# AXELROD & ASSOCIATES, P.A.

## Attorneys and Counselors at Law

*"Success is all that matters"*

Stuart Mark Axelrod†
W. Christopher Castro*
Tristan M. Shaffer
Emily M. Sordian‡
Caitlin M. Epley

4701 Oleander Drive
Myrtle Beach, SC 29577
Phone: (843) 916-9300
Fax: (843) 916-9311

†Certified Family Court Mediator
*Currently on Active Military Leave
‡Certified Guardian Ad Litem



April 21, 2015

Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

**RE: Raymond E. Chestnut v. State of South Carolina**
**Case No.: 2012-CP-26-1814**

Dear Clerk of Court:

Enclosed please find an original and one copy of a Notice of Appeal, along with the Order we are appealing in the above referenced matter. If you would, please file the Notice of Appeal and return a clocked copy to me in the envelope provided.

Please be advised that I have been court appointed to represent Mr. Chestnut in this matter.

Thank you for your assistance in this matter. If you have any questions or concerns, please feel free to contact my office.

With kind regards,

Tristan M. Shaffer

TMS/dke
cc: Joshua L Thomas, Esquire
Horry County Clerk of Court
Loreen French
Raymond Chestnut

RECEIVED

APR 24 2015

S.C. Supreme Court

SUPREME COURT OF SOUTH CAROLINA

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable G. Thomas Cooper, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-1814

Raymond E. Chestnut, Petitioner,

v.

State of South Carolina, Respondent.

# NOTICE OF APPEAL

Petitioner appeals the Order of Dismissal of the Honorable G. Thomas Cooper, Jr. dated March 17, 2015, filed March 25, 2015 and received by Petitioner on April 1, 2015.

April 22, 2015

Tristan M. Shaffer, Esq.
AXELROD & ASSOCIATES P.A.
4701 Oleander Drive
Myrtle Beach, SC 29577
(843) 848-6708 Phone
(843) 848-6709 Fax
Tristan@Gotaxelrod.com
*Attorney for Petitioner*

Respondent's Attorney:
Joshua L. Thomas, Esquire
S.C. Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

SUPREME COURT OF SOUTH CAROLINA

RECEIVED

APR 24 2015

S.C. Supreme Court

APPEAL FROM HORRY COUNTY
In The Court of Common Pleas

Honorable G. Thomas Cooper, Jr.,
Common Pleas Judge of the Fifteenth Judicial Circuit

Case No.: 2012-CP-26-1814

Raymond E. Chestnut, Petitioner,

v.

State of South Carolina, Respondent.

CERTIFICATE OF SERVICE

I, Deborah Evans, do hereby certify that I am an employee of Axelrod & Associates, P.A., in Myrtle Beach, South Carolina, and that I have this date served the Petitioner's Notice of Appeal upon the Respondent, by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

| | |
|---|---|
| Joshua L. Thomas, Esquire<br>S.C. Office of the Attorney General<br>Post Office Box 11549<br>Columbia, SC 29211 | Raymond Chestnut, #13465-171<br>U.S. PENITENTIARY<br>P.O. BOX 1000<br>Lewisburg, P.A. 17837 |
| Horry County Clerk of Court<br>P.O. Box 677<br>Conway, SC 29528-0677 | Loreen French<br>Appellate Defense<br>1330 Lady Street<br>Columbia, SC 29201 |

Deborah Evans

Deborah Evans
Paralegal to Tristan M. Shaffer

April 22, 2015
Myrtle Beach, South Carolina

00079480 - 1

| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA<br>COUNTY OF HORRY | ) | IN THE COURT OF COMMON PLEAS<br>FOR THE FIFTEENTH JUDICIAL CIRCUIT |
| Raymond E. Chestnut,<br><br>Applicant,<br><br>v.<br><br>State of South Carolina,<br><br>Respondent. | ) | Case No. 2012-CP-26-1814<br><br>**ORDER OF DISMISSAL** |



This matter comes before the Court by way of an Application for Post-Conviction Relief. The Court convened an evidentiary hearing into the matter on February 2, 2015, at the Horry County Courthouse. Applicant appeared via his appointed guardian *ad litem*,[1] Cooper C. Lynn, Esquire, and was represented by Tristan M. Shaffer, Esquire. Joshua L. Thomas, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant's guardian *ad litem* testified on Applicant's behalf at the evidentiary hearing. Also testifying were Applicant's plea counsels: G. Scott Bellamy, Esquire, Michael E. Suggs, Esquire, W. Thomas Floyd, Esquire, and Orrie E. West, Esquire. The Court had before it the records of the Horry County Clerk of Court regarding the subject convictions, the filings in this action, and the exhibits introduced at the hearing. The Court finds as follows:

## I. PROCEDURAL HISTORY

Applicant is presently confined in the Federal Bureau of Prisons on unrelated convictions. Applicant waived presentment in December 2002 on indictments charging him with

[1] See Rule 17(c), SCRCP ("person imprisoned outside this State shall appear by guardian ad litem in an action by or against him[.]")

enticing an enrolled child from attendance in public or private school (2002-GS-26-4656) and purse snatching (2002-GS-26-4739). Orrie E. West, Esquire, represented Applicant. On December 9, 2002, Applicant pled guilty as indicted. The Honorable John L. Breeden, Jr., sentenced Applicant to concurrent terms of two (2) years incarceration, suspended upon the service of two (2) years probation for each charge.

