

STATE OF SOUTH CAROLINA )  
COUNTY OF LANCASTER )

IN THE COURT OF COMMON PLEAS  
SIXTH JUDICIAL CIRCUIT

Brian A. Diggs, #248964, )

2015-CP-29-1434

Applicant, )

v. )

**ORDER RESTRICTING FUTURE FILINGS**

State of South Carolina, )

Respondent. )

FILED  
OFFICE OF CLERK  
OF COURT  
LANCASTER SC  
2016 FEB 29 PM 3:05  
Clerk of Court  
LANCASTER SC


This matter comes before this Court by way of an application for post-conviction relief filed October 20, 2015.

**PROCEDURAL HISTORY**

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lancaster County. The Applicant was indicted at the February 1995 term of the Court of General Sessions for Lancaster County for murder (95-GS-29-189) and attempted armed robbery (95-GS-29-191). He was represented by Leon Banks, Esquire. On April 14, 1998, the Applicant pled guilty as indicted. He was sentenced by the Honorable Paul E. Short, Jr., to confinement for life and a consecutive term of ten (10) years, respectively. The Applicant did not appeal his guilty plea or sentence.

**1999-CP-29-0187**

The Applicant subsequently filed an application for post-conviction relief (PCR) on April 7, 1999 and amended on May 27, 2003. The State filed its Return on September 21, 1999. An evidentiary hearing was convened on June 4, 2003, at the Fairfield County Courthouse. The Applicant was present and represented by Philip E. Wright, Esquire. In that application, Applicant



alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel; and
2. No right to appeal guilty plea.

The Honorable Kenneth G. Goode, denied and dismissed Applicant's application by written Order on August 1, 2003. Subsequently, the Applicant filed a document titled "59(e) Motion to Alter or Amend the Judgment." The Honorable Kenneth G. Goode denied this motion on September 19, 2003. A Petition for Writ of Certiorari was filed on behalf of the Applicant on March 8, 2004. The South Carolina Court of Appeals denied the Applicant's Petition for Writ of Certiorari by written Order dated April 11, 2007. The Remittitur was issued on May 1, 2007.

**9:08-cv-00540-GRA**

Applicant filed a *pro se* Petition for Writ of Habeas Corpus with the United States District Court for the District of South Carolina on February 12, 2008. The Respondent made its Return and Memorandum of Law in Support of Motion for Summary Judgment on July 25, 2008. The Honorable Bristow Marchant, United States Magistrate Judge, issued his Report and Recommendation on November 25, 2008. By Order filed December 31, 2008, the Honorable G. Ross Anderson, Jr., United States District Judge, adopted the Report and Recommendation by granting the Respondent's motion for summary judgment and dismissed the petition with prejudice. Applicant subsequently filed a Motion to Reconsider on January 9, 2009. By Order filed January 20, 2009, the Honorable G. Ross Anderson, Jr. denied the motion.

**2009-CP-29-0641**

The Applicant filed a second an application for PCR on May 1, 2009. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

A handwritten signature or set of initials, possibly "J. Anderson", written in black ink.

1. Newly discovered evidence; in that,
  - a. Applicant alleges that the negotiated plea was made before the ruling of Roper v. Simmons, 543 U.S. 551 (2005). In Roper, the United States Supreme Court held capital punishment unconstitutional for offenders who are under the age of eighteen when their crimes were committed. The Applicant, who was under the age of eighteen when his crime was committed, claims that the "state informed the court that in exchange for the plea, Petitioner would not be exposed to the death penalty." Thus, he claims that his plea negotiation is void since the threat of the death penalty is no longer applicable.

The Respondent made its Return and Motion to Dismiss on August 25, 2009. The Court issued a Conditional Order of Dismissal dated September 15, 2009, provisionally denying and dismissing the action. The Court gave twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Applicant submitted a pro se document motion for extension of time to respond to the conditional order of dismissal on September 17, 2009. On October 5, 2009, the Applicant submitted a "Motion to Amend Objection to State's Request for Summary Dismissal." The Applicant asserted the following reasons he is entitled to an evidentiary hearing:

1. Roper v. Simmons, 543 U.S. 551 (2005) prohibits capital punishment for those under eighteen when the crime was committed;
2. The State originally sought the death penalty against the Applicant in 1997, which is no longer an option.

The Applicant submitted an additional "Motion to Amend Objection to State's Request for Summary Dismissal" filed on October 22, 2009. The Applicant again submitted Roper v. Simmons rendered his plea involuntary. Filed that same day, the Applicant submitted a "Motion to Construe Pro-Se Pleadings Liberally" due to the Applicant's lack of legal training. On October 22, 2009, he also filed a "Motion to Add Future Motions," "Motion to Require the State to Reproduce and Seal Entire File and Make Such File a Part of the Record," and a "Motion for Appointment of Counsel



and Hearing Request."

