

E.g. Appendix A

UNPUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-7652

SEAN S. EARL,

Petitioner - Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Roderick Charles Young, Magistrate Judge. (3:19-cv-00547-REP-RCY)

Submitted: March 31, 2020

Decided: April 7, 2020

Before FLOYD, THACKER, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Sean S. Earl, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Sean S. Earl filed a notice of appeal in his pending 28 U.S.C. § 2254 (2018) proceedings. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291 (2018), and certain interlocutory and collateral orders, 28 U.S.C. § 1292 (2018); Fed. R. Civ. P. 54(b); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949). Here, the district court has not entered a final order, and Earl fails to identify an interlocutory or collateral order from which he seeks to appeal. *See* Fed. R. App. P. 3(c)(1)(B) (“The notice of appeal must . . . designate the judgment, order, or part thereof being appealed”). Accordingly, we dismiss the appeal for lack of jurisdiction. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

SEAN S. EARL,

Petitioner,

v.

Civil Action No. 3:19CV547

COMMONWEALTH OF VIRGINIA,

Respondent.

**MEMORANDUM ORDER
(Serving 28 U.S.C. § 2254 Petition)**

Petitioner, a Virginia state prisoner proceeding *pro se*, submitted a petition under 28 U.S.C. § 2254. Petitioner has paid the full filing fee. Upon consideration of Petitioner's payment of the full filing fee and the petition for a writ of habeas corpus, it is ORDERED that:

1. The petition is FILED;
2. Respondent shall file a responsive pleading within thirty (30) days of the receipt of this Memorandum Order;
3. Respondent will treat this Memorandum Order as a request that the records of the state criminal trial and habeas corpus proceeding, if deemed pertinent and available, be forwarded to the Clerk's Office in Richmond, Virginia. Such records shall be returned to the proper repository upon conclusion of the federal proceedings;
4. Petitioner is subject to the requirements of Rule 5 of the Federal Rules of Civil Procedure. From this point on, Petitioner must mail a copy of every document to counsel for Respondent. No document submitted by Petitioner will be considered without an attached

certificate stating that Petitioner has mailed a copy of the document to counsel for Respondent. The required certificate must also show the date and manner of service;

5. Petitioner immediately must advise the Court of his new address in the event he is transferred, released, or otherwise relocated while the action is pending. **FAILURE TO DO SO MAY RESULT IN DISMISSAL OF THE ACTION**; and,

6. The Court DOES NOT ACCEPT documents or pleadings submitted on paper that exceeds 8 1/2 inches by 11 inches in size, or that contains writing on the reverse side of a page. **ANY SUBMISSION MADE IN VIOLATION OF THIS PARAGRAPH WILL NOT BE CONSIDERED BY THE COURT.**

The Clerk of the Court is DIRECTED to serve Respondent. Service shall be made by electronically transmitting a copy of this Memorandum Order and the Petition (ECF No. 5) to the Attorney General for the Commonwealth of Virginia. A copy of this Memorandum Order shall also be sent to Petitioner.

It is so ORDERED.

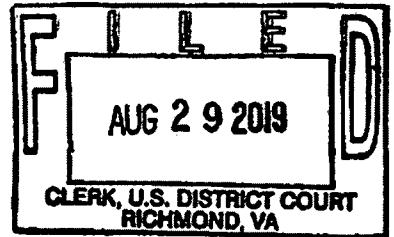
/s/



Roderick C. Young
United States Magistrate Judge

Date: September 26, 2019
Richmond, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division



SEAN S. EARL,

Petitioner,

v.

Civil Action No. 3:19CV547

COMMONWEALTH OF VIRGINIA,

Respondent.

MEMORANDUM ORDER
(Directing Petitioner to Complete and Return Form)

Petitioner, a Virginia inmate proceeding *pro se*, has submitted "PETITION FOR APPEAL OF MOTION TO VACATE VOID JUDGMENT AB INITIO." (ECF No. 1.) Given the content of this document, it is appropriate to give Petitioner the opportunity to pursue this action as a petition for a writ of habeas corpus under 28 U.S.C. § 2254. *See Rivenbark v. Virginia*, 305 F. App'x 144, 145 (4th Cir. 2008).

