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**STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT**

**RECEIVED**

APR 19 2018

**NOTICE OF APPEAL 2016-CP-43-0225**

S.C. SUPREME COURT

**JOHN EDWARD COLWELL  
PETITIONER**

**VS**

**STATE OF SOUTH CAROLINA  
RESPONDENT**

**RECEIVED**

APR 16 2018

SC Court of Appeals

**THIS MATTER COMES BEFORE THE COURT BY WAY OF NOTICE OF APPEAL OF CASE 2016-CP-43-0225; RECORDED BY SUMTER COUNTY CLERK OF COURT JAMES C. CAMPBELL JANUARY 17<sup>th</sup> 2018, DENIED AND DISMISSED BY JUDGE R. FERRELL COTHRAN JR, ON JANUARY 19<sup>th</sup> 2017, SERVED UPON PETITIONER ON MARCH 12<sup>th</sup> 2018. PETITIONER HAS ENCLOSED A COPY OF SERVICE FOR THE THE 30 DAYS TO APPEAL AND FOR THE COURT RECORD. (SEE: ATTACHMENT).**

**ATTACHMENTS/EXIBITS**

- (1) SOUTH CAROLINA DEPARTMENT OF CORRECTIONS LEGAL/PRIVILEGED/CERTIFIED MAIL DELIVERY LOG.**
  
- (2) NOTICE OF MOTION SCRPC 59(e) CODE, 1976 17-27-80/DATED AUGUST 1<sup>st</sup> 2006.**
  
- (3) PROOF OF SERVICE UPONN; THE HONORABLE THOMAS W.COOPER JR, THE OFFICE OF THE ATTORNEY GENERALS, MRS. PAUALA S.MAGARGLE, AND ATTORNEY CHARLES T.BROOKS,III.**
  
- (4) A LETTER FROM THE SOUTH CAROLINA SUPREME COURT CLERK DANIEL E. SHEAROUSE INDICATION THAT PETITIONER'S (PRO-SE) 59(e) SCRPC MOTION IS UNTIMELY.**

**STATEMENT OF THE CASE**

**PETITIONER FILED HIS FIRST (PCR) APPLICATION ON NOVEMBER 12<sup>th</sup> 2004 (2004-CP-43-1382). IN HIS APPLICATION, PETITIONER SET FORTH THE FOLLOWING GROUNDS FOR RELIEF:**

**(1) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.**

- A. FAILURE TO CHALLENGE SOLICITOR'S JURY STRIKES PURSUANT TO BOSTON V KENTUCKY.**
- B. FAILURE TO REQUEST HEARING ON OUT-OF-COURT IDENTIFICATION.**
- C. FAILURE TO OBJECT AND SEEK SUPPRESSION OF THE OUT-OF-COURT SHOW UP IDENTIFICATION CONDUCTED AT PETITIONER'S BOND HEARING AS BEING DULY SUGGESTIVE.**
- D. COUNSEL FAILED TO OBJECT TO THE TAINTED IN COURT IDENTIFICATION.**
- E. COUNSEL FAILED TO OBJECT TO THE DEPRIVATION OF CONFRONTATION AND CROSS EXAMINATION OF STATEMENTS OFFERED BY A NON-TESTIFYING DECLARANT. (HEARSAY)**
- F. COUNSEL FAILED TO OBJECT TO THE ADMISSION OF THE ATM VIDEO AND PHOTOGRAPH ADMITTED AT TRIAL.**
- G. COUNSEL FAILED TO OBJECT TO THE ADMISSION OF PREJUDICIAL EVIDENCE AT TRIAL.**
- H. COUNSEL FAILED TO OBJECT TO THE CHAIN OF CUSTODY OF THE ATM VIDEOTAPE**
- I. COUNSEL FAILED TO OBJECT TO THE STATE'S BLOSTERING IT'S CASE.**

J. COUNSEL FAILED TO OBJECT TO THE VIOLATION OF PETITIONER'S FOURTH AMENDMENT RIGHT.

K. COUNSEL FAILED TO OBJECT TO THE VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHT.

L. COUNSEL FAILED TO OBJECT TO THE VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT.

M. COUNSEL FAILED TO OBJECT TO THE PETITIONER'S (MUG SHOT) BEING INTRODUCED AT TRIAL.

N. COUNSEL FAILED TO OBJECT TO THE SOLICITOR'S COMMENTS REGARDING PETITIONER'S ARREST FOR PUBLIC INTOXICATION.

(2) INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

(3) VIOLATION OF FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS.

