

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF DARLINGTON)	
)	
)	2012-CP-16-814
Timothy Michael Farris,)	
)	
Applicant,)	
)	REPLY TO
)	
v.)	MOTION TO DISMISS and
)	
State of South Carolina,)	
)	
Respondent.)	CONDITIONAL ORDER OF DISMISSAL
)	
)	

Applicant Pro Se, in response to the Motion to Dismiss filed on January 17, 2013 and delivered to Applicant on February 8, 2013 would respectfully show this Court:

I.

Respondent erred in stating the Applicant was confined in the South Carolina Department of Corrections. Applicant was never confined by any court. But if Applicant was so confined, why did Respondent mail the Motion to Dismiss to the Union County Sheriff's Office in North Carolina? [Exhibit A]

1. If Respondent's Motion actually was mailed to Union County Sheriff's Office, the latter were under no obligation to track down and forward the mail to Applicant.
2. However, the Respondent's Motion was not received by the Union County Sheriff's Office. [Exhibit B]
3. Respondent's Motion was not delivered to Applicant until February 8, 2013, when the failed mailing was discovered inadvertently. Applicant had phoned the clerk's office to inquire about ordering hearing transcripts and learned, for the first time, that Respondent had filed the Motion and that a Conditional Order to Dismiss had been issued. The clerk with whom Applicant spoke, Jennifer Sanders, promptly placed the documents in an envelope addressed to his home address.
4. The Affidavit of Service by Mail, dated January 15, 2013 and filed on January 17, 2013 is a fraud on the court and a direct effort to quash the Applicant's rights.
5. In this reply, Applicant will show numerous errors of fact in Respondent's

Motion. Beneath Respondent's numeral I is the first error. Matthew Swilley did not represent Applicant on August 21, 2008, when Applicant was indicted.

6. No one represented Applicant until August 23, 2008 when, unknown to Applicant, Robert Kilgo, Jr. sent discovery request to the prosecutors. [Exhibits C].
7. Kilgo's name continues to appear on the docket because he is the only defense counsel who filed anything on behalf of Applicant. [Exhibit D] They never met and never spoke. Applicant did not know of his existence until June 4, 2012.
8. Matthew Swilley was not appointed to represent Applicant until two weeks prior to the Plea Hearing. [Exhibit E]
9. The last paragraph under number I contradicts the first paragraph, and does state correct facts: "On March 9, 2011, the Applicant pled guilty as indicted before the Honorable Paul M. Burch who sentenced Applicant to five years imprisonment suspended upon service of four years probation. Applicant did not appeal his sentence."
10. Applicant could not appeal his sentence because he tried to reach his plea counsel, Matthew Swilley, every day for fifteen days—past the ten day statute of limitations for filing an appeal. This was the last issue of many that will prove ineffective assistance of Counsel.
11. Respondent should have known at the time their Motion to Dismiss was filed that Applicant continued to be on probation, resided at his North Carolina home, and was under the supervision of probation officers of South Carolina, North Carolina, and the Interstate Compact. Any one of these officers could have provided the correct address.
12. It is not harmless error for the State to fail to mail its Motion to the correct address.

II.

Respondent **wrongly** states that Applicant alleges he is being held in custody unlawfully. Applicant alleges he was wrongly indicted and wrongly convicted and, for the first time can provide proof based on:

1. Ineffective Assistance of Counsel
2. Newly discovered evidence

III.

Respondent correctly cites case law applicable to proving the allegations in the application for post-conviction relief. It will become evident to the court when Applicant files his Motion for Summary Judgment that these cases unequivocally entitle Applicant to post-conviction relief.

IV.

Respondent claims the statute of limitations applicable to post-conviction relief actions bars the entire application. Respondent errs.

