

Case No. 2010-CP-05-0198

STATE OF SOUTH CAROLINA.....RESPONDENT,

V.

HERBERT HIGHTOWER.....APPLICANT.

NOTICE OF APPEAL

Herbert Hightower, appeals the Final Order of dismissal of the Honorable Doyet A. Early, III, dated 26, June 2012 Appellant received written notice of this Order of dismissal on July 30, 2012.

Herbert Hightower
Pro Se
SCDC#199706
Murray Unit #209
B.R.C.I.
4460 Broad River Rd
Columbia, SC 29210

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED
AUG 15 2012
S.C. SUPREME COURT

Appeal from Bamberg County
Doyet A. Early, III, Judge

Case No. 2010-CP-05-0198

STATE OF SOUTH CAROLINA.....RESPONDENT,
V.
HERBERT HIGHTOWER.....APPLICANT.

PROOF OF SERVICE

I, Herbert Hightower, certify that I have served the Notice Of Appeal on Megan E. Harrigan, at the Office of The Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing a copy of it in the Broad River Correctional Institution Mail Room United States Mail postage prepaid on this 10, day of August, 2012.

Herbert Hightower
Herbert Hightower
Pro Se

SUBSCRIBED AND SWORN TO before me
this 10th day of August, 2012.

Susan H. Frye
Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

PCR

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Bamberg County
Doyet A. Early, III, Judge

Case No. 2010-CP-05-0198

STATE OF SOUTH CAROLINA.....RESPONDENT,

V.

HERBERT HIGHTOWER.....APPLICANT.

PROOF OF SERVICE

I, Herbert Hightower, certify that I have served the Notice of Appeal on Daniel B. Shearouse, Clerk's Office, SC Supreme Court, P.O. Box 11330, Columbia, SC 29211, by depositing a copy of it in the Broad River Correctional Institution Mail Room United States Mail postage prepaid on this 10 day of August 20 12.

Herbert Hightower
Herbert Hightower
Pro Se

SWORN AND SUBSCRIBED TO before me
this 10th day of August 2012.

Susan A. Frye
Notary Public

My Commission Expires

My Commission Expires: March 5, 2018

STATE OF SOUTH CAROLINA

COUNTY OF BAMBERG

IN THE COURT OF COMMON PLEAS

A TRUE COPY

Herbert Hightower, 199706,

Plaintiff

Attest

J. B. Hines
CLERK OF COURT
BAMBERG COUNTY, SC

CASE NO.

2010-CP-05-0198

v.

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

State Of South Carolina

Defendant.

Plaintiff's Attorney:

Herbert Hightower, Bar No.

Address:

BRCI 4460 Broad River Road Columbia SC 29210

phone: fax:

e-mail: other:

Defendant's Attorney:

Megan Harrigan, Bar No.

Address:

Post Office Box 11549 Columbia SC 29211-1549

phone: (803) 734-3737 fax: (803) 734-4113

e-mail: other:

MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)

FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)

PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:

Estimated Time Needed: Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type

Written motion attached

Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Megan E. Harrigan
Signature of Attorney for Plaintiff / Defendant

June 25, 2012

Date submitted

SECTION III: Motion Fee

PAID - AMOUNT:

EXEMPT: Rule to Show Cause in Child or Spousal Support

(check reason) Domestic Abuse or Abuse and Neglect

Indigent Status State Agency v. Indigent Party

Sexually Violent Predator Act Post-Conviction Relief

Motion for Stay in Bankruptcy

Motion for Publication Motion for Execution (Rule 69, SCRPC)

Proposed order submitted at request of the court; or,

reduced to writing from motion made in open court per judge's instructions

Name of Court Reporter:

Other:

JUDGE'S SECTION

Motion Fee to be paid upon filing of the attached order.

Other:

JUDGE

CODE:

Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

MOTION FEE COLLECTED: _____

CONTESTED - AMOUNT DUE: _____

FILED
BAMBERG COUNTY
2012 JUL -3 AM 10:15
JAMES B. HARRIS
CLERK OF COURT
BAMBERG, SC

STATE OF SOUTH CAROLINA)
COUNTY OF BAMBERG)

IN THE COURT OF COMMON PLEAS
FOR THE SECOND JUDICIAL CIRCUIT

Herbert Hightower, #199706,)
Applicant,)

Case No. 2010-CP-05-0198

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)
Respondent.)