AN EVIDENTARY HEARING WAS CONVENED ON OCTOBER 7, 2005 AT WHICH PETITIONER WAS PRESENT AND REPRESENTED BY COUNSEL, PETITIONER TESTIFIED AND PRESENTED ISSUES OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL, IN AND ORDER DATED JULY 13, 2006. THE HONORABLE THOMAS W. COOPER JR, DENIED AND DISMISSED THE APPLICATION WITH PREJUDICE.

PETITIONER'S APPEAL PRESENTS (2) RELATED QUESTIONS TO THE COURT

(A) WHETHER OR NOT HIS CLAIMS IS PROCEDURALLY DEFAULTED DUE TO HIS CONCEDED FAILURE TO COMPLY WITH THE SOUTH CAROLINA RULE OF CIVIL PROCEDURE 59(e) AND (B) WHETHER OR NOT HIS TRIAL COUNSEL WAS IN FACT INEFFECTIVE FOR THE ISSUES PRESENTED THAT THE COURT FAILED TO MAKE SPECIFIC FINDINGS AND CONCLUSIONS OF LAW ON.

**RULE 227<sup>(c)</sup> (EXPLANATION REQUIRED)**

**PETITIONER WILL ABIDE BY SCACR 227, AND PRESENT SUFFICIENT FACTS ARGUMENT AND CITATION TO LEGAL AUTHORITY SHOWING THAT THERE IS AN ARGUABLE BASIS FOR ASSERTING THAT THE DETERMINATION BY THE LOWER COURT WAS IMPROPER IN HIS CURRENT ACTION (2016-CP-43-0225) AS WELL AS HIS ORIGINAL ACTION (2004-CP-43-1382).**

**THE LOWER COURT HAS DETERMINE THAT PETITIONER COLWELL'S CURRENT ACTION IS BARRED AS SUCCESSIVE OR BEING UNTIMELY UNDER THE STATUE OF LIMITATIONS. PETITIONER COLWELL DISAGREES FOR THE FOLLOWING: REASONS:**

**17-27-80**

**THE UNIFORM POST CONVICTION PROCEDURE ACT STATES:**

**THE COURT SHALL MAKE SPECIFIC FINDINGS OF FACT, AND STATE EXPRESSLY ITS CONCLUSIONS OF LAW, RELATING TO EACH ISSUE PRESENTED. THIS ORDER IS A FINAL JUDGEMENT. HISTORY: 1962 CODE SECTION 17-607; 1969(56) 158.**

**PETITIONER ASCERTS THAT JUDGE THOMAS W.COOPER JR, DENIED AND DISMISSED HIS (ORIGINAL PCR APPLICATION) AND PRESENTED ISSUES OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WITHOUT MAKING SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW AS REQUIRED 17-27-80.**

PETITIONER THEN FILED UPON SERVICE A TIMELY (NOTORIZED) MOTION RULE 59(e) SCRPC CODE, 1976 17-27-80 AS WELL AS A PROOF OF SERVICE UPON JUDGE THOMAS W.COOPER JR, DATED AUGUST 1<sup>st</sup> 2006 TO REACH A FINDING OF FACT AND CONCLUSION OF LAW ON EACH AND EVERY ALLEGATION OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL. (SEE ATTACHMENTS).

ON NOVEMBER 13<sup>th</sup> 2006 PETITIONER RECEIVED A LETTER FROM SOUTH CAROLINA SUPREME COURT CLERK, MR.DANIEL E.SHEAROUSE INDICATING THAT HIS (PRO-SE) RULE 59(e) SCRPC MOTION IS UNTIMELY. THEREFORE, HIS APPEAL WILL CONTINUE (ALSO SEE ATTACHMENT).

