

# The Supreme Court of South Carolina

Michael Joseph Fleming,                      Petitioner,

v.

State of South Carolina,                      Respondent.

The Honorable Robin Stilwell  
Greenville County  
Trial Court Case No. 2008-CP-23-09790

---

## ORDER

---

The request for an extension until May 23, 2012 to serve and file the Petition for Writ of Certiorari is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY



Clerk

Columbia, South Carolina

April 24, 2012

cc: Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Karen Ratigan

ORIGINAL



SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

April 23, 2012

RECEIVED

APR 23 2012

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

C

S.C. Supreme Court

Re: Michael Fleming v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari is due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a **one-time only** thirty day extension in which to serve and file the petition.

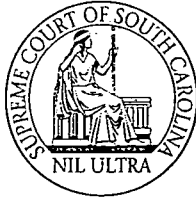
By copy of this letter, I am informing Karen Ratigan, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD:cms

cc: Karen Ratigan, Esquire



# 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

March 22, 2012

Chief Appellate Defender Robert M. Dudek  
South Carolina Commission on Indigent Defense  
P O Box 11589  
Columbia, SC 29211

Re: Fleming, Michael Joseph v. The State

Dear Counsel:

Enclosed is the order issued in the above entitled matter.

By copy of this letter and order, we are advising all interested parties of the action by the Court.

Very truly yours,

*Daniel E. Shearouse*  
DS

CLERK

DES/jj

cc: Michael Joseph Fleming #240116  
Assistant Attorney General Karen Ratigan

# The Supreme Court of South Carolina

Michael Joseph Fleming,                      Petitioner,

v.

State of South Carolina,                      Respondent.

---

## ORDER

---

Counsel has submitted a petition pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 210 (1988), and moves to be relieved. We deny the petition to be relieved and direct the parties to address the following question:

Did the post-conviction relief judge err in finding the fact that petitioner failed to prove an appeal would have merit warranted dismissing petitioner's allegation that he was denied his right to a direct appeal from his probation revocation on the ground?

Petitioner shall serve and file a petition on this question within thirty (30) days of the date of this order. Thereafter, respondent shall have thirty (30) days to serve and file its return.

IT IS SO ORDERED.

  
C. J.  
FOR THE COURT

Columbia, South Carolina

March 22, 2012

**ORIGINAL**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

FEB 28 2011

**S.C. Supreme Court**

\_\_\_\_\_  
Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge  
\_\_\_\_\_

MICHAEL JOSEPH FLEMING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

\_\_\_\_\_  
JOHNSON PETITION FOR WRIT OF CERTIORARI  
\_\_\_\_\_

ROBERT M. DUDEK  
Chief Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, S. C. 29211-1589  
(803) 734-1343

ATTORNEY FOR PETITIONER

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## ISSUE PRESENTED

Whether the post-conviction relief judge erred by ruling petitioner was not entitled to a belated appeal of the revocation of his probation where petitioner testified he asked his attorney to appeal the revocation, his attorney said he did not recall petitioner asking for an appeal but he admitted he did not usually appeal in such a situation since petitioner proved by a preponderance of the evidence that he wanted to appeal?

## STATEMENT OF THE CASE

Petitioner was indicted at the December 2005 term of the Greenville County grand jury for the offense of burglary in the second degree. App. 47-48. On September 12, 2006 petitioner pled guilty to second degree burglary (non-violent) before the Honorable J. Durham Cole. Judge Cole sentenced petitioner to fifteen years imprisonment, suspended on the service of one year, and three years of probation. Petitioner did not appeal from his guilty plea. App. 19.

On December 7, 2007 petitioner appeared before the Honorable John C. Few for a probation revocation hearing. Thomas Hoskinson represented petitioner. Amanda Mobley was the probation agent. App. 1. Defense Counsel Hoskinson told the court that Judge Simmons had previously revoked petitioner for one year “and then wanted him to go to Turning Point which is like a halfway house, rehab type place.” App. 4, ll. 17-20.

Defense counsel told the judge petitioner was apparently unable to get into Turning Point and that “he’s got a drug problem. He needs treatment for that.” Counsel noted that the underlying charge was theft of a bicycle from a garage. Counsel requested that the judge “revoke three years, ATU, then terminate.” App. 4, l. 17 – 5, l. 13.