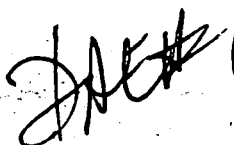
JAMES B. HERS
CLERK OF COURT
BAMBERG, SC

2012 JUL -3 AM 10:14

FILED
BAMBERG COUNTY

This matter comes before the Court pursuant to an application for post-conviction relief filed September 29, 2010. The Respondent made its Return and Motion to Dismiss on December 15, 2011, 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 dated December 16, 2011, provisionally denying and dismissing this action, while giving the Applicant 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 is an Affidavit of Service dated January 17, 2012, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

Applicant filed the following documents in response to Respondents Motion to Dismiss: "Motion of Objection, Objecting to the Signing of the Respondents Proposed Conditional Order Pursuant to South Carolina Rule of Civil Procedure, Rule (5)(b)(3)," filed on January 13, 2012; "Motion to Alter or Amend a Judgment" filed January 13, 2012; "Response to the Respondents Conditional Order" filed on February 14, 2012. The Applicant asserts the following claims:



- “The Respondent Proposed Order fails to make specific findings of fact, plus the fact in the Respondents Order are incorrect.”
- “...the alleged ‘newly discovered evidence’ is the application of a decision handed down in State v. Belcher”

The Applicant states that the dates when the Applicant was sentenced on page four of the Conditional Order of Dismissal are incorrect. The Court finds that the dates listed on the fourth page of the Conditional Order of Dismissal are incorrect; however the correct sentencing dates are listed within the procedural history section of the Dismissal. The Applicant further alleges that he has newly discovered evidence in the form of the Belcher v. State decision. In Belcher, the Court held, “where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.” State v. Belcher at 612, 685 S.E.2d at 810. The opinion expressly stated that “[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810.

The Applicant has also shown no reason why these issues were not 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(a). 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 went to trial and was found guilty on November 5, 1993. Therefore, the Applicant was required to file for post-conviction relief by November 6, 1994. This Application was filed on September 29, 2010, which was almost sixteen years after the statutory filing period had expired. 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, the Application for PCR is hereby denied and dismissed with prejudice.

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 26 day of June, 2012.



DOYET A. EARLY, III
Chief Judge for Administrative Purposes
Second Judicial Circuit

Bentley, South Carolina

Applicant filed an application for post-conviction relief on May 12, 1994 (94-CP-05-0006). An evidentiary hearing was convened before the Honorable Tom J. Ervin, at which Applicant was present and represented by Evert Comer, Jr. The application was denied and dismissed by Judge Ervin with prejudice by order dated January 27, 1995. A timely notice of appeal was filed on Applicant's behalf and a Petition for Writ of Certiorari was submitted. On January 16, 1996, the South Carolina Supreme Court denied the Petition.

The Applicant filed a second application for PCR on December 9, 1999. An evidentiary hearing was convened before the Honorable Rodney A. Peebles on October 25, 2000, at which Applicant was present and represented by William Rhoad, Esquire. The application was denied and dismissed with prejudice by Judge Peebles' order dated February 11, 2001, as was Applicant's subsequent *pro se* Motion to Reconsider.

A third application for PCR was filed by Applicant on October 14, 2002. (2002-CP-05-0169) On August 26, 2004, an evidentiary hearing was held before the Honorable Reginald I. Lloyd, at which Applicant was present and represented by Tommy Thomas, Esquire. Judge Lloyd dismissed the application with prejudice by order dated July 5, 2005, and on February 17, 2006, dismissed Applicant's motion to reconsider.

Applicant then filed a fourth application for PCR on May 2, 2005, in which he cited he had newly discovered evidence. (2005-CP-05-0151). The Respondent made its Return and Motion to Dismiss requesting the application be summarily dismissed because the alleged "newly discovered evidence" had already been argued in a previous PCR application. A conditional order of dismissal was signed by Judge Doyet A. Early, III, on November 29, 2010, giving Applicant twenty (20) days

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from which to respond why the conditional order should not become final. After receiving no response from Applicant, Judge Early signed a Final Order dismissing the application on April 4, 2011, and entered on April 11, 2011.