PETITIONER RECEIVED A JOHNSON PETITION AND WAS PROCEDURALLY BARED ON FEDERAL HABEAS CORPUS.

PETITIONER ASSERTS THAT THIS CURRENT ACTION IS NOT SUCCESSIVE BECAUSE IT'S NOT A NEW APPLICATION, IT'S MERELY AN ACTION TO RECEIVE A SPECIFIC FINDINGS OF FACT AND CONCLUSIONS OF LAW, RELATING TO EACH ISSUE OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL THAT WAS PRESENTED IN HIS ORIGINAL APPLICATION (A FULL BITE OF THE APPLE) AS 17-27-80 REQUIRES. THE STATUE OF LIMITATIONS DOESN'T APPLY HERE, THE COURTS RECORD WILL CLEARLY SHOW THIS COURT THAT PETITIONER COLWELL'S ORIGINAL (PCR) APPLICATION HAS BEEN DEEMED TIMELY BY THE COURTS.

COLWELL ALSO ASSERT THAT EVEN IF HIS SCRPC RULE 59(e) MOTION WAS UNTIMELY IT STILL SHOULD NOT PROCEDURALLY BAR HIS CLAIM IN THIS COURT OR ANY OTHER BECAUSE AT THE TIME OF COLWELL'S STATE PROCEEDINGS, SOUTH CAROLINA RULE 59(e) WAS NOT CONSISTENTLY APPLIED BY THE STATE'S COURTS. COLEMAN VS THOMPSON, 501 U.S. 722,750 BROWN VS LEE, 319 F.3d 162,169 FOR A STATE-LAW GROUND TO BE ADEQUATE, " THROUGH " IT MUST

BE APPLIED REGULARLY OR CONSISTENTLY; IT IS QUITE THAT RULE 59(e) WAS NOT CONSISTENTLY APPLIED BY THE SOUTH CAROLINA COURTS AT THE TIME OF COLWELL'S (PCR) PROCEEDINGS..

ALTHOUGH SOUTH CAROLINA SUPREME COURT HAS CLARIFIED ITS JURISPRUDENCE AND BEGUN APPLYING THE RULE MORE CONSISTENTLY THE STATE COURT DID NOT DO SO UNTIL WELL AFTER COLWELL FILED HIS PETITION FOR CERTIORARI; SEE MARLAR V. SOUTH CAROLINA 653 S.E. 2d 266 (S.C. 2007), REV'G 644 S.E.2d 769 (S.C. CT APP. 2007).

IN MARLAR, SOUTH CAROLINA COURT OF APPEALS DETAILED THE SOUTH CAROLINA SUPREME COURT PAST WILLINGNESS TO "OVERLOOK" RULE 59(e) VIOLATIONS IN ORDER TO ATTEND TO THE PERVASIVE PROBLEM OF INADEQUATE (PCR) ORDERS 644 S.E.2d 771. (CITING TO PRIOR DECISIONS IN WHICH THE STATE SUPREME COURT REMANDED TO THE (PCR) COURT FOR FURTHER FINDINGS, DESPITE A PETITIONER'S NON-COMPLIANCE WITH RULE 59(e), REV'D, 653 S.E.2d 266. IT ALSO DISCUSSED A SINGLE CASE IN WHICH THE COURT WAS UNWILLING TO OVERLOOK A PETITIONER'S FAILURE TO COMPLY WITH RULE 59(e), BUT STATED THAT "IT IS NOT CLEAR WHETHER" THE COURT WOULD BEGAN

TO CONSISTENTLY APPLY THE RULE IN LIGHT OF (PCR) COURT ERRORS THAT CONTINUE TO PERMEATE (SOUTH CAROLINA'S) JUDICIAL SYSTEM ID AT 772.