The judge revoked eight years of petitioner’s probation and then terminated it. App. 6, ll. 18-22.

Petitioner filed an application for post-conviction relief dated December 4, 2008. App. 9-17. Petitioner alleged ineffective assistance of counsel and “false and misleading information by his parole officer.” App. 11.

The state filed a return and partial motion to dismiss. The state alleged the petitioner was barred by the statute of limitations from appealing his guilty plea or the results of his guilty plea.

However, the state would concede the petitioner was entitled to litigate the issue of his right to appeal the probation revocation hearing. App. 19-29.

The judge then ruled that the issue “will be limited to the advisement of your right to appeal.” App. 29, l. 11 – 30 l. 18.

Petitioner testified that he spoke to Counsel Hoskinson after the probation revocation hearing and asked him to file an appeal. App. 33, ll. 3-22. Petitioner said although he asked counsel to appeal he said counsel “mumbled” and petitioner did not remember exactly counsel said about filing an appeal. App. 33, l. 23 – 34, l. 16.

Defense Counsel Hoskinson testified he did not recall whether petitioner asked him to appeal. App. 36, l. 8 – 37, l. 3. Hoskinson also said he generally talked to his clients about issues available for appeal and that he generally would file an appeal if the client requested one. App. 37, ll. 9-20.

Hoskinson said it was *not* common for him to talk to his clients after a probation revocation hearing. When asked in hindsight whether he should have talked to petitioner about an appeal from his probation revocation, defense counsel responded “I don’t know.” App. 38, l. 23 – 39, l. 7.

At the conclusion of the hearing the judge ruled that defense counsel’s conduct was within “professional standards.” The judge also stated there did not appear to be any appealable issue from the probation revocation hearing anyway. App. 39, l. 17 – 41, l. 10.

An order of dismissal was filed on July 12, 2010. This order noted that petitioner “argued he asked counsel about an appeal immediately after the probation revocation hearing.” The order noted petitioner did not recall his attorney’s response to his request and that counsel did not recall

talking with petitioner about an appeal. “Regardless, counsel testified he did not believe the applicant had any appealable issues from his probation revocation hearing.” App. 45-46.

The post-conviction relief judge concluded petitioner had failed to meet his burden of proving he was entitled to a belated appeal from his probation revocation hearing. App. 45-46.

From this order petitioner is seeking a writ of certiorari pursuant to Rule 227 of the SCACR.

## ARGUMENT

The post-conviction relief court erred by ruling petitioner was not entitled to a belated appeal of his probation revocation hearing. Petitioner specifically testified he asked for an appeal. His attorney could not recall whether petitioner asked for such an appeal. The evidence showed petitioner proved by a preponderance of the evidence his interest in appealing the revocation, and he should therefore be granted a belated appeal of his probation revocation hearing.

As seen, petitioner testified he asked his attorney to appeal the revocation of his probation. Defense counsel said he did not recall such a conversation about an appeal but he did admit it was *not his practice* to appeal from the revocation of probation.

The burden of proof is on the applicant in a post-conviction relief case to prove his allegations by a preponderance of the evidence. See Hall v. Catoe 360 S.C. 353, 601 S.E.2d 335 (2004); Frasier v. State 351 S.C. 385, 570 S.E.2d 172 (2002). In Bullis v. State 384 S.C. 472, 682 S.E.2d 803 (2009) this Court in a per curiam opinion cited Turner v. State 384 S.C. 451, 682 S.E.2d (2009) for the proposition that probation revocation counsel does not have an obligation to appeal the results of a probation revocation proceeding unless “extraordinary circumstances” exist.

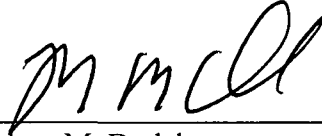
In this case petitioner testified he specifically asked for an appeal and the truncated three page probation revocation hearing does not establish precisely *what condition of probation* appellant violated.

The closest Probation Agent Mobley got to stating the precise grounds for the revocation was when she said “he knew he was continued on probation and never reported again upon release.” App. 6, ll. 10-13. There is not an adequate record here to justify the revocation.