The Myrtle Beach Police Department arrested Applicant in January 2003 for contributing to the delinquency of a minor (Warrant no. H-346040). Michael E. Suggs, Esquire, represented Applicant. On March 28, 2003, Applicant waived presentment of the indictment (2003-GS-26-802) and pled guilty as charged. Judge Breeden sentenced Applicant to three (3) years, suspended upon the service of ninety (90) days incarceration and three (3) years probation.

The Horry County Grand Jury indicted Applicant in November 2003 for unlawful possession of a pistol (2003-GS-26-3312). G. Scott Bellamy, Esquire, represented Applicant. On December 18, 2003, Applicant pled guilty as indicted. The Honorable Steven H. John sentenced Applicant to pay a $250.00 fine.

The Horry County Grand Jury indicted Applicant in July 2004 for assault with intent to kill (2004-GS-26-2651) and unlawful conduct towards a child (2004-GS-26-2652). William Thomas Floyd, Esquire, represented Applicant. On August 3, 2004, Applicant pled guilty to assault of a high and aggravated nature and unlawful conduct towards a child. The Honorable Jackson V. Gregory issued a sentence of three (3) years, suspended to time served and three (3) years probation for AHAN, and a suspended sentence of three (3) years for unlawful conduct towards a child.

The Horry County Grand Jury indicted Applicant in November 2004 for possession of crack cocaine (2004-GS-26-4448). Michael E. Suggs, Esquire, represented Applicant. On June 6, 2005, Applicant pled guilty as indicted. Judge Breeden sentenced Applicant to eighteen (18) months imprisonment.

Applicant filed appeals from his pleas on August 21, 2013. The South Carolina Court of Appeals dismissed the appeals as untimely on November 26, 2013. The remittitur was returned to the circuit court on April 8, 2014.

## II. ALLEGATIONS

Applicant originally filed this action as six (6) separate applications for post-conviction relief. In docket number **2012-CP-26-1814**, Applicant challenged his August 2004 plea to assault with intent to kill and unlawful conduct towards a child on the following grounds:

1. "Denied the right of a preliminary hearing."
2. "Victim was not assaulted."
3. "Denied fast and speedy trial"

In an amendment to this docket number,[2] Applicant alleged:

1. "Ineffective assistance of counsel."
2. "Fourteenth amendment violation (Due process)/5th amendment violation."
3. "involuntary and unknowing plea."

Respondent made its initial Return and Motion to Dismiss on or about April 24, 2012. Judge John entered a Conditional Order of Dismissal on May 12, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action

[2] Applicant initially filed a second application (2013-CP-26-3195). By order filed October 3, 2013, the Honorable Benjamin H. Culbertson merged these two filings together, and indicated the second application would be considered an amendment to the first.

should not be dismissed. Applicant filed a *pro se* objection to the conditional order on May 30, 2012.

In docket number **2012-CP-26-1815**, Applicant challenged his June 2005 plea to possession of crack cocaine on the following grounds:

1. "Did not possess crack cocaine. Due process violation, Structure error, wrongfully sentenced and convicted."
2. "Denied the right of a preliminary hearing."
3. "Fraudulent Indictment."

Respondent made its initial Return and Motion to Dismiss on or about May 24, 2012. Judge John entered a Conditional Order of Dismissal on June 11, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action should not be dismissed. Applicant filed a *pro se* objection to the conditional order on July 5, 2012.

In docket number **2012-CP-26-1816**, Applicant challenged his March 2003 plea to contributing to the delinquency of a minor on the following grounds:

1. "Illegal sentence and conviction."
2. "Due Process violation."
3. "Fraudulent Indictment."

Respondent made its initial Return and Motion to Dismiss on or about May 24, 2012. Judge John entered a Conditional Order of Dismissal on June 11, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action should not be dismissed. Applicant filed a *pro se* objection to the conditional order on July 6, 2012.

In docket number **2012-CP-26-2915**, Applicant challenged his December 2002 plea to enticing an enrolled child from attendance in public or private school on the following grounds:

1. "Denied the right of a preliminary hearing."
2. "Was not advised of right to appeal conviction."
3. "Ineffective assistance of counsel. Insufficient evidence. (misconduct) wouldve proceed to trial."