If Petitioner wishes to proceed pursuant to 28 U.S.C. § 2254, he must file a petition for a writ of habeas corpus on the proper form. The Clerk is DIRECTED to write the civil action number for the present action on the form and SEND the form to Petitioner. Because federal law prohibits the filing of any second or successive § 2254 petition, *see* 28 U.S.C. § 2244(a), Petitioner is strongly urged to present every available claim for relief in his first such motion. Petitioner is warned that federal law imposes a one-year statute of limitations on § 2254 petitions. 28 U.S.C. § 2244(d). Petitioner is also reminded that, before this Court can consider a § 2254 petition, he must first exhaust his state court remedies for all of his claims. *See* 28 U.S.C. § 2254(b), (c). Exhaustion is accomplished by presenting the claims to the Supreme Court of Virginia for review either on direct appeal or in a collateral proceeding.

If Petitioner wishes to proceed under 28 U.S.C. § 2254, he must complete and return the form to the Court within twenty (20) days of the date of entry hereof. In the alternative, Petitioner may file, within twenty (20) days of the date of entry hereof, a motion to withdraw this action. If Petitioner fails to take any action within that time, the Court will dismiss the action without prejudice. *See Fed. R. Civ. P. 41(b).*

All correspondence for the Court shall be directed to: Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse, 701 East Broad Street, Richmond, VA 23219.

The Clerk is DIRECTED to send a copy of this Memorandum Order to Petitioner.

It is SO ORDERED.

Roderick C. Young
United States Magistrate Judge

Date: August 29, 2019
Richmond, Virginia

E. g. Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

SEAN S. EARL, DOC #1198903,
Petitioner,

v.
COMMONWEALTH OF VIRGINIA,
Respondent.

Civil Action No. 3:19cv547

**RESPONDENT'S MOTION TO DISMISS
AND RULE 5 ANSWER**

The Director of the Department of Corrections, by counsel, pursuant to Rule 5, Rules Governing Section 2254 Cases, moves the Court to dismiss Sean S. Earl's petition for a writ of habeas corpus.

1. The reasons requiring dismissal are set forth in the accompanying memorandum of law, which is incorporated by reference.
2. Each and every allegation not expressly admitted is denied.
3. The lack of merit of the petition is ascertainable from the record and the applicable law without the need of an evidentiary hearing. See 28 U.S.C. § 2254(d), (e) (2000).

WHEREFORE, the respondent prays that the petition for a writ of habeas corpus will be dismissed without an evidentiary hearing.

Respectfully submitted,

Harold Clarke, Director

By: /s/
ELIZABETH KIERNAN FITZGERALD, AAG
VSB #82288
Attorney for Respondent
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219

(804) 786-2071
(804) 371-0151 (Fax)
OAGCriminalLitigation@courts.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I have electronically filed the foregoing Motion to Dismiss and Rule 5 Answer with the Clerk of Court using the CM/ECF system, and that I have mailed the document, with exhibits, by United States Postal Service to the following non-filing user: Sean Earl, #1198903, C-219, Red Onion State Prison, P.O. Box 970, Pound, VA 24279, petitioner herein.

By: /s/
ELIZABETH KIERNAN FITZGERALD, AAG
VSB #82288
Attorney for Respondent
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

SEAN S. EARL, DOC #1198903,

Petitioner,

v.

Civil Action No. 3:19cv547

COMMONWEALTH OF VIRGINIA,¹

Respondent.

BRIEF IN SUPPORT OF MOTION TO DISMISS

Respondent, by counsel, submits the following brief in support of his Motion to Dismiss and Rule 5 Answer:

PROCEDURAL HISTORY

1. The petitioner, Sean Earl, is detained pursuant to a final judgment of the City of Portsmouth Circuit Court dated July 9, 2007. Earl was convicted of second-degree murder, malicious wounding, and two counts of use of a firearm in the commission of a felony, and was sentenced to 56 years of incarceration with 25 suspended. (CR06002360-01, CR06002360-02, CR06002360-03, CR06002360-04).