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

1. "Newly Discovered Evidence"
 - a. "Decision in State v. Belcher 685 S.E.2d 802 (2009)...has rendered the jury charge that malice may be inferred, implied or presumed from the use of a deadly weapon unconstitutional...But for this unconstitutional burden shifting...the jury would not have found him guilty..."
2. "Abuse of Discretion by Trial Judge"
 - a. "Trial judge...erred and abused his discretion by asking defense attorney did he want to charge manslaughter to the jury."
3. "Actual Innocence"

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 application 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 application 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 sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief; 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; Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834.

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 offenses he challenges in this Application on August 28, 2000. The Applicant was therefore required to file his application before August 28, 2001. This Application was filed on March 6, 2008, which was over six (6) years after the statutory filing period had expired.

MJE
12/11

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.

Further, this Court finds this application is barred under the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id.

The Applicant had a full opportunity to litigate all allegations regarding ineffective assistance of counsel in prior post-conviction relief proceedings. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, the Court intends to summarily dismiss these claims as barred by *res judicata*.

Finally, this Court finds that Applicant's has failed to state a claim upon which relief can be granted through this application. Namely, in Applicant's first allegation, he states that he has newly discovered evidence which allows him to overcome the successive and untimely nature of this application. This alleged "newly discovered evidence" is the application of a decision handed down

JABE
FF-5

in State v. Belcher on October 12, 2009, more than fifteen (15) years after Applicant was convicted of this crime.

As stated above, the case of State v. Belcher, 385 S.C. 597, 685, S.E.2d 803 (2009), was decided by the South Carolina Supreme Court on October 12, 2009. Belcher “represents a clear break from our modern precedent” approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six (26) cases decided over the course of more than 100 years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant’s case was, at the time of his trial, the sanctioned charge on the law. In Belcher, the Court held, “where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon.” State v. Belcher at 612, 685 S.E.2d at 810. However, the opinion expressly stated that “[the] ruling... will not apply to convictions challenged on post-conviction relief.” Id. at 613, 685 S.E.2d at 810.

Applicant is attempting to apply the ruling made in Belcher, a decade and half after his conviction, to challenge that conviction in this post-conviction relief action. This is precisely the situation that the Court expressly barred in its opinion. For that reason, this allegation by Applicant is without merit and therefore must be summarily dismissed by this court.

Further, the second allegation regarding trial judge’s error must also be summarily dismissed for failure to state a claim cognizable under the Post-Conviction Procedure Act, S.C. Code Ann. § 17-27-10 to -160. An Applicant may commence a post-conviction relief action on the following grounds:

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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 [was] 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....

S.C. Code Ann. § 17-27-20 (1976).

Even if the facts alleged by the Applicant in his second allegation are true, these facts do not support a cognizable claim for post-conviction relief under any of the statutory grounds. The allegations presented by Applicant raises direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). Therefore, the Court must summarily dismiss the second allegation as improper for post-conviction relief.

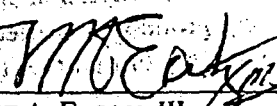
Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should

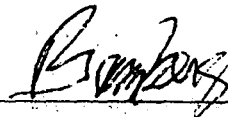


not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the Bamberg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Attn: Rob D. Corney, Esquire
P.O. Box 11549
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 10th day of Dec, 2011.


