

FALK LAW FIRM, LLC.

James K. Falk

(843) 606-6007

(843) 972-9005 Fax Admitted to practice: KY(1984) S.C. (2010) jfalklaw@gmail.com

December 3, 2016

Clerk of Court
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

RECEIVED

DEC -7 2016

S.C. SUPREME COURT

Re: James Bryant, 2014-CP-22-00812

Dear Clerk Shearouse:

Please find the enclosed Notice of Appeal, Proof of Service, and Order of Dismissal in the above Georgetown County PCR action. Please return a clocked copy of the Notice of Appeal and Proof of Service in the enclosed SASE.

Should you have any additional questions please do not hesitate to contact my office.

With best regards, I am,



James K Falk

Thank you for your assistance.

Cc: Jessica Kinard, Esq.; James Bryant 315781.

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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DEC -7 2016

APPEAL FROM GEORGETOWN COUNTY

Court of Common Pleas

S.C. SUPREME COURT

Honorable Benjamin Culbertson, Circuit Judge

Case No.: 2014-CP-22-00812

James Bryant 315781.....PETITIONER

V.

State of South Carolina.....RESPONDENT

NOTICE OF APPEAL

The Petitioner James Bryant appeals the Honorable Benjamin Culbertson's November 15, 2016, Order of Dismissal. Undersigned counsel received notice of entry of the order on November 21, 2016. A copy of the order on appeal is attached hereto.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

December 3, 2016

Jessica E. Kinard, Esq.
Office of S.C. Attorney General
PO Box 11549
Columbia, SC 29211-1549

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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DEC -7 2016

APPEAL FROM GEORGETOWN COUNTY S.C. SUPREME COURT
Court of Common Pleas

Honorable Benjamin Culbertson, Circuit Judge

Case No.: 2014-CP-22-00812

James Bryant 315781.....PETITIONER

V.

State of South Carolina.....RESPONDENT

PROOF OF SERVICE

I, James Falk, certify that I have today served the within notice of appeal upon the Respondent by depositing a copy of it in the U.S. Mail, postage prepaid, addressed to its attorney of record, Jessica Kinard, Office of the S.C. Attorney General, PO Box 11549, Columbia, SC 29211-1549. I further certify that all parties required by Rule to be served have been served this December 3, 2016.



James K Falk
Falk Law Firm
PO Box 1058
Charleston, SC 29402

STATE OF SOUTH CAROLINA
COUNTY OF GEORGETOWN

James A Bryant, #315781,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2014-CP-22-812

ORDER OF DISMISSAL

ALMA Y. WHITE
CLERK OF COURT

2016 NOV 15 PM 1:28

FILED
GEORGETOWN COUNTY, SC

This matter came before the Court by way of a document filed August 27, 2014, which was titled "Petition For Writ of Habeas Corpus." Respondent filed a return and motion to dismiss on January 26, 2016, to which Petitioner filed a *pro se* response on or about July 15, 2016. The Court convened a hearing to decide the pending motion on July 18, 2016 at the Georgetown County Courthouse. Petitioner was present and represented by James K. Falk, Esquire. Jessica E. Kinard, Esquire was present on behalf of the South Carolina Attorney General's Office. Respondent submits the petition should be summarily dismissed because it fails to support the requested relief.

At the call of the case, Mr. Falk represented to the Court that Petitioner had filed a motion to relieve him as counsel. In addressing this issue, the Court questioned the Petitioner regarding his reasons for the motion. Petitioner stated that he believed that Mr. Falk was not acting in his best interest, particularly by not relaying a filing to the Petitioner.¹ Petitioner additionally expressed concern regarding a broad conspiracy intent on having any case he filed

¹ The filing with which Applicant had an issue was actually written by the Applicant and sent to Mr. Falk and the Attorney General's Office. It was captioned as an Answer to the State's Motion to Dismiss. Mr. Falk added a cover sheet and filed the same document at the Georgetown County Courthouse before the hearing. At the hearing, the State objected to this as hybrid representation, but the Court allowed it to be considered, as the filing had been adopted and signed by Mr. Falk.

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dismissed. The Court explained that, unless Mr. Falk had a demonstrable conflict of interest in his representation of the Petitioner, he could not allow Mr. Falk to be relieved. The Court thoroughly explained the system of attorney/client relationships, especially in matters where an attorney is appointed. Petitioner's motion was denied, and the parties proceeded to argument regarding the State's motion to dismiss.

I.

The Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Georgetown County. The Petitioner was indicted at the April 2006 term of the Georgetown County Grand Jury for Burglary – First Degree (2006-GS-22-277), kidnapping (2006-GS-22-278), and three (3) counts of assault and battery with intent to kill (2006-GS-22-276, 279, 303). He was represented by J. Eric Fox, Esquire. Petitioner proceeded to a jury trial before the Honorable Edward B Cottingham on May 30, 2006. On June 1, 2006, the Petitioner was found guilty as indicted, with the exception of being found guilty of the lesser included offense of assault and battery of a high and aggravated nature on indict number 2006-GS-22-303. Judge Cottingham sentenced the Petitioner to twenty-five (25) years' imprisonment for each charge, to be served concurrently. A notice of appeal was filed with the South Carolina Court of Appeals on June 2, 2006, and was perfected. Petitioner's conviction and sentence were affirmed on January 14, 2009 in an unpublished opinion. State v. Bryant. 2009-UP-032, filed January 14, 2009. The remittitur was issued January 30, 2009.

Thereafter, Petitioner filed his first application for post-conviction relief (PCR) on April 1, 2009, and an amended application on July 22, 2009 (Case No. 2009-CP-22-477). The State made its return on May 29, 2009. An evidentiary hearing was convened on July 28, 2009 before the Honorable Larry B. Hyman, Jr., at which Petitioner was represented by Paul Archer, Esq. Judge Hyman denied and dismissed the application with prejudice in a written order signed

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August 25, 2009 and filed August 28, 2009. Petitioner filed a notice of appeal on August 27, 2009. The appeal was perfected with the filing of a petition for writ of certiorari by Robert Pachak, Esquire, of the South Carolina Office of Appellate Defense on January 29, 2010. The State filed its return to petition for writ of certiorari on March 8, 2010. During this process, Petitioner twice requested leave to file a pro se brief in support of his case, but neither of these requests were addressed by the Court. Certiorari was denied on April 7, 2011, and the remittitur was returned to the circuit court on April 25, 2011.

Petitioner filed a petition for federal habeas corpus relief on June 3, 2011. In it, he listed the following grounds for relief:

1. The judge erred in refusing to suppress prejudicial prior bad act testimony about a confrontation between the appellant and his estranged wife.
2. The judge erred in refusing to accept an Alford plea.
3. Ineffective Assistance of Counsel (Trial and Appeal Counsels)
 - a. "Was Appellant Counsel ineffective for failing to argue the directed verdict issues on Appeal?"
 - b. "Was Counsel ineffective for not arguing that the State's evidence at trial was in fatal variances with the allegations within the indictments?"
 - c. "Was Defense Counsel ineffective in failing to obtain or at least requiring a psychological evaluation for Applicant before going to trial?"
 - d. "Was Counsel ineffective for failing to object to the State's witness as a qualified expert?"
 - e. "Was Defense Counsel ineffective for not obtaining an independent crime scene and forensic expert?"
 - f. "Was Counsel ineffective for failing to object to the State's prejudicial use of prejudicial photos?"
 - g. "Did Counsel fail to adequately investigate and prepare for trial and thereby committing ineffective assistance?"
 - h. "Was Counsel ineffective for not objecting or taking exception to the Trial Court's erroneous Malice Charge?"
 - i. "Was counsel ineffective for not objecting to hearsay testimony?"
4. "Denial of Due Process by Prosecutorial Misconduct"

These were supported by a lengthy memorandum of law. The state filed a motion for summary judgment on or about October 13, 2011. Prior to this, Petitioner filed a motion for default on or about September 14, 2011. Ultimately, United States Magistrate Judge Kaymani D.

West issued a report and recommendation on May 31, 2012, which recommended granting the motion for summary judgment and denying Petitioner's motion for default judgment. Petitioner filed an objection to the report and recommendation, but the Honorable R. Bryan Harwell adopted the report and recommendation over Petitioner's objections in an order dated August 20, 2012. This order also denied the granting of a certificate of appealability. Regardless, Petitioner appealed this matter to the United States Court of Appeals for the Fourth Circuit, which dismissed his request on June 18, 2013. Petitioner also requested a rehearing *en banc*, which was denied. The mandate of the ^{district}~~distinct~~ court took effect on June 13, 2013.

II.

In his current Petition for State Habeas Corpus, filed on April 27, 2014, Petitioner alleges the following grounds:

1. "Whether the extra added aggravating circumstances of subsection § 16-11-311(3) as fact-offense elements of burglary first degree were sufficient to sustain the convictions where this evidence did not go to the grand jury and were not specifically charged within the indictment upon which the petitioner was indicted?"
2. "Whether the Grand Jury indicted Petitioner Bryant on subsection §16-11-312(A) or §16-11-311(A) [*sic*] in the indictment returned upon him by the Grand Jury in this case, and was the amendment to this indictment sufficient to sustain the convictions and sentences?"