2. Earl did not appeal his convictions.

¹ Harold W. Clarke, in his official capacity as Director of the Virginia Department of Corrections, is the person who has custody of the petitioner, and is the proper party respondent pursuant to Rule 2 of the Rules Governing Section 2254 Cases. See Code §§ 53.1-20, 19.2-310. Therefore, the Director of the Virginia Department of Corrections, by counsel, moves the Court to substitute him as party respondent in this habeas corpus case in lieu of the Commonwealth of Virginia.

3. Beginning in 2015, Earl filed a series of Motions to Vacate in the Portsmouth Circuit Court. His final motion to vacate was denied by the Portsmouth Circuit Court on May 25, 2018. (CR06002360-01, Final Order Motion to Vacate, Exhibit 1).

4. Earl appealed this judgment to the Supreme Court of Virginia, which refused the appeal on June 27, 2019. (Record No. 180956, Petition and Order Exhibit 2).

PETITIONER'S CURRENT CLAIMS

5. On or about July 25, 2019, Earl filed his current federal habeas petition raising the following claims, reproduced here *verbatim*:

- Ground 1: The Court never took judicial notice that the location of the alleged crime[s] were located in the Commonwealth (Pet. 6);
- Ground 2: Its decree in fixing and attaching liens upon the same was void judgment and may be set aside and disregarded as a nullity (Pet. 8);
- Ground 3: The Circuit Court erred when it assumed jurisdiction of the case from the inferior [General District Court] (Pet. 9); and
- Ground 4: The Circuit Court erred when it determined that the Petitioner didn't establish grounds for a Motion to Vacate. (Pet. 11).
(Pet. at 18).

THE PETITION IS UNTIMELY

6. Earl's petition is untimely pursuant to 28 U.S.C. § 2244(d) of the AEDPA. Under section 2244(d)(1), petitioner must have filed his federal habeas petition within one year from: (1) the time his conviction became final; (2) any state created impediment to filing a petition is removed; (3) the United States Supreme Court recognized the constitutional right asserted; or (4) the factual predicate for the claim could not have been discovered with due diligence. 28 U.S.C. § 2244(d)(1)(A)-(D):

7. Earl does not allege any state impediments, a newly recognized constitutional

right, or newly discovered evidence. Thus, his limitations period should be calculated from the date on which his convictions became final.

8. The City of Portsmouth Circuit Court entered final judgment in Earl's cases on July 9, 2007, and Earl did not appeal his convictions. Therefore, Earl's convictions became final 30 days later on August 8, 2007, the date on which his time to petition for an appeal to the Court of Appeals of Virginia expired. Va. Sup. Ct. Rule 5A:6.

9. The petitioner had one year from that date, or until August 8, 2008, to file his federal habeas petition. Earl's current petition was filed on or about July 25, 2019, the day his petition was mailed to the Court.² Under these circumstances, Earl's current petition was filed more than ten years after the statute of limitations expired.

10. Furthermore, although Earl filed multiple motions to vacate challenging the conviction at issue in this case, those proceeding did not toll the federal limitations period. Earl's state pleadings, filed in beginning in 2015, were neither filed nor pending during the statutory year. 28 U.S.C. § 2244(d)(2). Because Earl is not entitled to statutory tolling – and his current petition was filed over ten years after his direct review process ended – Earl's federal petition is untimely and must be dismissed. See Trapp v. Spencer, 479 F.3d 53, 58-59 (1st Cir. 2007); Vroman v. Brigano, 346 F.3d 598, 602 (6th Cir. 2003).