DOYET A. EARLY, III
Chief Judge for Administrative Purposes
Second Judicial Circuit


_____, South Carolina

HERBERT HIGHTOWER #199706
ALLENDALE CORRECTIONAL INSTITUTE
P.O. BOX 1151 F-1 A-22
FAIRFAX, S.C. 29827
JANUARY 24, 2012

FILED
BAMBERG COUNTY
JAN 26 AM 10:35
JAMES B. HIERS
CLERK OF COURT
BAMBERG, SC

BAMBERG COUNTY CLERK OF COURT
HONORABLE JAMES B. HIERS
POST OFFICE BOX 150
BAMBERG, S.C. 29003

RE: HERBERT HIGHTOWER V. THE STATE OF SOUTH CAROLINA
CASE NUMBER: 2010-CP-05-0198

Dear Honorable Clerk:

Please find enclosed a copy of Applicant's 59(e) Motion, pursuant to SCRCF, along with a certificate of service. This motion is filed pursuant to a Conditional Order filed with this Court on December 27, 2011 and received by the Applicant on January 17, 2012. Please be aware that this motion is timely and within the ten (10) day filing period pursuant to SCRCF, Rule 59(e). I've also enclosed a self-address stamped envelope and a extra copy of this cover letter so that you may return to me the extra copy with the filing date and time attached.

Your assistance will be highly appreciated and thank you in advance for receiving and reviewing this matter.

Respectfully Submitted,

Herbert Hightower

CC. OFFICE OF THE ATTORNEY GENERAL

PERSONAL FILES

ENCLOSURES:

RECEIVED

AUG 15 2012

S.C. SUPREME COURT

SC
RECEIVED

JAN 30 2012

Referred to

M. W. M. S.

Answered

HERBERT HIGHTOWER #199706
ALLENDALE CORRECTIONAL INST.
P.O. BOX 1151 F-1 A-22
FAIRFAX, S.C. 29827
JANUARY 24, 2012

BAMBERG COUNTY CLERK OF COURT
HONORABLE JAMES B. HIERS
POST OFFICE BOX 150
BAMBERG, S.C. 29003

RE: HERBERT HIGHTOWER V. THE STATE OF SOUTH CAROLINA
CASE NUMBER: 2010-CP-05-0198

Dear Honorable Clerk:

Please find enclosed a copy of Applicant's 59(e) Motion, pursuant to SCRCF, along with a certificate of service. This motion is filed pursuant to a Conditional Order filed with this Court on December 27, 2011, and received by the Applicant on January 17, 2012. Please be aware that this motion is timely and within the ten (10) day filing period pursuant to SCRCF, Rule 59(e). I've also enclosed a self-address stamped envelope and a extra copy of this cover letter, so that you may return to me the extra copy with the filing date and time attached.

Your assistance will be highly appreciated and thank you in advance for receiving and reviewing this matter.

Respectfully Submitted,

Herbert Hightower

CC. OFFICE OF THE ATTORNEY GENERAL
PERSONAL FILES

ENCLOSURES:

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF BAMBERG) FOR THE SECOND JUDICIAL
) CIRCUIT
HERBERT HIGHTOWER, #199706,)
APPLICANT,) CA No. 2010-CP-05-0198
v.)
STATE OF SOUTH CAROLINA,) MOTION TO ALTER OR AMEND A
RESPONDENT.) JUDGEMENT

FILED
BAMBERG COUNTY
2012 JAN 26 AM 10:37
JAMES S. HARRIS
CLERK OF COURT
BAMBERG, S.C.

Now comes the Applicant, Herbert Hightower, by way of his Motion to Alter or Amend a Judgement pursuant to S.C. Rule of Civil Procedure Rule 59(e).

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to commitment orders from the Bamberg County Clerk of Court. Applicant was indicted at the July 1993 term of the Bamberg County Grand Jury for Murder (1993-GS-05-0147). Applicant was represented by Richard B. Ness, Esquire. Applicant proceeded to jury trial before the Honorable Luke N. Brown on November 3, 1993, and on November 5, 1993, was found guilty for Murder. Judge Brown sentenced Applicant to imprisonment for the balance of his life. Counsel made a motion for new trial at the close of the trial, which he withdrew at Applicant's request. Applicant did not appeal the conviction or sentence thereafter.

This matter comes before the Court pursuant to an Application for Post-conviction Relief filed by the Applicant on September 29, 2010. In its Return, Motion to Dismiss, and Proposed Conditional Order of Dismissal, Respondent requested that the application be summarily dismissed as successive and barred by the one-year statute of limitations.

