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SC Court of Appeals

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S.C. SUPREME COURT

Keviuntae Hytower Petitioner,	)	
	)	Case No: 2015-CP-26-7674
vs,	)	
	)	
State of South Carolina Respondent,	)	Notice of Appeal
	)	

FACTUAL BACKGROUND

On May 7, 2007, Keviuntae Hytower was on narcotic charges in the City of Myrtle Beach S.C.. Hytower initially was charged with PWID Cocaine, Possession of Heroin, and Possession of Marijuana. On October 21st, 2008 he plead under the advice of counsel. The stipulation of the plea were for him to plea to heroin and the other two counts would be dismissed. Mr. Hytower plead and was sentenced to 10yrs suspended to 5yrs probation. In 2011, Hytower was indicted on a federal drug case and subsequently pleading in Federal Court violated S.C. State probation. On January 14th, 2014, the State of S.C. issued a sentence of 10yrs to be ran concurrent with Hytower's federal sentence.

Initially filing a Petition for Habeas Relief, Case No: 2015-CP-26-1741 on different grounds from the grounds in question of the instant petition lead to the discovery of issues that are the focus of pleadings. Hytower immediately filed amended petition and also wrote the court requesting advocacy due to impediment being his current incarceration in Federal prison with limited access to S.C. State Law. He also requested a Stay until a decision was made. The State of South Carolina dismissed

case, No: 2015-CP-26-1741. No response was made of request for advocacy. Neither was a decision made on grounds of amendment.

Petitioner filed a timely Notice of Appeal. After making several inquiries pertaining to the decision of amended version of 2015-CP-26-1741, Petitioner then filed a Petition for Habeas Relief, Case No: 2015-CP-26-7674. After timely response to States Conditional Order of Dismissal, the Horry County Clerk filed Petitioner's response under the wrong case No.. It took several inquiries and contacting numerous judicial entities to get the issue resolved. During this time Petitioner filed Motion to Compel and Motion to Expedite. After writing letter to the Honorable William Seals, Jr., a Final Order was proposed and granted. This Final Order initially before the Honorable Larry B. Hyman was granted by Judge Seals, Jr.. Throughout his pleadings the Petitioner made the Court aware he has limited access to the S.C. State Law while incarcerated in Federal Prison.

In this instance, the Petitioner, proceeding in a pro se manner, asserts that he is a novice when it comes to letters of law. Legal pleadings and forms requesting this Honorable Court construe his pleadings liberally and not hold him to strict standards as those of an attorney, pursuant to the doctrine set forth in Haines v. Kerner, 404 U.S. 519 92 S.Ct. 594 (1974), stating, "if a Court can reasonably read pleading to state a valid claim on which litigant could prevail, it should do so despite failures to site proper authorities, confusion of legal theories, poor santax and structure, or litigants unfamiliarity

with pleading requirements", (emphasis added). In addition the Petitioner respectfully request that this Honorable Court also construe his pleading to raise the strongest arguments they suggest as Petitioner has limited access to S.C. State Law he uses Supreme and Federal Circuit Court Law in the foregoing pleadings.

* Is Court determination an abuse of discretion, Buck v. Davis, 137 S.Ct. 759 L.Ed 2d 1: (2017)?

In this case Petitioner has given extraordinary circumstance of violation of Constitutional Right that his conviction of October 21st, 2008 is completely illegal, documents of case substantiate claim. Request for full discovery was made which was denied as it is at the Judges' discretion. See Section 17-27-150, the State of South Carolina states these documents "are of no use" to them or Petitioner. Petitioner is adamant the allowance of full discovery will shed light as to how this illegal conviction came to be, acting as 'bread crumbs' and will also assist in a more adequate address of issues illustration of exceptional circumstances exists that require relief.