CONCLUSION

The post-conviction relief court erred by ruling petitioner was not denied his right to a belated appeal of the revocation of his probation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'R M Dudek', written over a horizontal line.

Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of February, 2011.

BELATED APPEAL ISSUE

Whether the court erred by revoking petitioner's probation without making an on-the-record ruling of what condition of probation petitioner allegedly violated?

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

CERTIORARI TO GREENVILLE COUNTY  
ROBIN B. STILWELL, CIRCUIT COURT JUDGE

---

MICHAEL JOSEPH FLEMING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

---

PETITION TO BE RELIEVED AS COUNSEL

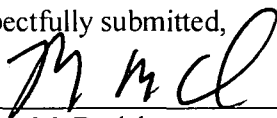
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Counsel for Michael Joseph Fleming states:

1. He is Chief Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on May 27, 2010. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Michael Joseph Fleming.

Respectfully submitted,

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 28th day of February, 2011

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

---

Certiorari to Greenville County  
Robin B. Stilwell, Circuit Court Judge

---

MICHAEL JOSEPH FLEMING,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

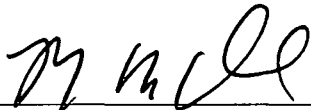
RESPONDENT

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CERTIFICATE OF SERVICE

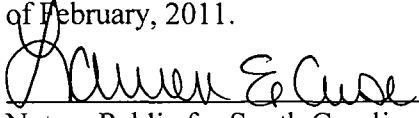
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I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Karen Ratigan, Esquire this 28th day of February, 2011.

  
\_\_\_\_\_  
Robert M. Dudek  
Chief Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 28th day  
of February, 2011.

 (L.S.)  
Notary Public for South Carolina

My Commission Expires: August 23, 2014.



ALAN WILSON  
ATTORNEY GENERAL

March 1, 2011

The Honorable Daniel E. Shearouse  
Clerk, South Carolina Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

RECEIVED

MAR 01 2011

S.C. Supreme Court

**Re: Michael Joseph Fleming v. State of South Carolina  
2008-CP-23-9790**


Dear Mr. Shearouse:

I am in receipt of the Petition for Writ of Certiorari in the above-captioned case which has been filed pursuant to the procedure set forth in Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). Please accept this letter in lieu of a formal return. The Respondent has no objection to the Petition of Robert M. Dudek, Esquire to be relieved as counsel.

If a formal return is required, the Respondent requests an opportunity to brief the issues as requested by the Court.

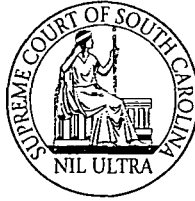
If there are any questions or comments, please feel free to contact me.

Sincerely,

  
Karen C. Ratigan  
Assistant Attorney General

KCR/jacc

cc: Robert M. Dudek, Esquire



# 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

March 1, 2011

Michael Joseph Fleming #240116  
Stevenson Correctional Institution  
4546 Broad River Road  
Columbia, SC 29210

Re: Fleming, Michael Joseph v. The State

Dear Mr. Fleming:

Your counsel has submitted a Petition for Writ of Certiorari indicating that this appeal is without merit and moves to be relieved as your counsel. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The records of this Court reflect that counsel served you with a copy of the Petition & Appendix on February 28, 2011.

You may, within forty-five (45) days of the date of this letter, file with this Court a pro se response to the Petition filed by your counsel. In this response, you may raise and argue any issues you believe the Court should consider in this appeal. Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

If you do decide to file a pro se response, the response must be either typewritten or legibly hand printed, and must have at least a one inch margin on all sides. Further, you will need to only submit one copy of your response, and this copy should **not** be stapled or bound in any manner.

Very truly yours,

CLERK

DES/jj

cc: Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Karen Ratigan

# The Supreme Court of South Carolina

Michael Joseph Fleming,                      Petitioner,

v.

State of South Carolina,                      Respondent.

The Honorable Robin Stilwell  
Greenville County  
Trial Court Case No. 2008-CP-23-09790

---

## ORDER

---

The request for an extension until February 28, 2011 to serve and file the Petition for Writ of Certiorari and Appendix is granted. Pursuant to this Court's order dated March 18, 2009, any further extension request must be based on a showing of good cause.

IT IS SO ORDERED.