On January 11, 2012, the Applicant filed with the Court a Motion of Objection, objecting to the signing of the Respondent's Proposed Conditional Order. The Respondent's proposed order was signed by Judge Doyet A. Early III on December 16, 2011, and the order was filed with the Court on December 27, 2011. The Applicant wasn't put on notice that the Respondent's order was signed until January 17, 2012.

The Applicant now files this Motion to Alter or Amend the Judgement, pursuant to S.C. Rules of Civil Procedure, Rule 59(e). The Applicant claims that the Respondent's Conditional order fails to make specific findings of facts, plus the facts in the Respondent's order are incorrect, and not in compliance with S.C. PCR Act under S.C. CODE ANN. §17-27-80 and Rule 52(a), SCRCP. See also, *Pruitt v. State*, 423 S.E.2d at 128; *Marlar v. State*, 653 S.E.2d at 267; and *Hall v. Catee*, 601 S.E.2d at 341, counsel preparing proposed orders should be meticulous in doing so, opposing counsel should call any omissions to the attention of

the PCR Judge prior to issuance of the order, and the PCR Judge should carefully review the order prior to signing it. Even after an order is filed, counsel has an obligation to review the order and file a Rule 59(e), SCRPC, motion to alter or amend if the order fails to set forth the findings and the reasons for those findings as required by §17-27-80 and Rule 52(a), SCRPC.

The facts in the Respondent's Conditional Order are incorrect, see EXHIBIT (A), ATTACHED WITH THIS MOTION, "a copy of the Respondent's Conditional Order," on page four (4) at the bottom of this page states:

THE APPLICANT WAS CONVICTED OF THE OFFENSES HE CHALLENGES IN APPLICATION ON AUGUST 28, 2000. THE APPLICANT WAS THEREFORE REQUIRED TO FILE HIS APPLICATION BEFORE AUGUST 28, 2001. THIS APPLICATION WAS FILED ON MARCH 6, 2008, WHICH WAS OVER SIX (6) YEARS AFTER THE STATUTORY FILING PERIOD HAD EXPIRED.

The correct facts for the Applicant's case pursuant to commitment orders from the Bamberg County Clerk of Court states; APPLICANT WAS INDICTED AT THE JULY 1993 TERM OF THE BAMBERG COUNTY GRAND JURY FOR MURDER (1993-GS-05-0147). APPLICANT PROCEEDED TO TRIAL BEFORE THE HONORABLE LUKE BROWN ON NOVEMBER 3, 1993, AND ON NOVEMBER 5, 1993, WAS FOUND GUILTY FOR MURDER.

The PCR Act requires the Court's order to "make specific findings of fact, and state expressly its conclusions of law,

relating to each issue presented." S.C. CODE ANN. 17-27-80 (2003). In order to preserve all issues for appellate review, counsel must carefully review the final order and address any insufficiency through a Rule 59(e) motion requesting the PCR Court to specifically address each issue raised in the application. See, *Marlar*, 653 S.E.2d at 267 (S.C. 2007) (per curiam). In addition to the situation when Court fails to address one or more PCR issues, "a Rule 59(e) motion may also be used when the order contains an erroneous findings of fact," just like the Applicant's case where the facts in this case are incorrect, a new hearing is required because the PCR Court's Order failed to make specific findings of fact, see, *McCray v. State*, 408 S.E.2d at 241 (S.C. 1991).

The Respondent also states in the Conditional Order that: THIS COURT FINDS THAT APPLICANT'S FIRST ALLEGATION, HE STATES THAT HE HAS NEWLY DISCOVERED EVIDENCE WHICH ALLOWS HIM TO OVERCOME THE SUCCESSIVE AND UNTIMELY NATURE OF THIS APPLICATION.

In the Applicant's current PCR application, the alleged "newly discovered evidence" is the application of a decision handed down in *State v. Belcher*, 385 S.C. 597, 685 S.E.2d 803 (2009). *Belcher* was decided by the South Carolina Supreme Court

on October 12, 2009, and the Applicant filed this current PCR application on September 29, 2010, within one (1) year of the Ruling under Belcher.