Respondent made its initial Return and Motion to Dismiss on or about May 24, 2012. Judge John entered a Conditional Order of Dismissal on June 11, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action should not be dismissed. Applicant filed a *pro se* objection to the conditional order on July 6, 2012.

In docket number **2012-CP-26-2916**, Applicant challenged his December 2002 plea to purse snatching on the following grounds:

1. "Ineffective assistance of counsel. Failed to provide motion of discovery (Brady material) acted unprofessional"
2. "Prosecutor concealed records, prosecutorial misconduct."
3. "Denied right to a preliminary hearing."
4. "Would have proceed to a jury trial."

Respondent made its initial Return and Motion to Dismiss on or about May 24, 2012. Judge John entered a Conditional Order of Dismissal on June 11, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action should not be dismissed. Applicant filed a *pro se* objection to the conditional order on July 16, 2012.

In docket number **2012-CP-26-2917**, Applicant challenged his December 2003 plea to unlawful possession of a pistol on the following grounds:

1. "Ineffective assistance of counsel. Performance was deficient."
2. "Denied right to a preliminary hearing."
3. "Violated 5th Amendment. (Due process)."

Respondent made its initial Return and Motion to Dismiss on or about May 24, 2012. Judge John entered a Conditional Order of Dismissal on June 11, 2012, provisionally denying the application and giving Applicant twenty (20) days to provide sufficient reasons why the action should not be dismissed. Applicant filed a *pro se* objection to the conditional order on July 6, 2012.

Subsequently, Judge Culbertson appointed counsel to represent Applicant on April 9, 2013. Judge Culbertson also issued an order on April 24, 2013, giving newly appointed counsel an opportunity to respond to the conditional orders. Counsel filed a timely reply to the conditional orders, asserting Applicant is entitled to a direct appeal from the underlying convictions. Judge Culbertson issued an order on October 3, 2013, finally dismissing all of Applicant's claims with the exception of the allegation he did not knowingly and voluntarily waive his right to a direct appeal.

Respondent made its amended return to each pending application on or about February 3, 2014. By order dated December 22, 2014, and filed January 5, 2015, the Honorable Larry B. Hyman merged all of Applicant's outstanding applications into a single docket number, **2012-CP-26-1814**. Respondent filed a second amended return on or about January 26, 2015.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

### A. Summary of Testimony

Applicant's guardian *ad litem* testified based on his discussions with Applicant regarding

this case. According to Applicant, his attorneys never informed him of his right to a direct appeal. Applicant believes he could have appealed plea judge failing, in each plea, to fully explain Applicant's rights to a jury trial. Applicant believed his applications were timely because he attempted to obtain records from his appeals, but it took a long time to acquire them. Applicant never directly requested his attorneys file an appeal for him. Applicant also understood he ~~revived~~ RECEIVED probationary sentences for each of his pleas.

Mr. Bellamy testified he no longer has a copy of Applicant's file because he is not required to retain records for more than six (6) years. He also testified he has no independent recollection of representing Applicant. He also did not recall Applicant asking for an appeal. However, he testified Judge John normally advises defendants of their right to appeal. Mr. Bellamy also testified there were no grounds to appeal the plea because Judge John accepted the recommendation and sentenced Applicant to pay a fine.

Mr. Suggs testified he does not recall the specifics of representing Applicant, but is familiar with Applicant's name. He testified he sometimes discusses appeals with clients, but did not recall whether he discussed it with Applicant. Mr. Suggs testified he would have filed an appeal if Applicant had asked him to. However, he testified he would have no grounds to appeal from a probationary sentence.

Mr. Floyd testified he had no independent recollection of representing Applicant. However, he noted Applicant's plea was for an accepted recommendation of probation, so he would have no grounds to file an appeal unless Applicant requested one.

Ms. West testified she is the chief public defender. She had no specific recollection of Applicant's pleas, and could not locate any of his files because the office is not required to retain



7

them for such a long period of time. Ms. West testified she always discusses appellate rights with clients, and was certain she would have done the same with Applicant. She also testified Judge Breeden's practice was to inform defendant of the right to appeal. However, Ms. West testified she would have no reason to file an appeal unless Applicant requested one because Applicant received a probationary sentence.

**B. Laches**

The Court finds Applicant's allegation he did not knowingly and voluntarily waive his right to a direct appeal is barred by the doctrine of laches. To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. See McElrath v. State, 276 S.C. 282, 284, 277 S.E.2d 890, 891 (1981). 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." Id. (citing Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979)). The doctrine of laches may bar any allegations where the applicant has failed to exercise his rights for an unreasonable period. Whitehead v. State, 352 S.C. 215, 219, 574 S.E.2d 200, 202 (2002) (laches applicable to Austin v. State claims); see also RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 199, 644 S.E.2d 730, 734-35 (2007) ("Laches connotes not only an undue lapse of time, but also negligence and opportunity to have acted sooner." (citing Chambers of South Carolina, Inc. v. County Council for Lee County, 315 S.C. 418, 434 S.E.2d 279 (1993))).