The court of Common Pleas did not construe Petitioner's pleadings liberally, taking advantage of his lack of legal knowledge, and legal aide, as he currently resides in Federal Prison with limited access to S.C. State Law. In presentation of issues of substantial merit as the documents of his case are overwhelming, evidence that his conviction and sentence is illegal

miscarriage of justice as he is actually innocent as he stands convicted of PWID Heroin on warrant for cocaine, the subject of the warrant was found to be an anti-fungal. The Court of Common Pleas also views 2nd filing as 'Successive', this issue is debatable. The 2nd petition was filed after Court failed to fully adjudicate Case No: 2015-CP-26-1741, no decision was made on amended version. Inquiries were made after sometime of receiving no response, a second petition was filed. Petitioner has demonstrated extraordinary circumstances, yet still, the Court invokes Procedural Bar. The Honorable William Seals, Jr. signed Final Order in Case No: 2015-CP-26-1741 June 23rd, 2015, Conditional Order of Case No: 2015-CP-26-7674 May 23rd, 2016, also Final Order March 20th, 2018 dismissing it with prejudice acting as 'wolf guarding hen house'.

* Does conviction and sentence that technically stands on an act that is not unlawful result in a miscarriage of justice?

United States v. Foote, 784, F.3d 931 (4th Cir. 2015) held that only errors resulting in a fundamental defect "a miscarriage of justice" cognizable under §2255 Collateral Relief. It is common knowledge §2255 governs all petitions for habeas relief, making Court of Common Pleas bound by 4th Circuits determinations.

In this case, sentence is most definitely defective as it stands on possession of anti-fungal which is not illegal to possess in the State of South Carolina. Lab results in reference to warrant No: k003489 which states substance was cocain found to

be anti-fungal. In this case conviction and sentence is defective for the following reasons:

1). Conviction of 2nd offense without sustaining first.

2). Conviction for PWID Heroin stands on warrant for PWID Cocaine.

Petitioner was never charged with PWID Heroin, yet he stands convicted of the offense. In it's defense the State of South Carolina refutes Petitioner's claim by making it seem the Petitioner is "confused" pertaining to that he was sentenced under incorrect statue. If rightfully convicted and sentence under warrant no: k003478, which is for heroin and it's statue 44-53-370(d)(1), he could receive maximum sentence of 2yrs.

* Fraud upon the Court, if the Judge issues illegal sentence unknowingly how much less accountable is defendant who received sentence?

United States v. Tucker, 404 U.S. 443, 445 (1972). We deal here, not with a sentence imposed with the informed discretion of a trial judge, but with sentence found at least in part upon misinformation of Constitutional magnitude.

On October 21st, 2008, the tools of justice were abused as the Court was defrauded by way of sentence factor manipulation. At this time Petitioner places no blame. Somehow a True Bill Indictment for PWID Heroin was passed on warrant that offense description clearly states substance was cocain, which resulted in subsequent conviction. Clearly the violation was not easily discoverable. It was never Petitioner's intention to challenge sufficiency of indictment as the State claims only to bring

attention to evidence of violation, if the Judge, Officer of the Court, accomplished member of the bar unknowingly issued a sentence. How is it that the State's argument that Petitioner waived his rights voluntarily as the true nature of plea was not known. No Judge would issue such a sentence knowingly for the State's failure to acknowledge the fact the Petitioner should not be held liable as violation is not easily discoverable, is denial of fairness, offensive to cannons of justice.

* Can filing petition for habeas relief lead to discovery of violation that warrants tolling?

Holmberg v. Arbretch, 327 U.S. 397, "Where individual has been injured by fraud, remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not run until fraud is discovered". After filing of PCR# 2015-CP-26-1741, Petitioner received return of warrant and indictment which is found to be inconsistent. True Bill stated it was for PWID and warrant was for cocaine. Amended version of PCR was filed on grounds relevant to discovery. Case No: 2015-CP-26-1741 was denied solely on grounds of initial version. Sometime later a second petition was filed, No: 2015-CP-26-7674.

In furtherance of claim that violation was newly discovered, Petitioner brings the Courts attention to case history which will show that his attorney never even possessed discovery of case. That attorney being Scott Bellamy. Stuart Axelrod was never Petitioner's attorney.

In this instance, based on the aforementioned, Petitioner asks the Court to consider counsels ineffectiveness in it's decision making. In a letter to the Honorable William Seals, Jr., Petitioner requested to file amendment to case, No: 2015-CP-26-7674 where he intendedto address issue in full as well as prosecutorial misconduct as it is evident these issues exists. To this day, Case No: 2015-CP-26-1741 has never been fully

adjudicated. Petition filing are in exertion of diligence in accordance with Section 17-27-45(c) of Uniform Post Conviction Procedure Act.

*.Is misrepresentation of true nature of plea conviction resulting in violation of substantial rights enough to warrant tolling?

