

Freddie Gardner #178124
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer, S.C. 29669

April 17, 2013

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

Re: Case No. 2012-CP-31-0173

Dear Honorable Daniel E. Shearouse:

Enclosed is a copy of Appointment of Counsel, Notice of appeal with rule 243CC) Explanation required to be filed with exhibit 1 arrest warrant D-204828, Exhibit 2 report of preliminary hearing, Exhibit 3 Indictment for Murder & possession of weapon during violent crime, Exhibit 4 Caption of Transcript of Record (Trial) May 24, 25 & 26, 1993, Exhibit 5 final order of dismissal.

Respectfully submitted
Freddie Gardner #178124

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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEE COUNTY

IN THE COURT OF COMMON PLEAS

FOR THE THIRD JUDICIAL CIRCUIT

GEORGE C. JAMES, JR. Chief Administrative Judge
Third Judicial Circuit Court

Case No. 2012-CP-31-0173

FREDDIE GARDNER #178124 Applicant,

V.

THE STATE OF SOUTH CAROLINA Respondent.

APPOINTMENT OF COUNSEL

Applicant Freddie Gardner, #178124, is indigent and ask this Honorable Court to appoint Appellate Counsel to assistance in this appeal.

Respectfully Submitted
Freddie Gardner #178124
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer, S.C. 29669

DATED this 17th day of April, 2013.

The Supreme Court of South Carolina
Daniel E. Shearouse, clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

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FREDDIE GARDNER #178124 Applicant,
V.
THE STATE OF SOUTH CAROLINA Respondent.

AFFIDAVIT OF SERVICE BY MAIL

1. I am the Applicant 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 appointment of Counsel on the following person by depositing in the United States mail at Perry Correctional Institution mailroom, postage prepaid:

The Supreme Court of South Carolina
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

DATED this 17th day of April, 2013.

Freddie Gardner #178124
Freddie Gardner #178124 Applicant
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer, S.C. 29669

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEE COUNTY
IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
GEORGE C. JAMES, JR. Chief Administrative Judge
Third Judicial Circuit Court

CASE No. 2012-CP-31-0173

FREDDIE GARDNER #178124. Applicant,
V.
THE STATE OF SOUTH CAROLINA. Respondent.

NOTICE OF APPEAL

Applicant, Freddie Gardner #178124, appeals his FINAL ORDER OF DISMISSAL which was served on him by mail on March 22, 2013, at Perry Correctional Institution, which he received from Perry Correctional Institution mailroom on March 26, 2013 by officer Mrs. Davis. The judgment was entered on the 20th day of March, 2013.

Freddie Gardner #178124

Freddie Gardner #178124
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer S.C. 29669

April 17, 2013

Other Counsel of record:
Office of the Attorney General
Assistant Attorney General, Megan E. Harrigan
P.O. Box 11549
Columbia S.C. 29211

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM LEE COUNTY

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

GEORGE C. JAMES, JR. Chief Administrative Judge
Third Judicial Circuit Court

CASE No. 2012-cp-31-0173

FREDDIE GARDNER #178124. Applicant,

v.

THE STATE OF SOUTH CAROLINA. Respondent.

PROOF OF SERVICE

I Freddie Gardner #178124, certify that a copy of the foregoing Notice of Appeal and Copy of Rule 243CC) Explanation required, was served on Assistant Attorney General, Megan E. Harrigan by depositing same in the United States mail, Postage prepaid, address to:

Office of the Attorney General
Assistant Attorney General, Megan E. Harrigan
P.O. Box 11549
Columbia S.C. 29211

SWORN TO BEFORE ME this 17th Day
of April 2013

[Signature] (L.S.)
Notary Public for South Carolina

My Commission Expires: 4-26-2020

Freddie Gardner #178124

Freddie Gardner #178124
Perry Correctional Institution B-X-18
430 Oaklawn Road
Pelzer S.C. 29669

Freddie Lyndell Gardner vs. State Of South Carolina

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: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed;
 - Reversed;
 - Remanded;
 - Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

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

Dated at Bishopville, South Carolina, this 20th day of March, 2013.

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 20th day of March, 2013, and a copy mailed first class this 20th day of March, 2013, to attorneys of record or to parties (when appearing pro se) as follows:

Freddie Lyndell Gardner ,

Megan E. Harrigan

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

James I Davis

James I Davis - Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF LEE)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT

Freddie L. Gardner, #178124)

Case No.: 2012-CP-31-0173

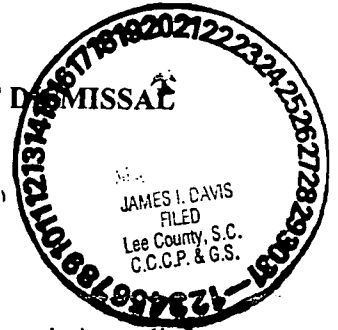
Applicant,)

v.)

FINAL ORDER OF DISMISSAL

State of South Carolina,)

Respondent.)



