

THE STATE OF SOUTH CAROLINA

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IN THE SUPREME COURT

OCT 07 2024

APPEAL FROM RICHLAND COUNTY

S.C. SUPREME COURT

COURT OF COMMON PLEAS

JOCelyn NEWMAN CIRCUIT COURT JUDGE

CASE NO# 2024-001289

KEVIN SMITH, 164910..... APPELLANT,

✓

STATE OF SOUTH CAROLINA;..... RESPONDENT,

AMENDED PETITION FOR REHEARING PURSUANT TO RULE 22.1(a) SOUTH CAROLINA APPELLATE COURT RULES

[Handwritten Signature]

KEVIN SMITH #164910; Appellant.
PRO-SE

*610 Hwy #9 West,
BENNETTSVILLE, SOUTH CAROLINA

SEPTEMBER 30, 2024, A.D

DE PENSE COUNSEL OF RECORD

D RUSSELL BARLOW II

ASSISTANT ATTORNEY GENERAL

P.O. BOX #11549, COLUMBIA,

SOUTH CAROLINA, #29211.

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CASE NO. #2024-001289

KEVIN SMITH, #164920, Appellant,
✓

STATE OF SOUTH CAROLINA: Respondent,

Supporting Memorandum of
Appellant - Petitioner

ISSUES. PETITIONER'S RESPONSE TO THE CONDITIONAL ORDER OF DISMISSAL

SUPPORTING FACTS - ARGUMENT - LEGAL AUTHORITY - DOCUMENTATION

on the Date of May. 22. 2024 AD the petitioner was served with a copy of the Conditional order of Dismissal v.i.a. S.C.D.C official Sgt. E. McRAE, to which the petitioner served an original copy of his Response to the Conditional order of Dismissal upon the Richland County Clerk of Court Ms. JEANETTE W. McBRIDE for filing; DEFENSE COUNSEL OF RECORD, and the Honorable Judge JOCELYN NEWMAN, v.i.a. "Certified" u.s. Mail on May. 24. 2024 AD (Prior to Defense Counsel service of the Conditional order of Dismissal upon petitioner on May. 31. 2024, the petitioner was served with a copy v.i.a. the Richland County Clerk of Court, to which petitioner served his timely response prior to service of the Conditional order of Dismissal upon him v.i.a. S.C.D.C official Sgt. Mcrae on May. 31. 2024 AD) SEE: The petitioners exhibit-A. Attached to the amended petition for rehearing (Notarized certificate of proof of service; Agreement to Debit E.H Cooper Account form, dated May. 24. 2024. AD, to include u.s. postal "Certified" mail receipts) and petitioner filed Response to the Conditional order of Dismissal

on the Date of July. 26. 2024 AD the petitioner was served with another (second) copy of the Conditional order of Dismissal (2024-cp-40-01526) v.i.a. S.C.D.C official Sgt. E. McRAE to which the plaintiff submitted another original copy of petitioner's Response to the Conditional order of Dismissal to the Richland

1. The Richland County Clerk of Court JEANETTE W. McBRIDE did not file petitioners Response to the Conditional order of Dismissal until approximately two (2) months after

County Clerk of Court JEANETTE W. McBRIDE for filing with HER office on July 29, 2024, AD. SEE: PETITIONERS EXHIBIT - B - ATTACHED (Affidavit of plaintiff KEVIN SMITH Notarized Certificate of proof of service, July 29, 2024 AD. with witness signature of S.C.D.C. official SANDRA OUTLAW-EVANS-CORR-INST. Mail Room Supervisor personnel)

IN MOSES V. STATE, 720 S.C. 500, 803 S.E.2d 918 (2022) This Court held; that the applicant demonstrated that the untimely filing of his application (P.C.A.) was due to circumstances beyond his control, and thus, was entitled to equitable tolling of one year limitation governing application. Citing; applicant relinquished control over application when he delivered it to prison officials' (authorities) for mailing, which was 27 days before limitations period expired. His application was notarized on same day and he advised that the associate warden confirmed that application was mailed before limitations period expired.

The Court (Moses) further held, the judge should consider any reasonable verifiable evidence of the date the document was purportedly in the possession of prison authorities for purpose of mailing. In the petitioners instant case petitioner Smith timely filed his responses to the Conditional Order of Dismissal has submitted documented evidence verifying such filings to include petitioner's filed responses with the Clerk of Court SEE: PETITIONERS EXHIBITS - A - B - ATTACHED

Continued... per (the Clerk's) Receipt of the petitioners responses to the Conditional order of Dismissal via a "certified" mail. SEE: PETITIONERS EXHIBIT - A - ATTACHED

Thus, the Respondents' assertions that the petitioner failed to file his response to the conditional order of dismissal with the Richland County Clerk of Court is baseless. In South Carolina, it is well settled that statements of fact appearing only in argument of counsel will not be considered. McLanahan v. Bank of Greenwood, 171 S.C. 94, 171 S.E.2d 473, 475 (1933); see also Shinn v. Kaul, 321 S.C. 94, 102, 189 S.E.2d 695, 700 (Ct. App. 1993) ("A court cannot consider facts appearing only in argument of counsel."); Gilmore v. Evey, 190 S.C. 53, 58, 348 S.E.2d 180, 184 (Ct. App. 1986) ("Judge" properly disregarded counsel's statements about contents of depositions when depositions were not provided to the court.)

wherefore based upon sufficient facts, argument, legal authorities, supporting documentation submitted by the petitioner, the court's dismissal of the petitioner's appeal is improper and the petitioner prays that the appeal be reinstated. Respectively


o o o

CC:

D. Russell Barlow II

SEPTEMBER 30, 2024 A.D.

Respectfully Submitted


 KEVIN SMITH PETITIONER
 PRO SE

2. petitioner respectfully request the court to take judicial notice that the lower court's record are devoid of any PCR application being filed with the Richland County Clerk of Court's office on the date of March 8, 2024 A.D. by this petitioner.

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