Irwin v. Dept. of Veterans Affairs, 489 U.S. 111 S.Ct. 443 provides framework deciding applicability of tolling to statue of limitations by stating, "individual must establish basis for toling". In this instance Petitioner's basis is excusable neglect and/or ignorance. In Irwin the Supreme Court makes it clear under which circumstance toling is warranted. One of which is where indicidual has been "induced or tricked" by adversaries misconduct into allowing filing deadline to pass. 489 U.S. at 96. On October 21st, 2008 Petitioner was lead to believe that he would be pleading to Possession of Heroine and as part of this pleas the cocaine and marijuana charges would be dismissed.

On the surface of Petitoner's 2008 conviction states that it's for PWID Heroin. On closer inspection the warrant number (k003480) is found on all documents relevant to conviction such as True Bill and Sentencing Sheet. K003480 is number of warrant for PWID Cocain. In a case where individual was "lulled" into inaction by prosecution deception, tolling is warranted due to violation not being easily discoverable and hidden in plain sight. See Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 L.Ed

770, 79 S.Ct. 760 (1959) Adversaries misrepresentation caused plaintfff to let time period lapse. Also see Holmber v. Armbrecht, 327 U.S. 392, 90 L.Ed (1946) statutes are not controlling measure for equitable relief, but drawn upon equity solely for the light they shed in determination whether individual excusably slept upon his rights so as to make decree against defendant. Supreme Court gives true purpose of statute of limitations which does not apply in such situation as Petitioner where he was "hoodwinkled" by deceptive plea. The state insists that procedural bar is applicable, that Petitioner waived rights upon signing of sentencing sheet.

* Does wrongful conviction sentence under same statutory range avoid violation?

As Petitioner asserts conviction and sentence under wrong warrant and it's statute is erroneous deserving relief. The State of South Carolina believes the conviction should be upheld due to fact heroin and cocaine are punishable under the same statute. The Supreme Court roundly rejects that arguement in Hicks, "such arbitrary disreguard of Petitioner's rights to liberty is denial of due process of law" at 346. The States argument on this issue is off subject in avoidance of the truth. Petitioner's conviction is under wrong warrant and statute as he was never charged with PWID Heroin but possession of heroin. Adherance to State's position further denial of relief would make case even more of miscarriage of justice. See Hick v. Oklahoma,

447, U.S. 343 (1980).

* Can defendants rights be violated and waive in same action be basis for denial of relief?

The State of South Carolina stands firmly on argument that Petitioner waived rights to challenge by pleading, therefore procedural bar applies "conventional notions of finality have no place where life or liberty is at stake and infringement of constitution rights is alleged", Sanders v. United States, 378 U.S. at 8. In his pleadings the Petitioner asserts the fact his rights were violated, 5th, 6th, and 14th along with Sections 3 and 14 of S.C. Constitution. As fairness was denied, Petitioner was not fully informed, therefore he did not receive equal protection. Court's improper determination stem from refusal to construe pleadings of habeas petition liberally as it is evident that violation of rights exist deserving remedy relief in accorfdance with Uniform Post Conviction Procedure Act 17-27-10.

CLOSING

The Petitioner now lays rest to his pleadings, he prays that this Court makes just decision, reversing decision of lower Court vacating illegal sentence which resulted in from the 'snake in the grass plea, it's bite flows through judicial veins' as Petitioner was enhanced under Federal Guidelines for illegal prior conviction, deserving the remedy of habeas relief.

Respectfully Submitted,

Keviuntae Hytower

On this day of 25, month of April 2018

Keviuntae Hytower
FCI Butner #1
P.O. Box 1000
Butner, N.C. 27509

ENCLOSURES

PCR Application:	Oct. 2015
Conditional Order:	May 2016
Motion to Prevail:	May 2016
Motion to Compel:	Jan. 2017
Motion to Expedite:	Jan. 2017
Letter to Judge Seals:	Oct. 2017
Final Order:	May 2018