There are exception to the general one-year statute of limitations. When the South Carolina Supreme Court announces a new substantive standard or right that is intended to be applied retroactively, "a PCR applicant has one-year from the date on which the new standard or right was determined to commence a PCR application." See, S.C. CODE ANN. §17-27-45(B)(2003); see also Talley v. State, 640 S.E.2d at 882 (determining that the limitations period set forth in section 17-27-45(B) applied in Talley's post-conviction relief application because the application was filed within one year of Alabama v. Sheton, 535 U.S. 645 (2002), which announced a watershed rule of criminal procedure that applies retroactively).

South Carolina Courts are required to follow the United States Supreme Court Decisions on retroactivity. See, e.g., Danforth v. Minnesota, 522 U.S. _____, 128 S.Ct. 1029, 1035 (2008); Talley v. State, 640 S.E.2d 878, 880-81 (S.C. 2007). In general, a new procedural rule will not be applied retroactively unless the new rule falls within one of two (2) exceptions: (1) it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe;" or (2) it "requires the observance of those

procedures that... are implicit in the concept of ordered liberty." *Teague v. Lane*, 489 U.S. 288, 307 (1989) (internal quotations marks omitted) (internal citation omitted).

The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. *Teague*, 489 U.S. at 311. The Supreme Court has repeatedly cited *Gideon v. Wainwright*, 372 U.S. 335 (1963), as an example of the watershed exception. *Id.* (holding that the sixth Amendment right to assistance of counsel for all criminally accused is made obligatory on the state by the Fourteenth Amendment). The Applicant's case falls within the second exception under *Teague*, because the ruling in *Belcher* announces a watershed rule of criminal procedure that applies retroactively. *Belcher* deals with the "ELEMENTS OF A CRIME." Under *Belcher*, the S.C. Supreme Court held that;

JURY CHARGE INSTRUCTING THAT MALICE MAY BE INFERRED FROM THE USE OF A DEADLY WEAPON IS NO LONGER GOOD LAW IN SOUTH CAROLINA WHERE EVIDENCE IS PRESENTED THAT WOULD REDUCE, MITIGATE, EXCUSE OR JUSTIFY THE HOMICIDE.

Malice is a element for the charge of Murder, and when dealing with elements of a charge, the Due Process Clause requires the government "to prove beyond a reasonable doubt every element of the crime with which a defendant is charged. See, In

re Winship, 397 U.S. 358, 364 (1970). The reasonable doubt standard applies in both state and federal proceedings. See, Sullivan v. Louisiana, 113 S.Ct. 2078, 2081 (1993). Also a jury instruction which erroneously defines reasonable doubt is never harmless, and must always invalidate the conviction. Sullivan, 113 S.Ct. at 2081. The Due Process Clause, and the Eighth Amendment's prohibition against cruel and unusual punishment, see Speiser v. Randall, 357 U.S. 513, 523 (1958); see also, Robinson v. California, 370 U.S. 660, 666-67 (1962), (definition of offenses violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental").

In Belcher the S.C. Supreme Court ruled that:

IN MANY MURDER PROSECUTIONS, AS BELCHER CONCEDES, THERE WILL BE OVERWHELMING EVIDENCE OF MALICE APART FROM THE USE OF A DEADLY WEAPON. HERE, HOWEVER, THE ERROR IN CHARGING THAT "MALICE MAY BE INFERRED BY THE USE OF A DEADLY WEAPON CANNOT BE CONSIDERED HARMLESS." See, Belcher, 685 S.E.2d at 809-10.

The Applicant was found guilty of Murder because "malice was inferred from the use of a deadly weapon." In the Applicant's case there were evidence that suggested a lesser included offense for "VOLUNTARY MANSLAUGHTER." See, EXHIBIT (B), ATTACHED with this motion, a copy of page (275) from the Applicant's trial transcript. trial Judge Honorable Luke N. Brown asked Applicant's trial attorney Richard B. Ness the following:

COUNSELOR, YOU MIGHT BE GIVING IT SOME THOUGHT ALSO, UNDER THE THEORY THAT THE GREATER CRIME CAN INCLUDE A LESSER CRIME, AND IN VIEW OF THE FACT THAT WE DIDN'T HAVE AN EYEWITNESS AND THAT IT'S -- SOME OF IT'S CIRCUMSTANTIAL EVIDENCE, "YOU MIGHT DECIDE WHETHER OR NOT YOU WANT ME TO CHARGE MANSLAUGHTER.