11. The petitioner is also not entitled to equitable tolling. A habeas petitioner may be permitted to file a federal habeas petition out of time if he can establish that he is entitled to equitable tolling. Equitable tolling is only available in federal habeas where the petitioner

² The incarcerated pro se litigant's habeas petition is considered filed when it is delivered to prison officials to be mailed to the court. Lewis v. Richmond City Police Dept., 947 F.2d 733 (4th Cir. 1991); Houston v. Lack, 487 U.S. 266 (1988).

shows: (1) he pursued his rights diligently, and (2) some extraordinary circumstance prevented him from timely filing his habeas petition. See Holland v. Florida, 560 U.S. 631, 649 (2010). See also Green v. Johnson, 515 F.3d 290, 304 (4th Cir. 2008). A habeas petitioner “bears the burden of demonstrating that he is entitled to equitable tolling.” Vroman, 346 F.3d at 604. The petitioner here cannot satisfy the two-pronged test in Holland. He has demonstrated neither the circumstances nor the diligence required to invoke equitable tolling.

12. For all of these reasons, the current federal habeas corpus petition should be dismissed as time-barred.

EARL'S CLAIMS ARE EXHAUSTED BUT DEFAULTED

13. Earl presented the same claims in the instant petition and the arguments in support thereof to the Supreme Court of Virginia on appeal of his motion to vacate, see Petition, Exhibit 2, so he has exhausted these claims for purposes of federal habeas review. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). Earl's claims, however, are defaulted.

14. “If a state court clearly and expressly bases its dismissal of a habeas petitioner’s claim on a state procedural rule, and that procedural rule provides an independent and adequate ground for the dismissal, the habeas petitioner has procedurally defaulted his federal habeas claim.” See Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998). “A habeas petitioner is barred from seeking federal review of a claim that was presented to a state court and ‘clearly and expressly’ denied on the independent, adequate state ground of procedural default.” Bennett v. Angelone, 92 F.3d 1336, 1343 (4th Cir. 1996) (citing Harris v. Reed, 489 U.S. 255, 263 (1989)); Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). A state procedural rule is “adequate” if it is firmly established and regularly or consistently applied by the state court and independent if it does not depend on a federal constitutional ruling. Yeatts v. Angelone, 166 F.3d 255, 263-64

(1998).

15. In dismissing Earl's claims, the Portsmouth Circuit Court³ held that it no longer had jurisdiction by operation of Virginia Supreme Court Rule 1:1. (Exhibit 1, Final Order). Such a jurisdictional time limitation is an independent and adequate state law ground that precludes federal review of the merits of a claim. Coleman, 501 U.S. at 740 - 41; see also Crowley v. Landon, 780 F.2d 440, 444 (4th Cir. 1985) (describing Rule 1:1 as an unambiguous existing rule of law). Therefore, even if they were timely, all of Earl's claims are procedurally defaulted in this federal proceeding.

NO FEDERAL QUESTION

16. Federal courts can issue a writ of habeas corpus to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." Wilson v. Corcoran, 562 U.S. 1, 5 (2010) (per curiam) (quoting 28 U.S.C. § 2254(a)). See also Estelle v. McGuire, 502 U.S. 62, 67 (1991) (quoting Lewis v. Jeffers, 497 U.S. 764, 780) ("We have stated many times that "federal habeas corpus relief does not lie for errors of state law."). By contrast, all of Earl's claims challenge the jurisdiction of the state circuit court. The circuit court's jurisdiction is defined by Virginia Code § 17.1-513. This statute provides that "[a]ll the circuit courts of the Commonwealth 'have original jurisdiction of all indictments for felonies and of presentments, informations and indictments for misdemeanors.'" Porter v. Commonwealth, 661 S.E.2d 415, 427 (Va. 2008) (quoting Va. Code § 17.1-513). Whether the trial court applied this statute properly is exclusively a matter of state law, and presents no

³ The Supreme Court of Virginia summarily affirmed the Portsmouth Circuit Court's judgment dismissing Earl's Motion to Vacate. See Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018) ("We hold that the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning.").

federal question. Accordingly, in addition to being untimely and defaulted, Earl's state law claims cannot support a grant of federal habeas corpus relief.

17. Every allegation not expressly admitted by the respondent is denied.

18. The lack of merit of petitioner's claims is ascertainable from the record, and an evidentiary hearing in this Court is not necessary. See 28 U.S.C. § 2254(e)(1) and (e)(2).