On October 27, 2009, the Applicant submitted an additional two-part "Motion to Amend Objection to State's Conditional Order of Dismissal." Again, the Applicant submitted that his application was appropriate due to new constitutional standards via Roper v. Simmons and his claim is one of newly discovered evidence. On November 2, 2009, the Applicant submitted an additional motion requesting an extension of time to respond to the Conditional Order of Dismissal. The Honorable Brooks P. Goldsmith denied the application by written Order filed December 11, 2009. On January 12, 2010, the applicant submitted a "Motion 59(e) to Alter or Amend Judgment." Respondent made its Return to Applicant's Pro Se 59(e) Motion on March 9, 2010. The Honorable Brooks P. Goldsmith denied the motion with written Order filed March 24, 2010.

The Petition for Writ of Certiorari was filed November 23, 2010 submitted by Wanda H. Carter, Esquire of the South Carolina Office of Appellate Defense. Respondent made its Return to Petition for Writ of Certiorari on January 7, 2011. By Order dated September 4, 2012, the South Carolina Supreme Court denied the petition. The Remittitur was sent on December 5, 2012.

**2011-CP-29-0846**

Applicant filed a third application for PCR on June 7, 2011. In that application, Applicant alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel; in that,
  - a. Counsel failed to challenge a statement given by Applicant under coercion,
  - b. Counsel failed to argue Applicant "acted under duress and determination of adult co-defendant,
  - c. Counsel failed to argue Applicant "had no juvenile or adult criminal history of prior criminal conviction or prior experience with the criminal justice system at the time of his plea"
  - d. Counsel failed to argue Applicant "had sub-average general intellectual functioning existing with a IQ below 75;"
2. Involuntary guilty plea; in that

- a. Applicant only pled guilty to avoid the death penalty,
  - b. Neither his Counsel nor the Court explained the importance of the rights he was waiving;
3. Denial of due process; in that,
- a. Applicant's sentence of life imprisonment is "unconstitutionally cruel and unusual as applied to punish an offense committed when the perpetrator was less than 18 years of age,"
  - b. The State introduced evidence of aggravation it had not informed the Applicant of in writing before the sentencing hearing. "Pursuant to South Carolina Code § 16-3-20 (B), only such evidence in aggravation as the State has informed the defendant in writing before the trial is admissible.

The Respondent made its Return and Motion to Dismiss on June 28, 2012. The Honorable Brooks P. Goldsmith issued a Conditional Order of Dismissal dated June 29 2012, provisionally denying and dismissing the action, 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. The Applicant submitted a *pro se* document motion for extension of time to respond to the conditional order of dismissal on July 12, 2012. On August 7, 2012, Applicant's attorney, Elizabeth Franklin-Best, submitted a "Response to State's Return and Motion to Dismiss." The Applicant argues that recent United States Supreme Court decisions entitle him to a successive application pursuant to S.C. Code §17-27-25(b), which extends that statute of limitations by one year from the decision date of a new substantive law. Applicant relied on the following cases:

1. Graham v. Florida, 130 S. Ct. 2011 (2010),
2. Miller v. Alabama, 132 S.Ct. 2455 (2012),
3. Lafler v. Cooper, 132 S.Ct 1376 (2012),
4. Missouri v. Frye, 132 S.Ct. 1399 (2012),
5. Martinez v. Ryan, 132 S.Ct. 1309 (2012).

Subsequently, a "Motion for Order to Produce Records" was filed by counsel on August 20,



2012, requesting an order be signed allowing Applicant access to mental health records related to his case. On November 19, 2012, counsel then filed a "Motion to Hold in Abeyance" requesting the court stay the proceedings until the South Carolina Supreme Court decided *Aiken et. al. v. Byars*. The Honorable Brooks P. Goldsmith denied the application and all motions by written Order signed December 20, 2012.

On January, 3, 2013, the Applicant's counsel submitted a "Motion 59(e) to Alter or Amend Judgment." Respondent made its Return to Applicant's Pro Se 59(e) Motion on January 25, 2013. The Honorable Brooks P. Goldsmith denied the motion with written Order signed January 31, 2013. The Petition for Writ of Certiorari was filed November 7, 2013 submitted by David Alexander, Esquire of the South Carolina Office of Appellate Defense. Respondent made its Return to Petition for Writ of Certiorari on March 26, 2014. By Order dated November 20, 2014, the South Carolina Supreme Court denied the petition. The Remittitur was sent on December 8, 2014.

#### **Fourth PCR**

Applicant filed his fourth PCR application on October 20, 2015. Respondent made its Return and Motion to Dismiss on or about February 5, 2015. In that Application, Applicant alleges he is being held unlawfully for the following reasons:

1. "Unconstitutionality of Juvenile Virtual L.W.O.P.;"
2. "Sentenced beyond the maximum allowed;"
3. "Applicant's projected parole date and South Carolina's parole system does not provide "a meaningful opportunity" for release when applied to juvenile offenders under *Miller v. Alabama* and *Aiken v. Byars*. Constitutional Art. 12 sec 2 Art. 1 see 15."

The application is currently pending before the Court.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**



This Court finds that Applicant had a full opportunity to litigate his current allegations in prior court proceedings. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his convictions. The public interest in finality of judgments requires that litigation must eventually come to an end.