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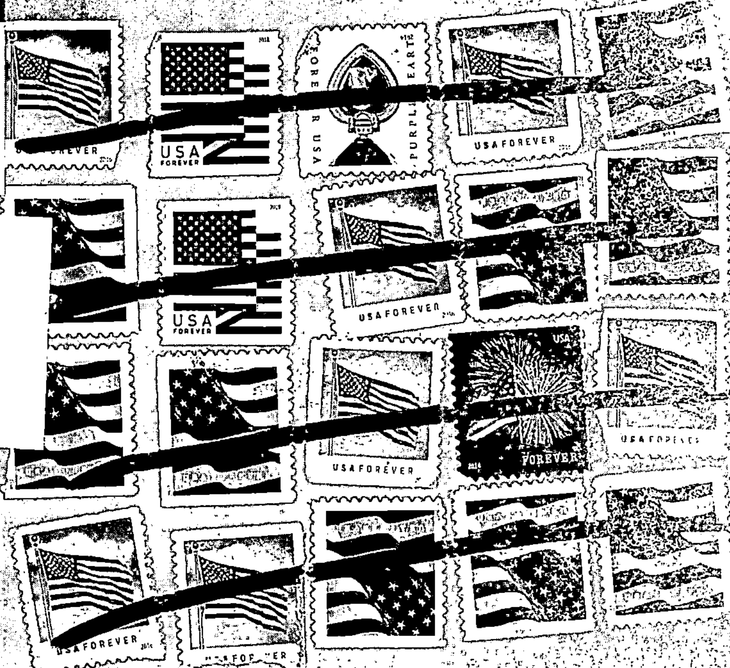

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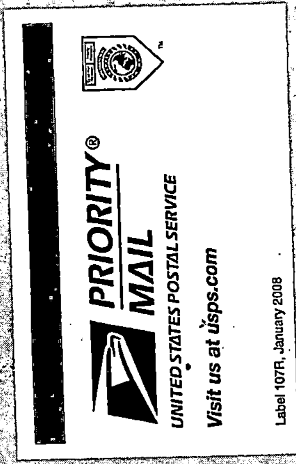

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MAY 01 2018
SC Court of Appeals

Clerk's Office

⇔23394-171⇔

ALAN WILSON
ATTORNEY GENERAL

May 19, 2016

Keviuntae Hytower, #23394-171
U.S. P. Terre Haute
P.O. Box 33
Terre Haute, In 47808

Re: **Keviuntae Hytower, #23394-171 v. State of South Carolina**
2015-CP-26-7674

Dear Mr. Hytower:

Enclosed please find a filed copy of the Conditional Order of Dismissal signed by Judge Seals in the above-captioned case.

Sincerely,

Jessica E. Kinard
Assistant Attorney General

JEK/nb

Enclosure

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2015-CP-26-7674
	)	
	)	
KEVIUNTAE HYTOWER, #23394-171	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

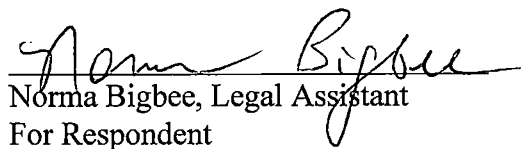
1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a filed copy of the Conditional Order of Dismissal in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

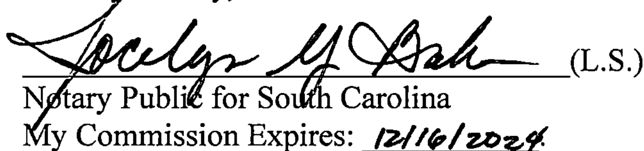
Keviuntae Hytower, #23394-171
U.S. P. Terre Haute
P.O. Box 33
Terre Haute, In 47808

DATED this 19th day of May, 2016.



Norma Bigbee, Legal Assistant
For Respondent

SWORN to before me this
19th day of May, 2016.



______________________(L.S.)
Notary Public for South Carolina
My Commission Expires: 12/16/2024

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)
	) 2015-CP-26-7674
Keviuntae Hytower,	)
S.C.D.C. No. 223187,	)
	) **CONDITIONAL ORDER OF DISMISSAL**
v.	)
	)
State of South Carolina	)
	)
Defendant.	)

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HORRY COUNTY
CLERK OF COURT

This matter comes before the Court by way of an application for post-conviction relief filed by Keviuntae Hytower (Applicant) on October 26, 2015 ("the Application"), Respondent would show this Court:

I. PROCEDURAL HISTORY

Applicant is in the custody of the United States Bureau of Prisons for unrelated matters.[1] Applicant was indicted by the Horry County Grand Jury on October 25, 2007 for Possession With Intent to Distribute Heroin, 2nd (2007-GS-26-4119). Scott Bellamy represented Applicant on the charges. On October 21, 2008, Applicant entered a plea of guilty to Possession With Intent to Distribute Heroin, 1st. The Honorable Larry B. Hyman sentenced Applicant to ten (10) years incarceration suspended on five (5) years probation. Applicant filed no direct appeal.