THE STATE SUPREME COURT ACKNOWLEDGE HOWEVER, THAT IT HAD PREVIOUSLY EXCUSED FAILURES TO FILE RULE 59(e) MOTIONS IN ORDER TO FORCE (PCR) COURTS TO MAKE SPECIFIC FINDINGS. ID. EVEN IN OVERRIDING THE INTERMEDIATE COURT AND INSISTING THAT IT WOULD CONSISTENTLY APPLY RULE 59(e) FROM THAT DAY FORWARD; THE STATE APPEALS COURT ISSUED ITS DECISION IN MARLAR IN MARCH 2007; THE STATE SUPREME COURT DID NOT REVERSE THAT DECISION UNTIL NOVEMBER 2007; THEREFORE SOUTH CAROLINA CANNOT BE SAID TO HAVE "REGULARLY OR CONSISTENTLY" APPLIED THE LAW IF BOTH OF ITS APPELLATE COURTS ACKNOWLEDGED THAT THEY DID NOT STRICTLY ENFORCE RULE 59(e) 1 1/2 YEARS AFTER COLWELL'S ORIGINAL (PCR) WAS DISMISSED AS WELL AS HIS FILINGS FOR CERTIORARI IN THE SOUTH CAROLINA SUPREME COURT.

WHERE A PROCEDURAL RULE IS INCONSISTENTLY APPLIED, THIS COURT SHOULD NOT ALLOW A INVOCATION

OF THAT RULE " TO THWART REVIEW OF CONSTITUTIONAL  
ISSUES THAT "ADEQUACY" REQUIREMENT WAS DESIGNED  
TO PREVENT." BROWN, 319 F.3d AT 170.

## CONCLUSION

FOR THE FORGOING REASONS PETITIONER JOHN E.  
COLWELL ASK THIS COURT TO:

" ALLOW HIM TO RECEIVE AN APPOINTMENT OF COUNSEL  
IN RECEIVING A NEW (PCR) EVIDENTIARY HEARING.  
(A FULL BITE OF THE APPLE) OR A COMPLETE SPECIFIC  
FINDINGS OF FACT AND CONCLUSIONS OF LAW, RELATING  
TO EACH ISSUE PRESENTED, OR ANY RELIEF THIS  
COURT DEEMS JUST AND PROPER IN THIS MATTER!

SWORN TO BEFORE ME THIS

11<sup>TH</sup> DAY OF APRIL 2018

John E. Colwell

CASE NO.

2016-CP-43-0225

WK

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS  
Office of General Counsel  
LEGAL/PRIVILEGED/CERTIFIED MAIL DELIVERY LOG

Date Received	Inmate Name and SCDC Number:	Sender's Name and Address	Date Mail/Order to Report Delivered to Inmate	Inmates Recipient's Signature	Inspected/Delivered in Inmate's Presence By:	Comments
3/08/2018	Conrad Allen SCDC 365648 WA143B	R Mills Ariail, Jr 11 North Irvine Street, Suite 11 Greenville, SC 29601				
03/08/2018	Wesley Givens SCDC 294844 WA145B	Richland County Public Defender P O Box 192 1701 Main Street Columbia, SC 29202		<i>Wesley Givens</i>	<i>W</i>	
03/08/2018	Willie James Randolph, Jr SCDC 369090 WA235B	Social Security Administration 1379 Sims St Orangeburg, SC 29115				
03/08/2018	John Colwell SCDC 184047 WA252A	James C Campbell Clerk of Court 215 N Harvin Street, Room 303 Sumter, SC 29150		<i>John Colwell</i>	<i>Wesley 3-12-18</i>	
03/08/2018	Timothy Fitzgerald SCDC 113830 WA264B	Madeline deLone, Esq Innocence Project 40 Worth Street, Suite 701 New York, NY 10013				
03/08/2018	Christopher Trent Wilder SCDC 303905 WA271A	The Supreme Court of South Carolina Office of Disciplinary Counsel P O Box 12159 Columbia, SC 29211	<i>3/12/18</i>	<i>x Chris Wilder</i>	<i>Buttle</i>	

SCDC FORM 10-12 (Revised May 2013)