1. Applicant is aware that when he filed the PCR on September 24, 2012, it was beyond the one-year statute of limitations.
2. Applicant's failure to timely file is excusable. It was not due to lack of diligence. Rather, it was due to hardship: ineffective counsel; counsel's refusal despite, repeated requests, to provide the complete file; new information; inability to use the new information due to lack of knowledge of the law; months of not knowing about the PCR; and more months of fruitless search for an attorney willing to represent him pro bono.
3. The State's failure to respond within the statutory limit of (60) sixty days places them on equal footing with Applicant.
4. When the State filed its Reply on January 17, 2013—two months past the statute of limitations—it was in procedural default, the consequence of violating S.C. CODE §17-27-70, Rule 12(A). The State's lack of due diligence is inexcusable. Justice requires the State be held to the same standard as applicants for post-conviction relief.
5. It is a matter of record that the State flouted procedural rules numerous times:
 - by failing to request a continuation to permit a late filing;
 - by not responding to the PCR complaint within the requisite (60) sixty days—not until January 17, 2013;
 - by failing to serve the pro se plaintiff with their answer;
 - by filing a false certification of mailing with the court. When a plaintiff or applicant is pro se, the Answer to a Complaint should be mailed to the plaintiff. It is beyond credibility that the Attorney General's staff is not cognizant of this.
6. The State is not excused from default simply by filing an answer *eventually*. “[F]iling a late answer would not alter the fact that Appellants were in default, especially if entering default is a ministerial act to be automatically performed once an affidavit shows the defendant has failed to comply with the requirements of the rules.[citation].” *Stark Truss Co., Inc. v. Superior Construction Co., et al*, No. 3859 (S.C. App. Ct. 2004).
7. The Court cannot grant equitable tolling to the State's violation of statute of limitations and simultaneously dismiss Applicant's petition based on the statute of limitations. No hardship prevented the State from filing on time, whereas Applicant's case exemplifies those rare and exceptional circumstances that warrant application of the doctrine of equitable tolling.

"[E]quitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine." *Pelzer v. State*, No. 4439 (S.C. App. Ct. 2008).

8. Applicant received new evidence on June 4, 2012 and filed his PCR on September 24, 2012—well within one year after the date of actual discovery of new evidence. In *McCoy* the South Carolina Supreme Court emphasized this exception to the statute of limitations:

"[S]ection 17-27-45(C) provides that if a PCR applicant discovers 'material facts not previously presented and heard that require[] vacation of [his] conviction or sentence,' he may file a PCR application 'within one year after the date of actual discovery . . . or after the date when the facts could have been ascertained by the exercise of reasonable diligence.'" *McCoy v. State*, No. 27214 (S.C. Supreme Court, February 6, 2013).

9. Moreover, "[w]hen considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant. *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (citing S.C. Code Ann. § 17-27-80)." *Id.*
10. "Where an applicant alleges facts that would establish an exception to [] the statute of limitations [] and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing. *Cf. Delaney v. State*, 269 S.C. 555, 556, 238 S.E.2d 679, 679 (1977)." *Id.*
11. The PCR judge in *McCoy* was chastised for overlooking "the discovery rule in section 17-27-45(C), which allows one year after the discovery of 'material facts not previously presented and heard that require[] vacation of the conviction or sentence' to file a PCR application." *Id.*

V.

Applicant therefore requests this Court to find the State in procedural default as a matter of law, and seeks relief in accord with *McCoy v. State* on the basis there are

genuine issues of material fact which necessitate an evidentiary hearing.

VI.

Wherefore, having made sufficient argument as to the appropriate timing of the PCR and the reasonableness of an evidentiary hearing, Applicant requests this Court to so hold and to appoint an appellate defender to assist the Applicant.

Respectfully submitted,

BY: _____
Timothy Michael Farris, Applicant Pro Se

EXHIBITS

JP

STATE OF SOUTH CAROLINA)
)
 COUNTY OF DARLINGTON)
)
)
)
 TIMOTHY MICHAEL FARRIS)
)
 Applicant,)
)
 vs)
)
 STATE OF SOUTH CAROLINA,)
)
 Respondent.)
)

IN THE COURT OF COMMON PLEAS

2012-CP-16-0814

AFFIDAVIT OF SERVICE BY MAIL

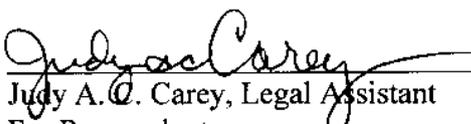
1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** of the Respondent in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Timothy Michael Farris
Union County Sheriff's Office
3344 Presson Road
Monroe NC 28112

DATED this 15th day of January, 2013.