Petitioner filed a motion to proceed *in forma pauperis* along with his petition, which was denied by this Court on August 27, 2014. Petitioner filed a motion to reconsider this ruling on or about September 23, 2014, along with a request for appointment of counsel. This Court denied the motion for reconsideration via a form 4, which indicated that the action was concluded. In early 2016, Respondent was informed that Petitioner's trust account had been paid with the Georgetown County Clerk of Court. Upon receiving this information, Respondent contacted the Clerk of Court in order to resolve the issue of this outstanding matter. The instant hearing was scheduled and held at the instruction of this Court.

III. Findings of Fact and Conclusions of Law

The Court has reviewed the record in its entirety and has heard arguments presented at the motion hearing. The Court has further had the opportunity to observe the entire record present before it. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Based on a review of procedure as reflected in the transcript, this Court finds that the indictments returned upon the Petitioner by the Grand Jury were sufficient to sustain these convictions. Primarily, Petitioner asserts that the handwritten amendments to the indictments are not proper and capable of indicting him, thus amounting "trial by ambush" because he did not have adequate notice of the charges. Upon review of the record and hearing arguments of counsel, this Court finds that the amendment to the indictment was made with full knowledge and awareness of both Petitioner and his trial counsel. This is clear on page 26 of the trial transcript, where a formal motion to amend the indictment is made, the Court characterizes it as a correction of a scrivener's error, the Defendant (now Petitioner) agrees, and the amendment is made. It is clear that there was a joint understanding between the parties and a ratification by the Court of this amendment.

The Court finds that Petitioner's current habeas corpus petition is a successive application, as it presents issues which could have been raised on direct appeal or post-conviction relief. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). Petitioner argues that the issue of the amended indictment is one that is determinative of whether the evidence was sufficient to

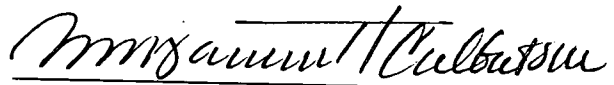
support a conviction, and therefore is an exception to the type of claim that may be considered through post-conviction relief pursuant to S.C. Code Ann. §17-27-10(A)(6).² Based on the analysis above regarding the scrivener's error, the Court does not find that there is any valid allegation or attack regarding the sufficiency of evidence simply because there was an error in the cited section of the indictment. For these reasons, Petitioner's request for relief on this basis is denied.

Primarily, the Court finds that Petitioner's request for relief is barred under McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965). The inquiry on habeas corpus is limited to the legality of the prisoner's present detention. Id., 247 S.C. at 18, 145 S.E.2d 419-20. The only remedy which can be granted is release from custody, whether absolute or conditional. McCall, 247 S.C. at 18. The writ is not available to test the legality of a conviction or sentence where a decision in the prisoner's favor will leave him in lawful confinement under another existing sentence. Id., citing Bearden v. Manning, 238 S.C. 187, 119 S.E.2d 670; Bowers v. State, 241 S.C. 282, 127 S.E.2d 881; Balkcom v. Chastain, 220 Ga. 265, 138 S.E.2d 319; Pippin v. Sheffield, 220 Ga. 179, 137 S.E.2d 627. Petitioner is currently incarcerated on multiple convictions not at issue in this case. Because the specified relief regarding this individual charge will not allow Petitioner to be released from incarceration due to his service on other charges, Petitioner is not entitled to relief. The Court cannot grant Petitioner's requested habeas relief under McCall, as doing so would have no effect due to the additional prison sentences Petitioner is serving.

²“(A) Any person who has been convicted of, or sentenced for, a crime and who claims... (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; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. **Provided, however, that this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.**” (emphasis added)

IT IS THEREFORE ORDERED that the application for post-conviction relief is denied and dismissed *with prejudice* based on Petitioner's pending motion for reconsideration of his sentence.

AND IT IS SO ORDERED this 15 day of Nov., 2016.



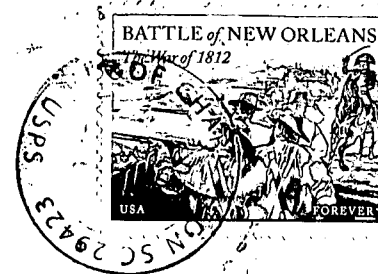
BENJAMIN H. CULBERTSON
Chief Administrative Judge, Common Pleas
Fifteenth Judicial Circuit

Georgetown, South Carolina

FALK LAW FIRM

PO Box 1058

Charleston, SC 29402



Clerk of Court.

Supreme Court of South Carolina

PO Box 11330

Columbia, SC 29211-1549

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