Due to the repetitive and frivolous nature of Applicant's numerous applications, this Court directs the Lancaster County Clerk of Court to not accept any further PCR applications from the Applicant unless he pays the normal filing fee generally required for the filing of a summons and complaint. The United States Supreme Court has denied litigants who have filed repetitive, frivolous petitions the right to proceed *in forma pauperis*, resulting in the litigants having to pay the required filing fee with that Court. In re Whitaker, 513 U.S. 1, 115 S.Ct. 2, 130 L.Ed.2d 1 (1994); In re Anderson, 511 U.S. 364, 114 S.Ct. 1606, 128 L.Ed.2d 332 (1994); In re Demos, 500 U.S. 16, 111 S.Ct. 1569, 114 L.Ed.2d 20 (1991); In re Sindram, 498 U.S. 177, 111 S.Ct. 596, 112 L.Ed.2d 599 (1991); In re McDonald, 489 U.S. 180, 109 S.Ct. 993, 103 L.Ed.2d 158 (1989).

Additionally, this Court finds that the Applicant is required to provide a properly notarized affidavit certifying that the Applicant believes in good faith that the matter raised is not frivolous. In In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996), the South Carolina Supreme Court required Maxton, who had filed numerous meritless petitions with the Court, to pay a filing fee and accompany any future filings with a properly notarized affidavit by Maxton certifying that he in good faith believed that the matters he was raising were non-frivolous and proper for the Court to consider. Id. Other courts have required that the abusive litigant file an affidavit certifying that he believes the petition raises an original claim or is non-frivolous before accepting filings from the litigant. In the Matter of Verdone, 73 F.3d 669 (7th Cir.1995); Abdul-Akbar v. Watson, 901 F.2d 329

A handwritten signature or set of initials, possibly "AK", enclosed within a large, loopy circular scribble.

(3d Cir.1990); Green v. Warden, 699 F.2d 364 (7th Cir.), *cert. denied*, 461 U.S. 960, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983).

This Court also finds that if the Applicant submits an Application that is accompanied with a notarized affidavit, that, before filing, the Clerk's office be directed to submit the Application to the Chief Administrative Judge for Common Pleas. The Administrative Judge should then make a finding on whether the issues raised in the Application are non-frivolous and proper for the Court to consider. If the Administrative Judge finds the Application proper, it would then be submitted to the Clerk's office for filing. **No Application should be filed without a proper finding from the Chief Administrative Judge.**

This Court also cautions the Applicant that should he continue to file Applications containing matters that are frivolous, he may be held in contempt or for the Court to impose sanctions as circumstances of the case and discouragement of like conduct in the future may warrant. The Supreme Court imposed such warning on an Applicant in In re Theron Maxton, 325 S.C. 3, 478 S.E.2d 679 (1996).

There is a strong interest in finality of the criminal process; judicial review must stop at some juncture and finality must be realized. Aice v. State, 305 448, 409 S.E.2d 392 (1991). The Court quoted Justice Harlan when discussing the importance of finality in litigation when they stated the following:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the

judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final. (citation omitted) This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.

Anderson v. Leeke, 271 S.C. 435, 441-442, 248 S.E.2d 120, 123 (1978) citing Mackey v. United States, 401 U.S. 667, 91 S.Ct. 1160, 1179, 28 L.Ed.2d 404 (1971).

### CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has received his full bite at the apple. The Applicant's repetitive filings shall be restricted in order to preserve the Court's time and resources and stop any interference with the fair administration of justice.

### IT IS THEREFORE ORDERED:

1. The Clerk of Court should refuse to accept further petitions from the Applicant asking the Court to entertain matters unless he pays a filing fee generally required for filing motions and petitions with this Court.
  - a. The Applicant should be prohibited from filing any legal actions in any jurisdiction in South Carolina without submitting the requisite filing fees<sup>1</sup> and providing a properly notarized affidavit certifying that the Applicant believes in good faith that the matter raised is not frivolous.

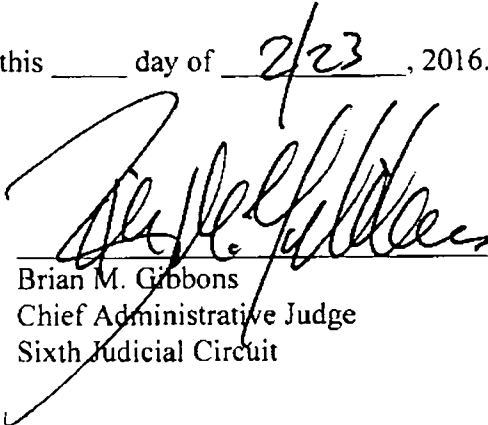
---

<sup>1</sup> S.C. Code Ann. § 8-21-310(11)(a) (Supp. 2004)



- b. Any Applications submitted with properly notarized affidavits be submitted to the Chief Administrative Judge to make a finding on whether the allegations are non-frivolous and proper for the Court before they are filed.
- c. The Clerk of Courts should be instructed to return all documents that do not comply with this order.

**AND IT IS SO ORDERED** this \_\_\_\_\_ day of 2/23, 2016.



\_\_\_\_\_  
Brian M. Gibbons  
Chief Administrative Judge  
Sixth Judicial Circuit

        , South Carolina.