2013 JAN 17 AM 11:04
 SCOTT B. SUGGS
 CLERK OF COURT/R.O.D.
 DARLINGTON COUNTY, S.C.

FILED


 Judy A. C. Carey, Legal Assistant
 For Respondent

6. The names and current addresses of any expert witnesses the State has used to assist in the investigation of its case or any witnesses that the State propose to use as witnesses at the trial.
7. The results of any photo identification procedures employed in this case together with any photographs so employed.
8. The best results of scientific, psychological, and/or psychiatric test or experiments conducted in this case.
9. The names and present addresses of person(s) who has knowledge of the existence of evidence relevant to the acts charged in this case, including all persons who will be called as witnesses for the State upon trial of this case and those who will not be called as witnesses for the State.
10. All information relevant to the credibility of any government witness.
11. All information concerning the conduct, character and reputation of such witnesses.
12. The criminal records either juvenile or adult, of such witnesses.
13. The substance of any agreement or proposed agreement made between the State or it's agents and any witness in this case dealing with of reward, favored treatments, or leniency in return for information or favorable testimony.
14. The substance of any such agreements entered into in the past between the State, its agents and any potential witness in this case with reference to other criminal cases or investigations.
15. All materials of any nature and witnesses names and addresses that may be exculpatory.

FURTHER, The Defendant will specifically move that said Order requiring production, inspection, copying and/or photographing specifically require compliance by the state within (30) days of receipt of this Motion. This production is specifically sought so that the information discoverable pursuant to the Rule 5, South Carolina Rules of Criminal Procedure, will be meaningful for the proper preparation of the defense of TIMOTHY MICHAEL FARRIS.

**Robert Kilgo, Jr.
Public Defender
300 Russell Street, Suite 113
Post Office Box 648
Darlington, S.C. 29540
(843) 398-4320**

**Darlington, S.C.
August 23, 2008**

SAVED FOR EXHIBIT B



Darlington County Fourth Judicial Circuit Public Index



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Switch View

The State of South Carolina VS Timothy Michael Farris

Case Number:	J087214	Court Agency:	General Sessions	Filed Date:	08/18/2008
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	Burch, Paul M.
Disposition:	Pled Guilty				
Disposition Date:	03/09/2011	Date Received:	08/18/2008	Arrest Date:	08/01/2008
Law Enf. Case:		True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:	2008GS1601555	Waiver Date:	
Probation Case:					

[Case Parties](#) [Charges](#) [Sentencing](#) [Associated Cases](#) [Actions](#) [Financials](#) [Bonds](#)

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Farris, Timothy Michael	Order/Form 9 restructure accounts	Order		01/26/2012-14:17		
Farris, Timothy Michael	Active - Probation	Filing		03/21/2011-12:25		
Farris, Timothy Michael	Bond Comment To Notes Screen	Filing		03/10/2011-00:18	03/09/2011-00:18	
Farris, Timothy Michael	RULE 5 KILGO 082508LT FROM ATTY GEN OFFICE 101508	Filing			03/09/2011-00:00	

CMSWeb 6.1

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SC Commission of Indigent Defense
Office of the Fourth Circuit
Public Defender
313 West Hampton Street
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Dillon, South Carolina 29536

A.C. Michael Stephens, Chief Circuit Public Defender

J. Richard Jones, Deputy Chief Public Defender
Emily M. Crayton, Assistant Deputy Chief Public Defender
William E. Grove, Assistant Public Defender

Matt S Swilley, Assistant Public Defender
Tiffany Gibson, Assistant Public Defender
Christa Caines Lane, Circuit Administrator

February 24, 2011

Office of the Solicitor
William B. Rogers, Jr.
Fourth Judicial Circuit
Darlington County, South Carolina

RE: Notice of Assignment of Attorney
Timothy Michael Farris
J 087214; J 087215; J 087216
;;

Dear Solicitor:

Please be advised that the Fourth Circuit Public Defender Office has assigned the above referenced case.

Matt Swilley is the Public Defender representing the above client in this matter.

Fourth Circuit Public Defender
313 West Hampton Street
Dillon, South Carolina
877-225-2922



A.C. Michael Stephens
Chief Circuit Defender

16A08-00000786