JEAN H. TOAL, CHIEF JUSTICE

BY Brenda J. Shealy  
Clerk

Columbia, South Carolina *Chief Deputy*

January 31, 2011

cc: Chief Appellate Defender Robert M. Dudek  
Assistant Attorney General Karen Ratigan

ORIGINAL



**SCCID**

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender

January 28, 2011

RECEIVED

JAN 28 2011

S.C. Supreme Court

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
P.O. Box 11330  
Columbia, SC 29211

Re: Michael Fleming v. The State

Dear Mr. Shearouse:

The Petition for Writ of Certiorari and accompanying appendix are due to be served and filed with the Court today. However, because of my heavy workload at this time, I am requesting a thirty day extension in which to serve and file the petition.

By copy of this letter, I am informing Karen Ratigan, Esquire, of the Attorney General's Office, of my request.

Sincerely,

Robert M. Dudek  
Chief Appellate Defender

RMD:lec

cc: Karen Ratigan, Esquire



# SCCID

SOUTH CAROLINA COMMISSION ON INDIGENT DEFENSE

Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332

Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1343  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

**RECEIVED**

NOV 29 2010

November 29, 2010

**S.C. Supreme Court**

The Honorable Daniel E. Shearouse  
Clerk, S.C. Supreme Court  
Post Office Box 11330  
Columbia, SC 29211

Dear Mr. Shearouse:

The following case falls under the 60 day rule for appeals, and the date we received the transcript is listed to the side.

Michael Joseph Fleming v. State of South Carolina

11/29/2010

I would appreciate you beginning our time limits from the above date, and if you need additional information, or have any questions please contact me.

Thank you for your assistance in this matter.

Sincerely,

Sharon A. Graham  
Administrative Coordinator



Division of Appellate Defense  
1330 Lady Street, Suite 401  
Columbia, South Carolina 29201-3332  
Post Office Box 11589  
Columbia, South Carolina 29211-1589  
Telephone: (803) 734-1330  
Facsimile: (803) 734-1397

Robert M. Dudek, Chief Appellate Defender  
Wanda H. Carter, Deputy Chief Appellate Defender  
Joseph L. Savitz, III, Senior Appellate Defender

RECEIVED

AUG 31 2010

S.C. SUPREME COURT

August 31, 2010

Ms. Theresa Johnson  
Circuit Court Reporter  
Post Office Box 2812  
Greenville, SC 29602

Dear Ms. Johnson:

Our office has been requested to perfect the appeal arising out of:

Michael Joseph Fleming v. State of South Carolina      Case #:      08-CP-23-09790.

County: Greenville      Date of Trial: May 27, 2010

Presiding Judge: Robin B. Stilwell

It is my understanding that you were the court reporter at this time. That being the case, I request that you send this office the original trial transcript along with your bill. If you send a copy to this office, please bill us accordingly. To ensure prompt payment of this bill, please prepare it on the enclosed CID FORM 3500 (Substitution for SCCA DI-4) and include the original criminal case number (Indictment number) where the space is provided.

We request that the lines on the paper be numbered from 1-25, and that you include in the transcript any and all recorded motions, pre and post-trial. Additionally, please transcribe the jury selection, and the State and defense counsel's opening and closing arguments. We have found that even if there are no objections, we need to review both opening and closing arguments for appeal.

If you are aware of the existence of co-defendants not listed in the prior captioned case, please contact us prior to transcribing the transcript. In this manner, we can consult our records to ensure that in ordering a transcript, a duplication has not occurred. In addition, if the Attorney General's Office has already requested an original transcript, please notify us.

Ms. Theresa Johnson  
August 31, 2010  
Page Two

I am sorry for any inconvenience this may cause, but I appreciate your assistance in this matter. If you have any questions, or problems, please contact me.

Thank you for your kind cooperation in this matter.

Sincerely,

  
Lorie French  
Legal Services Coordinator

cc: S.C Supreme Court  
Attorney General's Office

per

# Law Office of Lawrence W. Crane

101 WHITSETT STREET  
GREENVILLE, SOUTH CAROLINA 29601

LAWRENCE W. CRANE, ESQ.  
ELIZABETH P. WIYGUL, ESQ.  
CAROLINE M. HORLBECK, ESQ.