By order dated January 16, 2014, the Honorable Steven H. John, upon finding that Applicant violated conditions six, seven, and ten of the standard conditions of probation, revoked Applicant's probation in full and imposed a sentence of ten (10) years incarceration. Judge John further ordered that the sentence run concurrently with Applicant's federal sentence, with no credit for prior federal time served.

[1] Applicant's BOP Register Number is 23394-171.

copy

Applicant filed his first Application for Post-Conviction Relief on March 4, 2015 (2015-CP-26-1741). Respondent made its Return and Motion to Dismiss on April 8, 2015, and the matter was dismissed as barred by the Statute of Limitations by the Honorable Benjamin H. Culbertson by order dated July 23, 2015. Applicant filed no direct appeal.

II. CURRENT APPLICATION

In his post-conviction relief application, Applicant alleges he is being held unlawfully for the following reasons (syntax preserved):

1. I am actually innocent of conviction.
2. Charging instrument and incitement inconsistent
   a. The conviction under warrant # K-003480 is for cocaine.
   b. See true bill indictment of case for warrant # K-003480
   c. Plea agreement stated I was pledging to Heroin 1st not cocaine.
3. Constitution right 5th violated among others

Applicant requests relief as follows (syntax preserved):

- Case be dismissed with prejudice

Respondent attaches the Horry County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, the final order of Applicant's previous PCR action, and the records of this current PCR action.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Statute of Limitations

The Court finds that the Application must 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. Specifically, the act requires 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 on appeal, whichever is later.

S.C. Code Ann. § 17-27-45(a).

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). 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) 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."

The Applicant was convicted on October 21, 2008 and never appealed. The current application was not filed until October 26, 2015 – well after the one-year statutory filing period expired. Therefore, the Application must be summarily dismissed as barred by the statute of limitations.

B. Successive

The Court finds the Application must also be summarily dismissed because it is successive to Applicant's previous PCR application. 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). Section 17-27-90 of the South Carolina Code 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 indicate 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, 409 S.E.2d 392 (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. at 450, 409 S.E.2d at 394. 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 the allegations could not have been previously raised. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980).

Furthermore, Applicant's current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post-conviction relief; thus, the current application is successive and barred under S.C. Code Ann. § 17-27-90. Applicant has failed to establish any sufficient reason why he could not have raised his current allegations in his previous applications for post-conviction relief. Therefore, he has failed to meet the burden imposed upon him. *See again* Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

Therefore, the Application must be summarily dismissed as successive to Applicant's previous PCR applications.

C. Failure to State a Claim – Innocence

The Court further finds the Application must be 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:

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 write, motion, petition, proceeding or remedy [...]. 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.

S.C. Code Ann. § 17-27-20.

Applicant's allegations do not support a cognizable claim for post-conviction relief under any of the statutory grounds. Absent a proper claim of newly discovered evidence, a claim of actual innocence is not a valid post-conviction relief allegation, especially where the Applicant pled guilty. The Applicant waived his right to raise innocence as a defense when he pled guilty and waived his right to a jury trial. Therefore, the plea waives any non-jurisdictional defects and defenses, including challenges to the sufficiency of the evidence. Whetsell v. State, 276 S.C. 295, 277 S.E.2d 891 (1981); Rivers v. Strickland, 264 S.C. 121, 213 S.E.2d 97 (1975).