Applicant's trial attorney Richard Ness failed to request the Court to charges the jury with the lesser offense of Manslaughter, thus resulting in ineffective assistance of counsel. See, U.S. v. Smith, 10 F.3d 724, 727 (1993); see also, Poyner v. Murray, 964 F.2d 1404, 1420 (4th Cir), (under the performance prong of Strickland v. Washington, there is a "strong presumption" that counsel's strategy and tactics fall within the wide range of reasonable professional assistance).

Again Belcher announces a watershed rule of criminal procedure which allows the Applicant's PCR application to overcome the one-year statute of limitations standard set forth in S.C. CODE ANN. §17-27-45(B); see also, Tally, 640 S.E.2d at 882; Teague, 489 U.S. at 311.

Lastly the Applicant alleges that the Respondent's Conditional order fail to address the issue of "ACTUAL INNOCENCE".

The PCR Act requires the Court's order to "make specific findings of fact, and state expressly its conclusions of law,

relating to each issue presented." See, S.C. CODE ANN. §17-27-80 (2003). When referring about the Applicant's issue of "actual innocence," the Respondent's Conditional order is silent.

The Applicant raises the issue actual innocence because he did not have a direct appeal, due to ineffective assistance of counsel, thus making Applicant's conviction "not final." See, U.S. v. Peck, 922 F.2d 39,41 (4th Cir. 1993)(ineffective assistance when counsel failed to file direct appeal. There is one last caveat to this discussion on the statute of limitations, which is that the general one-year period does not apply where a defendant is denied direct appeal due to ineffective assistance of counsel. See, Odom v. State, 523 S.E.2d 753, 756 (S.C. 1999). This is not so much an exception to the statute of limitations, but rather a special situation in which the statute of limitations does not apply. See, Wilson v. State, 559 S.E.2d 581 (S.C. 2002).

CONCLUSION

In order to preserve all issue for appellate review, counsel must carefully review the final order and address any insufficiency through a "Rule 59(e) Motion" requesting the PCR Court to specifically address each issue raised in the application. See, Marljar v. State, 653 S.E. 266,267 (S.C. 2007).

The Applicant request this Court to reverse Respondent's Conditional Order and remand this case for a new hearing where

PCR Court's order failed to make specific findings of fact and conclusions of law sufficient for appellate review, see, *McCray v. State*, 408 S.E.2d 241 (S.C. 1991).

RESPECTFULLY SUBMITTED,

s/ Herbert Hightower

HERBERT HIGHTOWER.

STATE OF SOUTH CAROLINA
COUNTY OF BAMBERG

) IN THE COURT OF COMMON PLEAS
) FOR THE SECOND JUDICIAL CIRCUIT

HERBERT HIGHTOWER, #199706
APPLICANT,

) CASE NUMBER 2010-CP-05

V.

) CERTIFICATE OF SERVICE

STATE OF SOUTH CAROLINA,
RESPONDENT.

)

)

)

FILED
BAMBERG COUNTY
2012 JAN 26 AM 10:38
JAMES B. MEERS
CLERK OF COURT
BAMBERG, SC

I Herbert Hightower, hereby certify that I have served upon The Respondent S.C. Attorney General Office, and the Clerk of Court for Bamberg County, one (1) copy of Applicant's 59(e) Motion in the above-captioned case by depositing a copy of same in the United States Mail, first class, postage prepaid, addressed as follows:

S.C. ATTORNEY GENERAL'S OFFICE
POST OFFICE BOX 11549
COLUMBIA, S.C. 29201

BAMBERG COUNTY CLERK OF COURT
POST OFFICE 150
BAMBERG, S.C. 29003

THIS 24th DAY OF JANUARY, 2012

Herbert Hightower
APPLICANT.

EXHIBIT

A

nt Nighthower #199706 murray.209

R. C. I

Broad River Rd

via S.C. 29210



Daniel E. Shearouse
Clerk's office S.C. Supreme Court
P.O. Box 11330 Columbia S.C. 29211

RECEIVED