Applicant initiated this action over six (6) years after his most recent plea, and over nine (9) years after his earliest plea. The transcript of Applicant's pleas was destroyed pursuant to Rule 607(i), SCACR. (See Resp. Ex. #2). The files from Applicant's plea counsels have been

destroyed pursuant to Rule 1.15(i), Rule 407, SCACR. Many of the witnesses had no specific recollection of Applicant's pleas. Under these circumstances, the Court finds Respondent should not be called upon to defend the constitutionality of Applicant's convictions after such a long delay. McElrath, 276 S.C. at 284, 277 S.E.2d at 891. Accordingly, the Court finds the doctrine of laches bars Applicant's claim because of his lack of diligence in pursuing relief.

**C. White v. State Claim**

Even if Applicant's claim was not bared by the doctrine of laches, the Court finds he has failed to meet his burden of proving he did not knowingly and voluntarily waive his right to a direct appeal from his guilty pleas. Trial counsel normally must ensure that a criminal defendant is made fully aware of his appeal rights. White v. State, 263 S.C. 110, 118, 208 S.E.2d 35, 39 (1974). However, "[a]bsent extraordinary circumstances ... there is no constitutional requirement that a defendant be informed of the right to a direct appeal from a guilty plea." Turner v. State, 380 S.C. 223, 224-25, 670 S.E.2d 373, 374 (2008) (citing Roe v. Flores-Ortega, 528 U.S. 470 (2000); Weathers v. State, 319 S.C. 59, 459 S.E.2d 838 (1995)). Extraordinary circumstances arise where "there are nonfrivolous grounds for appeal" or the applicant "reasonably demonstrated an interest in appealing." Id. The Court finds credible each plea counsel's testimony that an appeal would have been filed had Applicant requested one. The Court also finds credible each plea counsel's testimony that they saw no viable grounds for an appeal. In each case, Applicant received the benefit of a recommended plea, and all but one plea resulted in Applicant serving no active sentence. Thus, each plea counsel correctly surmised there were no nonfrivolous grounds for an appeal from Applicant's pleas. Because no



G 9

extraordinary circumstances arose from Applicant's pleas, none of his counsels were under a duty to inform Applicant of the right to a direct appeal.

The Court also finds Applicant waived any right to an appeal by his conduct in waiting between six (6) years and nine (9) years to initiate these actions. A defendant may waive a direct appeal by making a "knowing and intelligent decision not to pursue the appeal." Simuel v. State, 390 S.C. 267, 271, 701 S.E.2d 738, 739-40 (2010) (quoting Sheppard v. State, 357 S.C. 646, 594 S.E.2d 462 (2004)). Likewise, "[a]cts inconsistent with the continued assertion of a right, such as a failure to insist upon the right, may constitute waiver." Bonnette v. State, 277 S.C. 17, 18, 282 S.E.2d 597, 598 (1981) (citing 92 C.J.S. Waiver, p. 1063 (1955)). The Court finds especially credible the testimony of Ms. West that she would have advised Applicant of his right to an appeal, and that the sentencing judge would have done so as well. Because Ms. West was the first counsel to represent Applicant, he would have been aware of his appellate rights at his subsequent pleas as well. His failure to request an appeal after each plea constitutes a waiver of the right to appeal. Likewise, Applicant's delay in filing these actions – waiting until he became incarcerated in federal prison – constitutes a waiver of any right to a direct appeal from his pleas. Accordingly, the Court finds Applicant would not be entitled to an appeal from his guilty pleas even if this claim was not barred by the doctrine of laches.

## IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established he timely filed this application. Likewise, the Court finds and concludes Applicant has not established he did not knowingly and voluntarily waive his right to a direct appeal from his

guilty pleas. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from his attorney's receipt 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, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, his attorney must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED THAT:**

1. The Application for Post-Conviction Relief is denied and dismissed with prejudice; and

2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

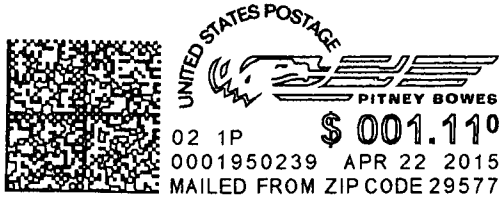
**AND IT IS SO ORDERED** this 17 day of MARCH, 2015.

THE HONORABLE G. THOMAS COOPER, JR.
Presiding Judge

CHARLESTON, South Carolina

AXELROD
& ASSOCIATES
ATTORNEYS AT LAW

4701 Oleander Drive ♦ Myrtle Beach, SC 29577
dke




Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211