Insufficient evidence of guilt is not a valid claim to overturn a guilty plea conviction. "Where a defendant voluntarily, intelligently, and understandingly enters a plea of guilt, this makes it unnecessary for the State to offer evidence to prove the offense charged in the warrant or indictment." State v. Allen, 261 S.C. 448, 451, 200 S.E.2d 684, 686 (1973). This is because the guilty plea "admits all matter of fact averments of the accusation." Id. The defendant admits all circumstances described in the indictment, leaving only sufficiency of the indictment for review and waiving all other defenses. State v. Thomason, 341 S.C. 524, 526, 534 S.E.2d 708,

710 (2000). Additionally, PCR is not a proper avenue to challenge the sufficiency of evidence. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974); S.C. Code Ann. § 17-27-20(a)(6); *see also* State v. Munsch, 287 S.C. 313, 314, 338 S.E.2d 329, 330 (1985) (quoting U.S. v. Broce, 488 U.S. 563, 569 (1989)) ("[W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack.")

For these reasons and pursuant to Rule 12(b)(6), SCRCP, the Court must dismiss the Application for failing to state a cognizable claim for which relief can be granted under the Post-Conviction Relief Act.

D. Failure to State a Claim - Indictment

Furthermore, the Court finds that Applicant's allegations regarding his indictment are without merit. An indictment is a notice document and any insufficiency in the indictment does not deprive the circuit court of jurisdiction. State v. Gentry, 363 S.C. 93, 102, 610 S.E.2d 494, 499 (2005). Rather, challenges to the indictment must be raised prior to the swearing of the jury or they are waived. Id. (citing S.C. Code Ann. § 17-19-90). Thus, a PCR applicant may only raise challenges to the sufficiency of an indictment by alleging ineffective assistance of counsel for failing to properly move to quash the indictment in accordance with § 17-19-90. Because Applicant has failed to do so, this allegation must be dismissed pursuant to Rule 12(b)(6), SCRCP.

E. Failure to Request Relief Available

Finally, the Court finds that the Application must be summarily dismissed for exclusively seeking a form of relief not available. In his prayer for relief, Applicant requests (verbatim)

"case be dismissed with prejudice." This relief is unavailable in a post-conviction relief action. If this Court finds a defect in the original proceedings, the only relief typically available to Applicant would be a new trial on the original indictments. Gilstrap v. State, 252 S.C. 625, 168 S.E.2d 88 (1969). Where an applicant seeks only relief to which he or she is not entitled, "it is not incumbent upon [the] court to pass upon what relief, if any, he [or she] might, perchance, be entitled to." Young v. State, 250 S.C. 476, 479, 158 S.E.2d 764, 765 (1968); *see also* Grant v. MacDougall, 244 S.C. 387, 391, 137 S.E.2d 270, 272 (1964) ("When the court offered to set aside the plea and sentence, fix bail and remand the prisoner to the Court of General Sessions for Charleston for further proceedings, it thereby offered to give the petitioner everything he was entitled to[.]") Because Applicant seeks only relief which is not available to him, the Application must be summarily dismissed.

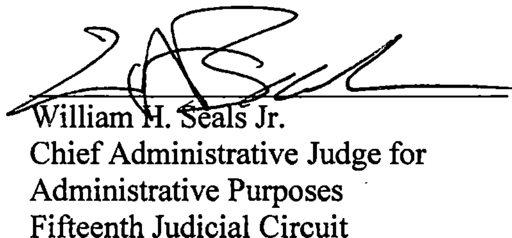
{Conclusion and signature on following page}

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. 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. Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Jessica Kinard, Esquire
PCR Division – 15th Circuit
P.O. Box 11549
Columbia, SC 29211

AND IT IS SO ORDERED this 3 day of May, 2016.



William H. Seals Jr.
Chief Administrative Judge for Administrative Purposes
Fifteenth Judicial Circuit

Marion, South Carolina

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
	) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)
Keviuntae Hytower,	) Case No.: 2015-CP-26-7674
S.C.D.C. No. 223187,	)
Applicant,	)
v.	) **FINAL ORDER OF DISMISSAL**
State of South Carolina	)
Respondent.	)

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CLERK OF COURT
HORRY COUNTY, SC

This matter comes before the Court by way of an application for post-conviction relief filed October 26, 2015. Respondent made its return on or about April 28, 2016, requesting the application be summarily dismissed as untimely, successive, for stating claims not cognizable under the Uniform Post-Conviction Procedure Act, and for requesting only relief not available to an applicant in a PCR action.

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 May 3, 2016, and filed May 12, 2016, provisionally denying and dismissing this action, while giving the Applicant 20 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 by reference is an Affidavit of Service dated May 19, 2016, serving the above-mentioned Conditional Order of Dismissal on Applicant.