WHEREFORE, the respondent moves this Court to dismiss the petition for a writ of habeas corpus.

Respectfully submitted,

Harold Clarke, Director

Respondent herein

/s/

Elizabeth Kiernan Fitzgerald
Assistant Attorney General

Elizabeth Kiernan Fitzgerald, AAG
VSB #82288
Attorney for Respondent
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CERTIFICATE OF SERVICE

On October 25, 2019, I electronically filed this Brief in Support of Motion to Dismiss and Rule 5 Answer with the Clerk of Court by using the CM/ECF system and mailed by UPS the pleading and its attachments to the following CM/ECF non-participants: Sean Earl, #1198903, C-219, Red Onion State Prison, P.O. Box 970, Pound, VA 24279.

By: _____/s/_____

ELIZABETH KIERNAN FITZGERALD, AAG
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VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 27th day of June, 2019.

Sean S. Earl,

Appellant,

against

Record No. 180956

Circuit Court Nos. CR06-2360-01-04

Commonwealth of Virginia,

Appellee.

From the Circuit Court of the City of Portsmouth

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court is of the opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

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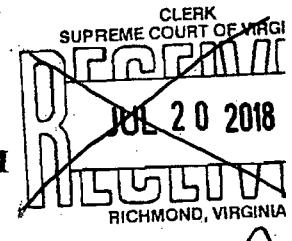
Douglas B. Robelen, Clerk

By:



Deputy Clerk

E.g. Appendix D



VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF PORTSMOUTH

COMMONWEALTH OF VIRGINIA,

v.

Case No: CR06-2360-01-04

SEAN S. EARL,

Defendant,

FINAL ORDER

In the above styled case, comes now the Defendant, Sean S. Earl, to be heard upon the MOTION TO VACATE filed by the Defendant, *pro se*.

The instant motion is styled as a Motion to Vacate a void judgment pursuant to Va. Code § 8.01-428(D). In 2006, Defendant was found guilty of a multitude of offenses, including, *inter alia*, murder in the second degree. (CR06-2360-01-04). The Court imposed a total sentence of fifty-six (56) years with twenty-five (25) years suspended. (*Id.*).

Defendant now alleges that this Court's orders regarding his conviction and sentence were void *ab initio* due to a lack of subject matter jurisdiction over the proceedings. Specifically, Defendant contends that at the preliminary hearing during which his case was certified to this Court, the Commonwealth failed to establish subject matter jurisdiction and venue for the charged offenses. As such, the argument goes, when the charges were certified, this Court could not assume subject matter jurisdiction over the proceedings because of the evidentiary defect. Even assuming *arguendo* that Defendant is correct, and that failure to establish subject matter jurisdiction and venue at a preliminary hearing somehow divests the circuit court of its subject matter jurisdiction, Defendant has failed to establish grounds for a motion to vacate. A cursory review of the transcript of the preliminary hearing before the general district court reveals that

the Commonwealth's only witness established venue with specificity, reciting that charged conduct had occurred at 3305 Downes Street in the City of Portsmouth. No evidence was adduced to refute this testimony. As such, Defendant's contention that venue was never established is without merit and this Court properly assumed subject matter jurisdiction over the case.

The Court, having thoroughly considered the Motion and upon review of this case and the applicable law, concludes that the judgment against Defendant was not void *ab initio*. Accordingly, more than twenty-one (21) days having passed since the entry of the Order of Conviction against Defendant, this Court has no jurisdiction over his Motion to Vacate Judgment pursuant to Rule 1:1 of the Rules of the Supreme Court of Virginia. Defendant's Motion is **DENIED**.

Pursuant to Rule 1:13 the endorsements of counsel and the pro se defendant are waived and a copy of this order shall, upon entry, be mailed to the Commonwealth's Attorney and to Defendant at his listed address.

It is so ORDERED.

ENTERED this 25th day of May, 2018.

William S. Moore
William S. Moore, Chief Judge
Portsmouth Circuit Court