RECEIVED  
APR 19 2018  
S.C. SUPREME COURT

STATE OF SOUTH CAROLINA

RECORDED  
IN THE COURT OF COMMON PLEAS  
2006 AUG -3 AM 11:21

COUNTY OF Sumter

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

Clerk of Court

John Colwell ----- Applicant

NOTICE OF MOTION

S.C.D.C. No. 184047

CODE, 1976 17-27-80

Case No. 2004-CP-43-1381

Rules 52(A), 59(E), 60(B)

This Matter comes before the Court by way of Code 1976, 17-27-80 Rules, 52(A), 59(E), 60(B) to Alter or Amend Judgment; to the "Order of Dismissal with Prejudice", imposed and signed by the Honorable Thomas W. Cooper, Jr.; dated July 13, 2006, Applicant John Colwell received July 24, 2006, to reach a Finding of Fact and Conclusion of Law on each and every allegation of Ineffective Assistance of Counsel.

Sworn To Before Me This 1st

*John Colwell 184047*

Day of August, 2006.

John Colwell --- Applicant

*Elizabeth Wood*

S.C.D.C. No. 184047

Notary Public for South Carolina

Case No. 2004-CP-43-1381

My Commission Expires: July 29, 2007

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APR 19 2010

S.C. SUPREME COURT

RECEIVED

APR 16 2010

SC Court of Appeals

CERTIFIED TRUE COPY  
OF ORIGINAL FILED  
*Christy L. Hoff*  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

RECEIVED

SEP 05 2013

SC Court of Appeals

RECORDED

2006 AUG -3 AM 11:21

PROOF OF SERVICE JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

I, the undersigned, do hereby certify that on this 1st Day of August 2006, I served the foregoing "Notice of Motion"; Code, 1976, 17-27-80, Rules 52(A), 59(E), 60(B) as well as Proof of Service in this Matter by depositing a True Copy of it in the United States Mail, postage paid on August 1st, 2006; To be addressed to the following as indicated below.

Attorney

Charles T. Brooks, III  
309 Broad Street  
P.O. Box 3512  
Sumter, South Carolina 29151

Office of Attorney General

Paula S. Magargle  
Post Office Box 11549  
Columbia, S.C. 29211-1549

Court of Common Pleas Third Judicial Circuit

Honorable Thomas W. Cooper, Jr.  
Sumter, South Carolina 29151

Sworn To Before Me This 1st  
Day of August, 2006.

John Colwell 184047  
John Colwell----- Applicant  
S.C.D.C. No. 184047

Elizabeth W. ...  
Notary Public for South Carolina

My Commission Expires: July 29, 2007

CERTIFIED TRUE COPY  
OF ORIGINAL FILED  
Christie L. Hoff  
DEPUTY CLERK OF COURT  
SUMTER COUNTY  
SOUTH CAROLINA

59(c) motion



# The Supreme Court of South Carolina

DANIEL E. SHEAROUSE  
CLERK OF COURT

BRENDA F. SHEALY  
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330  
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

~~READ~~

November 13, 2006

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
P O Box 11589  
Columbia, SC 29211

Re: Colwell, John v. The State


Dear Counsel:

↓

Enclosed is correspondence received from your client. Since his counsel before the circuit court indicated that he received the order on appeal on July 19, 2006, Mr. Colwell's pro se Rule 52 and 59, SCRPC, motion which is dated August 1, 2006, appears to be untimely. Therefore, this appeal will continue. Cf. Hudson v. Hudson, 290 S.C. 215, 349 S.E.2d 341 (1986).

Regarding his request under Rule 60(b), SCRPC, this Court has not granted leave for him to make this motion. Rule 60(b), SCRPC ("During the pendency of an appeal, leave to make the motion must be obtained from the appellate court."). Further, since your Office represents him in this matter, any request for leave to make a Rule 60(b) motion will have to be made by your Office. Jones v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Very truly yours,

  
CLERK

Enclosure

cc: Mr. John Colwell, #184047  
Assistant Attorney General Paula Magargle

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF SUMTER ) JUDICIAL CIRCUIT

RECORDED  
2018 JAN 17 AM 10:43  
JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

John Edward Colwell, #184047 2016-CP-43-225

Applicant, )

**FINAL ORDER OF DISMISSAL**

v. )

State of South Carolina, )

Respondent. )  
\_\_\_\_\_ )

This matter comes before the Court by way of an application for post-conviction relief (“PCR”) filed February 9, 2016. Respondent made its Return and Motion to Dismiss on November 2, 2016, requesting the application be summarily dismissed based upon the expiration of the statute of limitations, successiveness, and failure to state a claim cognizable under the Uniform Post-Conviction Relief Act.