Applicant initially filed a response on May 20, 2016, but the filing indicated the wrong docket number.[1] Applicant contacted the Clerk of Court and the error was corrected on or about

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[1] Applicant alleges this error was the result of a handwritten modification of his filing by the Clerk of Court.

October 3, 2016. In any event, Applicant argues that the procedural bars should not apply for a variety of reasons, to be addressed below. Applicant, dismayed by the long delay in the resolution of this action, filed a motion to compel on January 6, 2017, demanding he be provided various documents, including his October 2008 plea agreement, the transcript of his October 2008 plea, minutes from meetings of the Horry County Grand Jury, and discovery.

Applicant again replied by letter addressed to the Honorable William H. Seals, Jr. dated October 5, 2017. In that letter, Applicant re-asserted some of his arguments from the original response, pointed out that his confinement in federal prison presents additional challenges to compliance with the procedural requirements in post-conviction relief actions, and requested that the bar on successive applications not apply given the lack of an evidentiary hearing in his first application for relief.

This Court has reviewed Applicant's responses to the Conditional Order of Dismissal in their entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

First, the Court liberally construes Applicant's motion to compel as an attempt to invoke discovery processes, as it specifically requests provision of certain documents. South Carolina law provides that:

> A party in a noncapital post-conviction relief proceeding shall be entitled to invoke the processes of discovery available under the South Carolina Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

S.C. Code Ann. § 17-27-150. Upon review of the allegations, procedural history, and documents specifically requested by Applicant, the Court declines to grant Applicant's request. The documents Applicant seeks would be of no use to him or this Court in determining the applicability of the procedural bars and do not appear to have existed at the time he filed this

application in April 2016. See Rule 607(i), SCACR ("[A] court reporter shall retain the primary backup tapes of a proceeding for a period of at least five (5) years after the date of the proceeding, and the court reporter may reuse or destroy the tapes after the expiration of that time period."). Indeed, by amendment made November 15, 2017, Respondent supplemented the record with a letter from South Carolina Court Administration dated April 7, 2015, affirming that the transcript of Applicant's plea proceeding was not available. Accordingly, Applicant's motion to compel is **DENIED**.

As for Applicant's arguments against the statute of limitations, ignorance of the law provides no excuse to suspend the statute of limitations, even when Applicant is incarcerated in another jurisdiction. Leamon v. State, 363 S.C. 432, 435, 611 S.E.2d 494, 496 (2005). Furthermore, an allegation that the State breached its side of the bargain in a plea agreement is the subject of no exceptions to the statute of limitations. See, generally Ferguson v. State, 382 S.C. 615, 677 S.E.2d 600 (2009) (exception where failure is due to mental incompetence);[2] Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002) (exception where direct appeal involuntarily waived due to ineffective assistance of counsel); Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999) (exception for claims pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991)); S.C. Code Ann. § 17-27-45(B) (exception where previously unrecognized standard or right is determined to exist by the Supreme Court of the United States or the Supreme Court of South Carolina *and* is intended to be applied retroactively); S.C. Code Ann. § 17-27-45(C) (exception for newly-discovered evidence). Absent some exception, the statute of limitations applies, and the application is procedurally barred.

[2] Not to be confused with mere ignorance of the law, as Applicant professes.

As for Applicant's argument against the prohibition against successive applications, he appears to concede that the allegations raised in this action were raised in his previous application for relief. Accordingly, the application is procedurally barred.

As for Applicant's remaining arguments, he expounds upon his claim of actual innocence and argues that he was erroneously sentenced for PWID Cocaine, when in truth he was in possession of heroin. Such is still a claim for actual innocence and the Court affirms its findings in the Conditional Order of Dismissal. Applicant waived any challenge to any discrepancy in the warrant and indictment when he pled guilty and signed the sentencing sheet. State v. Means, 367 S.C. 374, 385, 626 S.E.2d 348, 355 (2006) ("A defendant may waive a potential challenge to an indictment, just as he may waive any of his constitutional rights, by failing to raise the issue or by admitting the sufficiency of a particular indictment."); State v. Smalls, 364 S.C. 343, 346, 613 S.E.2d 754, 756 (2005) ("[S]igning a sentencing sheet for a charge to which defendant has pled guilty constitutes a written waiver of presentment. Moreover, a signed document that informs a defendant of the charges against him, such as a sentencing sheet, gives rise to a presumed regularity in the proceedings and signifies that the defendant has been notified of the charges to which he has pled guilty."). Accordingly, the application is procedurally barred.