TELEPHONE (864) 235-2900  
FAX (864) 467-1916  
TOLL FREE (800) 852-0899

August 11, 2010

**Via Regular Mail**

Mr. Daniel E. Shearouse  
Clerk, The S.C. Supreme Court  
Post Office Box 11330  
Columbia, South Carolina 29211

**Re:** MICHAEL J. FLEMING v. State

Dear Mr. Shearouse:

Enclosed you will find the original Notice of Appeal in the above matter along with Proof of Service upon the Respondents. The Notice has been filed with the Greenville County Clerk of Court.

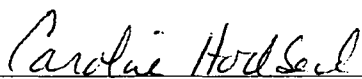
These matters are being referred to the Office of Appellate Defense in that we were participating as Court appointed counsel at trial.

Thank you for your attention to this matter.

Yours very truly,

RECEIVED

AUG 12 2010

  
Caroline M. Horlbeck, Esq.

S.C. SUPREME COURT

Enclosure

cc: Office of the Attorney General  
Office of Appellate Defense

FILED-CLERK OF COURT  
GREENVILLE COUNTY  
PAUL B. WILKINSON

**THE STATE OF SOUTH CAROLINA**  
**In the Supreme Court**

2010 AUG -9 A 11: 26

**APPEAL FROM GREENVILLE COUNTY**  
**Court of Common Pleas**  
**THE HONORABLE Robin B. Stilwell**

---

**CA No. 2008-CP-23-9790**

MICHAEL J. FLEMING,

APPELLANT,

vs.

STATE OF SOUTH CAROLINA

RESPONDENT.

**NOTICE OF APPEAL**

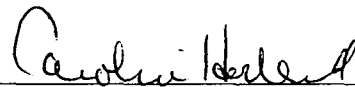
Appellant MICHAEL J. FLEMING, appeals from the Order of the Honorable Robin B. Stilwell Circuit Court Judge clocked July 12, 2010.

Respectfully submitted,

**RECEIVED**

AUG 12 2010

**S.C. SUPREME COURT**



Caroline M. Horlbeck, Esq.  
101 Whitsett St  
Greenville, SC 29601

Date: August 9, 2010

Other Counsel of Record: Karen Ratigan, Esq.  
Assistant Attorney General  
Post Office Box 11549  
Columbia, SC 29211

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE SUPREME COURT

Michael J. Fleming, )  
 )  
 )  
Appellant, )

C.A. No. 2008-CP-23-9790

-vs- )

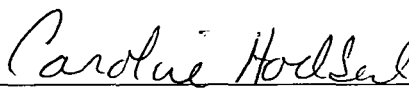
CERTIFICATE OF SERVICE

State of South Carolina, )  
 )  
 )  
Respondent. )

This is to certify that I am an employee in the law office of Lawrence W. Crane, attorneys for Applicant, and that I have this day caused to be served upon the person(s) named below Applicant's Notice of Appeal by placing copies of same in the United States mail, with adequate postage thereon, addressed as follows:

Ms. Loriene French  
S.C. Office of Appellate Defense  
1205 Pendleton St., Suite 306  
Columbia, SC 29201

Karen Ratigan, Esq.  
Office of the Attorney General  
P.O. Box 11549  
Columbia, SC 29211

  
Caroline M. Horlbeck

Greenville, South Carolina

Aug 11, \_\_\_\_\_, 2010

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2008CP2309790

Michael Joseph Fleming vs. South Carolina State Of

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other:
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

\_\_\_\_\_  
PRESIDING JUDGE -

This judgment was entered on the 12th day of July, 2010, and a copy mailed first class this 12th day of July, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

Caroline M.W. Horlbeck Law Offices Of  
Lawrence W. Crane 101 Whitsett Street  
Greenville, SC 29601

Karen Ratigan

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

Paul B. Wickensimer Greenville County Clerk Of Court  
- Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Michael Joseph Fleming, )  
 S.C.D.C. No. 240116, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 C.A. No. 2008-CP-23-9790

**ORDER OF DISMISSAL  
 WITH PREJUDICE**

2010 JUL 12 A 11:17  
 CLERK OF COURT  
 GREENVILLE COUNTY

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed December 31, 2008. The Respondent made its partial return and motion to dismiss on June 30, 2009. A hearing was convened at the Greenville County Courthouse on May 27, 2010, at which time the Applicant was present in court and represented by Caroline Horlbeck, Esquire. The Respondent was represented by Karen C. Ratigan, Esquire, of the South Carolina Office of the Attorney General.