This matter comes before the Court pursuant to an application for post-conviction relief filed July 9, 2012. The State made its Return and Motion to Dismiss on October 9, 2012, requesting that the application be summarily dismissed as successive and barred by the one-year statute of limitations. 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 October 9, 2012 and filed October 23, 2012, provisionally denying and dismissing this action. This Court gave Applicant twenty 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 November 5, 2012, serving the aforementioned Conditional Order of Dismissal on the Applicant.

Applicant responded to the Conditional Order of Dismissal in a document captioned "Motion to Not Dismissed PCR Application and Order should Not Become Final and Motion to Amend Application for Post-Conviction Relief 12-CP-31-173 by adding additional ground 10(b)" dated October 22, 2012. In this document, Applicant acknowledges that this application, his *sixth* post-conviction relief action,¹ is beyond the one year statute of limitations as proscribed

¹ In Respondent's Return and Motion to Dismiss and this Court's Conditional Order of Dismissal, only three prior actions were listed; the following two actions were inadvertently omitted: 1995-CP-31-0013 and 1997-CP-31-0050.

by S.C. Code Ann. § 17-27-45 and is successive to his five prior post-conviction relief actions. However, Applicant argues that he is attempting to correct an error from his first post-conviction relief action, where he “failed to show that trial counsel made errors so serious that counsel was not functioning as counsel.” Applicant elaborates that his first application was “inadequately filled out by another inmate who didn’t have no [sic] argument.” However, Applicant acknowledges that he was represented by appointed counsel and an evidentiary hearing was convened on his first application, as well as at least one subsequent application. In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). This Court finds that Applicant has not set forth sufficient factual or legal reasons as his application is timely or his allegations could not have been raised in one of his five prior post-conviction relief actions.

Additionally, Applicant asserts that this Court should allow him to amend his Application to include the following allegation: “Trial Court error in jury instruction that malice maybe [sic] inferred by the use of a deadly weapon which violated common law and Constitutional of S.C. Const. Art. V § 21.” In support of this amendment, Applicant provides eight pages of trial testimony experts with his analysis followed by case law primarily supported by State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009). Applicant contends that “[O]n September 1, 2012, Applicant actual discovery of facts of new rule in State v. Johnny Rufus Belcher” makes his application for post-conviction relief timely under S.C. Code Ann. § 17-27-45 (B) and (C). The Applicant alleges the South Carolina Supreme Court’s 2009 decision in State v. Belcher, 385 S.C. 597, 685 S.E.2d, 802, lead to Applicant’s discovery of outcome determinative issues that amounted to an exception of the retroactivity provision that was set forth by the Court in Belcher. Therefore, Applicant argues, the inferred malice charge, plus the State’s closing



arguments and the trial court's responses to the jury when they had questions, made the murder verdict fundamentally unfair in light of the evidence presented during the trial.

However, Belcher was decided by the South Carolina Supreme Court on October 12, 2009, more than sixteen years after the Applicant was convicted in 1993. Belcher "represents a clear break from our modern precedent" approving of the jury charge on inference of malice from use of a deadly weapon, expressly overruling some twenty-six cases decided over the course of more than one-hundred years, ranging in date from 1894 to 2006. 385 S.C. at 612, 685 S.E.2d at 810. The charge given in Applicant's case was, at the time of his trial, the sanctioned charge on the law. In Belcher, the Court held, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher at 612, 685 S.E.2d at 810. The opinion expressly stated that "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810. Additionally, a jury charge applying the correct statement of the law at the time of trial concerning the inference of malice is not an issue of fundamental unfairness that warrants retroactively applying a change in law made more than sixteen years after a conviction. Based on the explicit language of the Supreme Court's opinion, this Court is precluded from applying Belcher to the conviction challenged in this post-conviction relief application. Therefore, Applicant's motion to amend his application to add this new allegation is denied.

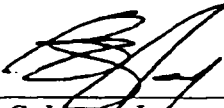
In conclusion, this Court has reviewed the Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds that sufficient reason has not been shown why the Conditional Order of Dismissal should not become final. Applicant has failed to set forth sufficient, specific reasons, factual or legal, as to why his

application is neither untimely under the statute of limitations as set forth in S.C. Code Ann. § 17-27-45 or successive to his prior post-conviction relief action. Accordingly, this Court finds no reason why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal and the reason set forth in this order, the application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a Notice of Appeal within thirty days of the service of this Order if he wishes 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 11 day of MARCH, 2013.



GEORGE C. JAMES, JR.
Chief Administrative Judge
Third Judicial Circuit Court


_____, South Carolina.

Freddie Gardner #178124

Perry Correctional Institution B-X-18

430 Oaklawn Rd

Pelzer, S.C. 29669

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P.C.I. MAILROOM

The Supreme Court of South
Daniel E. Shearouse, Clerk of
Post Office Box 11330
Columbia, S.C. 29911