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 signed August 22, 2017 and filed August 31, 2017, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Applicant was served with the Order on September 26, 2017, as evidenced by the attached Affidavit of Service.

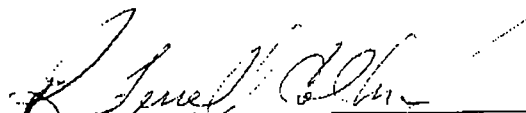
On September 19, 2017, Applicant filed his “Sufficient Reasons for Granting Applicant’s Belated Appeal”, dated November 28, 2016. This Court has reviewed Applicant’s response and finds that all of Applicant’s objections are meritless. Applicant has failed to show that he should be entitled to a hearing on his untimely PCR application. Accordingly, this Court finds that

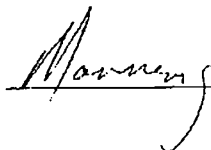
Applicant has failed to provide sufficient reason why the Conditional Order of Dismissal should not become final.

**IT IS THEREFORE ORDERED** that, for the reasons set forth in this Court's Conditional Order of Dismissal, the PCR application is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant that he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. See Rule 203, SCACR. Applicant's attention is directed to Rule 227, SCACR., for the procedures following the filing and service of the notice of appeal.

**AND IT IS SO ORDERED** this 19 day of Apr., 2017.

  
\_\_\_\_\_  
R. FERRELL COTTRHAN JR.  
Chief Administrative Judge  
Third Judicial Circuit

  
\_\_\_\_\_, South Carolina.

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**  
Post Office Box 21787 – Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2), SCRPC, the Director of the South Carolina Department of Corrections has designated Anderson (Server) as his duly authorized agent for the purpose of making service on the below named individual.

STATE OF SOUTH CAROLINA )  
COUNTY OF Litchford )

**AFFIDAVIT OF PERSONAL SERVICE**

On this 26 day of September, 2017, I served the Conditional Order of Dismissal on Inmate Colwell, John, SCDC Inmate Number 184047, by delivering personally and leaving a copy of same at Broad River Correctional Institution, cola, SC. I am not a party to this action.

s/ Anderson  
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME  
this 26<sup>th</sup> day of September, 2017.

Lisa Brown-Alston  
Notary Public for South Carolina  
My commission expires: 2/5/2023

LISA BROWN-ALSTON  
Notary Public, State of South Carolina  
My Commission Expires 2/5/2023

**ACCEPTANCE OF SERVICE**

Service of a copy of the within Legal Pleadings is accepted at the South Carolina Department of Corrections ( Broad River Correctional Institution), Litchford County, SC this 26<sup>th</sup> day of September, 2017.

s/ John Colwell  
Inmate Colwell, John  
SCDC Inmate Number 184047



RECORDED

2018 JAN 17 AM 8:43

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

ALAN WILSON  
ATTORNEY GENERAL

January 11, 2018

The Honorable James C. Campbell  
Clerk of Court, Sumter County  
215 North Harvin St.  
Sumter, SC 29150-4974

Re: John E. Colwell v. State of South Carolina  
2016-CP-48-0225

Dear Mr. Campbell:

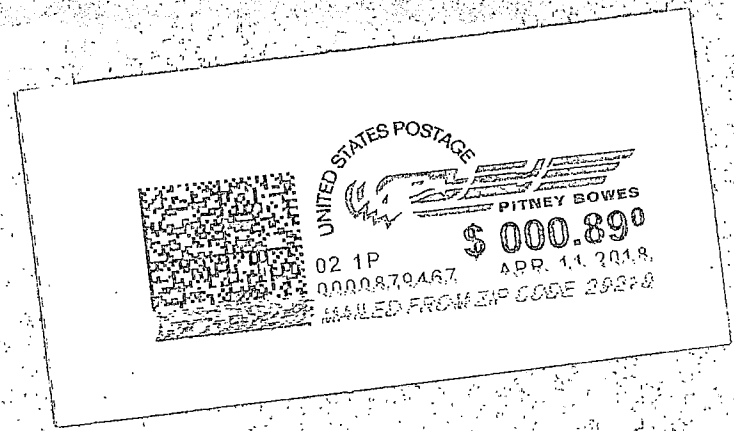
Enclosed please find an original and a copy of a Final Order of Dismissal in connection with the above referenced case. Please file the original and return a certified copy to me in the self-addressed envelope provided for your convenience.

Sincerely,

Rasheeda Cleveland  
Assistant Attorney General

RC:ces  
Enclosures

OHU E. COLWELL # 184047  
160 BROAD RIVER RD  
R.C.I. / WATERFEE UNIT 252  
COLUMBIA, S.C. 29210



RECEIVED  
APR 16 2018  
SC Court of Appeals

SOUTH CAROLINA COURT OF APPEALS  
1015 SUMNER ST # 5  
COLUMBIA, SOUTH CAROLINA

RECEIVED  
APR 11 2018  
BRCI  
MAILROOM

RECEIVED 29201

LEGAL MAIL



RECORDED

2017 AUG 31 PM 2:31

JAMES C. CAMPBELL  
CLERK OF COURT  
SUMTER COUNTY, S.C.

ALAN WILSON  
ATTORNEY GENERAL

August 29, 2017

The Honorable James C. Campbell  
Clerk of Court, Sumter County  
215 North Harvin St.  
Sumter, SC 29150-4974

Re: John E. Colwell v. State of South Carolina  
2016-CP-43-0225

Dear Mr. Campbell:

Enclosed please find an original and a copy of a Conditional Order of Dismissal in connection with the above referenced case. Please file the original and return a certified copy to me in the self-addressed envelope provided for your convenience.

Sincerely,

Julie A. Coleman  
Assistant Attorney General

JAC:cey  
Enclosures

cc: John E. Colwell, #184047



2004-CP-43-1382

Following dismissal of his appeal, Applicant filed his first PCR application on November 12, 2004 (2004-CP-43-1382). In his application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of trial counsel.
  - a. Failure to challenge solicitor's jury strikes pursuant to Batson v. Kentucky.
  - b. Failed to request hearing on out-of-court identification.
  - c. Failed "to object and seek suppression of the out-of-court show-up identification conducted at Applicant's bond hearing as being duly suggestive."
  - d. "Counsel failed to object to the tainted in-court identification."
  - e. "Counsel failed to object to the deprivation of confrontation and cross examination of statements offered by a non-testifying declarant. (Hearsay)"
  - f. "Counsel failed to object to the admission of the ATM video and photograph admitted at trial."
  - g. "Counsel failed to object to the admission of prejudicial evidence at trial."
  - h. "Counsel failed to object to the chain of custody of the ATM video tape."
  - i. "Counsel failed to object to the State's bolstering its case."
  - j. "Counsel failed to object to the violation of Applicant's Fourth Amendment right."
  - k. "Counsel failed to object to the violation of Applicant's Sixth Amendment right."
  - l. "Counsel failed to object to the violation of Applicant's Fifth Amendment rights."
2. Ineffective assistance of appellate counsel.
3. Violation of Fourth, Fifth, Sixth, and Fourteenth Amendment Rights.

In an amended application filed August 30, 2005, Applicant further asserted:

1. Lack of subject matter jurisdiction due to defects in the indictment.

In a second amended application filed September 9, 2005, Applicant further asserted:

1. Ineffective assistance of counsel in that counsel failed to object to Applicant's "mug shot" being introduced at trial.
2. "Counsel failed to object to the Solicitor's comments regarding the Applicant's arrest for public intoxication."