At the hearing, the Respondent made a Partial Motion to Dismiss. The Respondent argued that, as the PCR application was not filed before the expiration of the statute of limitations, the only surviving issue was whether the Applicant was entitled to a belated appeal.

**I. PROCEDURAL BACKGROUND**

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Greenville County Clerk of Court. The Greenville County Grand Jury indicted the Applicant for first-degree burglary (2005-GS-23-10530). John P. Abdalla, Esquire, represented the Applicant.

On September 12, 2006, the Applicant pled guilty to second-degree burglary (non-

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violent). The Honorable J. Derham Cole sentenced the Applicant to fifteen (15) years suspended on the service of one (1) year and three (3) years probation. The Applicant did not appeal.

On December 7, 2007, the Applicant appeared in court for a probation citation. The Applicant was represented by Thomas Hoskinson, Esquire. The Honorable John C. Few revoked the Applicant's probation and levied an eight (8) year sentence. The Applicant did not appeal.

## II. ALLEGATIONS

In his current PCR application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel:
  - a. Counsel led him to believe he would receive a three (3) year sentence.
  - b. Counsel did not advise of right to appeal.
2. Misrepresentation of facts and false information.
3. False and misleading information by parole officer.

## III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the records of the Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections and the pleadings and makes the following findings of fact and conclusions of law:

### A. Statute of Limitations

This Court finds the Respondent's partial motion to dismiss is well taken. All issues other than that of a belated appeal should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). South Carolina 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 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 upon an appeal, whichever is later.

The Applicant's probation was revoked on December 7, 2007. The Applicant was therefore required to file his application before December 7, 2008. This Application was filed on December 31, 2008, which was more than three (3) weeks after the statutory filing period expired. The statute of limitations contained in section 17-27-45(a) sets forth a bright-line test that must be followed by this Court in determining whether an application for PCR was filed in a timely manner. The Applicant has failed to set forth any cognizable reason that would justify disregarding this one-year statute of limitations.

### **B. Belated Appeal**

The sole surviving issue is whether the Applicant is entitled to an appeal from his probation revocation hearing.

The Applicant argued he asked counsel about an appeal immediately after the probation revocation hearing. The Applicant stated he did not recall what counsel said in response to his request. Counsel testified he did not recall the Applicant asking him to file an appeal, but that he usually files an appeal if asked to do so. Counsel testified that, when asked to file an appeal, he usually discusses the possible outcomes with the defendant. Counsel testified he did not recall having such a conversation with the Applicant. Regardless, counsel testified he did not believe the Applicant had any appealable issues from his probation revocation hearing.

This Court finds the Applicant has failed to meet his burden of proving he is entitled to a belated appeal from his probation revocation hearing. This Court finds credible the testimony of probation revocation counsel that he did not recall the Applicant asking him to file an appeal and that he likely would have filed an appeal if requested. Regardless, this Court finds there are no appealable issues from the Applicant's probation revocation hearing. Counsel stated the

Applicant admitted his violations, and the Applicant did not object. (Probation revocation transcript, p.4). Further, the Applicant failed to point to any legal error or omission in the revocation hearing that could have merited relief on appeal.

#### IV. CONCLUSION

Based on the records, pleadings, the arguments of counsel and evidence presented, this Court finds (1) the Applicant failed to file his application for PCR within the time mandated by the Uniform Post-Conviction Procedure Act and (2) the Applicant failed to meet his burden of proving he is entitled to a belated appeal. This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure the appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

#### IT IS THEREFORE ORDERED THAT:

1. The Respondent's Partial Motion to Dismiss is hereby **GRANTED** and the post-conviction relief application.
2. The Applicant's allegation that he is entitled to a belated appeal is **DENIED** and all other issues are **DENIED AND DISMISSED WITH PREJUDICE**.
3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 7 day of July, 2010.



Robin B. Stilwell  
Presiding Judge  
Thirteenth Judicial Circuit

Greenville, South Carolina.

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