Ultimately, to address Applicant's claim that his conviction is generally a miscarriage of justice, the sum of Applicant's frustrations may be most practically addressed by the observation that possession *with intent to distribute* both heroin and cocaine are subject to punishment under the same statute: S.C. Code Ann. § 44-53-370(b)(1) (West 2002). Heroin is a Schedule I opium derivative and cocaine is a Schedule II substance. See S.C. Code Ann. §§ 44-53-190(c)(10), 44-53-210(b)(4) (West 2002). Possession with intent to distribute either, first offense, is a felony punishable by up to 15 years and/or a fine of up to $25,000.00. A second offense may be subject

to between 5 and 30 years incarceration and/or a fine of up to $50,000.00. Applicant's claim that he could have and should have been subject to punishment of only up to two years misreads which statute is applicable—Applicant is looking at S.C. Code Ann. § 44-53-370(d)(1), which pertains to mere possession, not possession with intent to distribute. Applicant does not contest the "intent to distribute." Therefore, notwithstanding the fact that all of Applicant's claims are procedurally barred, it appearing that his sentence was within the statutory range of the crime to which he pled, as well as the crime to which he wished he pled, this Court can discern no miscarriage of justice.

IT IS THEREFORE ORDERED that for the reasons set forth in the Court's Conditional Order of Dismissal, as well as those reasons set forth above, the Application for post-conviction relief is hereby **DENIED AND DISMISSED WITH PREJUDICE.**

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within 30 days of the service of this Order to secure appellate review. See Rule 203, SCACR. 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 20 day of March, 2018.

WILLIAM H. SEALS, JR.
Chief Judge of Common Pleas
Fifteenth Judicial Circuit

Marion, South Carolina.

MAILED 3/23/18

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	
Keviuntae Hytower, F.B.O.P. #23394-171 ☐ Plaintiff	)	CASE NO. 2015-CP-26-7674
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
State Of South Carolina ☒ Defendant.	)	

Plaintiff's Attorney: Keviuntae Hytower, F.B.O.P. #23394-1741, Bar No. Address: FCI Butner Medium I PO Box 1000 Butner, NC 27509 phone: fax: e-mail: l other:	Defendant's Attorney: Johnny E. James Jr, Bar No. 101260 Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: jjames@scag.gov 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.

Johnny E. James Jr.
Signature of Attorney for ☐ Plaintiff / ☒ Defendant

March 23, 2018
Date submitted

2018 MAR 23 PM 1:34
CLERK OF COURT
HORRY COUNTY, SC

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ 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, SCRCP)
☐ 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

Collected by: Date Filed:

MAILED 3/23/18 – PPN

SCCA/233 (11-03)

ALAN WILSON
ATTORNEY GENERAL

2018 MAR 23 PM 1:34
CLERK OF COURT
HORRY COUNTY, SC

March 21, 2018

The Honorable Renee N. Elvis
Clerk of Court, Horry County
Post Office Box 677
Conway, SC 29528-0677

Re: **Keviuntae Hytower v. State of South Carolina**
2015-CP-26-7674

Dear Ms. Elvis:

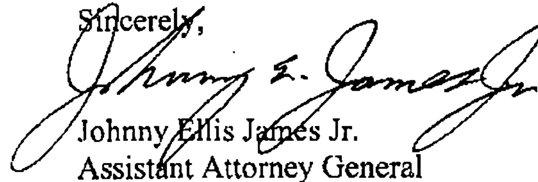
Enclosed please find the original **Final Order of Dismissal** signed by the Honorable William H. Seals, Jr., in the above-captioned case, for filing in your office.

Pursuant to Rule 71.1(f), of the South Carolina Rules of Civil Procedure, please "provide notice of entry of judgment and serve a copy of the order or judgment to the parties as provided in Rule 77(d), SCRCP."

In addition, please forward proof of service and a time stamped copy back to our office for our file.

If you have any questions, please do not hesitate to call me at (803) 734-3737.

Sincerely,



Johnny Ellis James Jr.
Assistant Attorney General

JEJ/mm

Enclosure

MAILED

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283