An evidentiary hearing was convened on October 7, 2005, at which Applicant was present and represented by counsel. In an order dated July 13, 2006, the Honorable Thomas W. Cooper, Jr., denied and dismissed the application with prejudice. A Johnson Petition for Writ of Certiorari was then filed in the South Carolina Supreme Court. The Petition was denied on January 23, 2008, and the Remittitur was sent on February 8, 2008.

### Federal Habeas Corpus

On May 6, 2008, Applicant filed a petition for writ of habeas corpus with the United States District Court for the District of South Carolina. Applicant raised the following issues:


1. Ineffective assistance of trial counsel.
2. Ineffective assistance of appellate counsel.
3. Violation of Sixth Amendment rights.
4. Violation of Fifth Amendment rights.
5. Improper chain of custody and authentication of ATM video.

Respondent filed a Motion for Summary Judgment on November 12, 2008. Pursuant to the Report and Recommendation of the United States Magistrate Judge, the Honorable Henry M. Herlong, Jr. granted Respondent's Motion for Summary Judgment and dismissed the petition.

### 2011-CP-43-2081

On November 3, 2011, Applicant filed his second PCR application. He raised the following issues:

1. Ineffective assistance of trial counsel.
  - a. Counsel failed to preserve issues for appeal.
2. Ineffective assistance of PCR counsel.
  - a. Counsel failed to file a motion pursuant to Rule 59(e), SCRPC, to have issues ruled upon.

 Respondent filed its Return and Motion to Dismiss on January 5, 2012, to which Applicant responded with a document captioned, "Denial of Respondents Motion to Dismiss" filed on

January 24, 2012. On January 18, 2012, the Honorable R. Ferrell Cothran, Jr. issued a Conditional Order of Dismissal granting Respondent's Motion to Dismiss. The Conditional Order of Dismissal became final by Order dated July 6, 2012 and the application for post-conviction relief was denied and dismissed.

Applicant filed a notice appeal on August 1, 2012 in the Supreme Court of South Carolina. The appeal was dismissed by the Supreme Court by Order dated October 9, 2012. The remittitur was issued on October 29, 2012.

### Current Application

In his current application for post-conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of PCR counsel.

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

This Court finds 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 judgement 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 January 16, 2003. The Remittitur after the Applicant's unsuccessful appeal, on July 20, 2004. This Application was filed on

February 9, 2016, which was well after the statutory filing period had expired.

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.

This Court further finds the current application should also be dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the 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.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant

could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

Ineffective assistance of PCR counsel is not a ground for relief and not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722 (1991). Once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of PCR counsel. Aice, 305 S.C. at 452, 409 S.E.2d at 395.

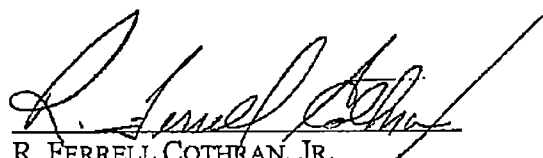
The South Carolina Supreme Court held the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were.” Aice, 305 S.C. at 452, 409 S.E.2d at 395 (citing Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989)). The Court also noted, “[f]inality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice.” Id. at 451, 409 S.E.2d at 395. Aice further held that “the contention that prior PCR counsel was ineffective is not *per se* a ‘sufficient reason’ allowing for a successive PCR application under § 17-27-90.” Id. at 452, 409 S.E.2d at 394. Applicant’s contention that prior PCR counsel was ineffective is not a sufficient reason warranting a successive PCR application. Thus, Applicant has failed to show that a successive application is appropriate. Accordingly, this Court summarily dismisses the application because it is successive.

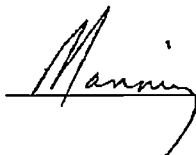
## CONCLUSION

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 with the Sumter County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Valerie Giovanoli, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 22 day of Aug, <sup>2017</sup>~~2016~~.

  
R. FERRELL COTHRAN, JR.  
Chief Administrative Judge  
Third Judicial Circuit

 \_\_\_\_\_, South Carolina