10-28-13

To: The Supreme Court of South Carolina
Post Office Box 11330
Columbia, S.C. 29211
Attn: Clerk of Court

Case No: 2011-CP-23-00547

From: Brenda Nesbitt #139726
Leath Correctional Institution
Alexander - Quad 2 - 102X
2809 Airport Road
Greenwood, S.C. 29649

RE: Per your request

10-28-13

Dear
Sir or Madam,

I am writing you this letter in respond to your letter dated October 22, 2013, I recieved your response on October 24, 2013. I am deeply sorry about the date's of my appeal. On April 18, 2011 a notice of appeal was filed in my behalf, but it was submitted to the address listed below:

Court Clerk,
County of Greenville
133 South Main Street
Greenville, S.C. 29601

Also on March 18, 2011, when I had recieved my return and motion to dismissed, I did filed the first Notice of Appeal, it was also submitted to the wrong address, but it was properly submitted to the Attorney General Office on April 4, 2011 and again on April 18, 2011. I am attaching a copy of all the following documents per your request, but the proof of service, I do not have.

① Order dismissing PCRA should not be made final, (Notice of Appeal)
Dated: April 18, 2011
Mailed out with signate on April 25, 2011

② Reply to Motion to Dismiss
(Notice of Appeal)
Dated: March 29, 2011
Mailed out with signature on April 4, 2011.
③ Conditional Order of Dismissal
Recieved: April 6, 2011
④ Application for PCR Brief
I hope and pray that this with show my mistake and I will be forwarding a copy of a written order of my motion seeking permission to allow late filing.
Thank you in advance for your immediate cooperation in this most pressing legal matter, by any change your office cannot help me, please provide me with the name and address of who can.

Thanking You
In Advance
Brenda Nesbitt

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2011-CP-23-0547
COUNTY OF GREENVILLE	)	
	)	
Brenda Nesbitt, S.C.D.C. No. 139726,	)	
	)	
Applicant,	)	**FINAL ORDER OF DISMISSAL**
	)	
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 25, 2011. The Respondent made its return on March 11, 2011, requesting the application be summarily dismissed based upon the expiration of the statute of limitations and the presumption against successive PCR applications.

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 March 23, 2011 and entered March 25, 2011, provisionally denying and dismissing this action, while giving the Applicant twenty (20) 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 April 6, 2011, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

In a document captioned "Reply to Motion to Dismiss/Notice of Appeal" and dated March 29, 2011, the Applicant argues she was denied effective assistance of counsel. The Applicant argues the Uniform Post-Conviction Procedure Act has "subsumed habeas corpus

relief, which under this State's Constitution cannot be suspended by the Act." The Applicant also states this document serves as a notice of appeal.

In a document captioned "Order Dismissing PCRA Should Not Be Made Final/Notice of Appeal" and dated April 18, 2011, the Applicant reiterates the arguments made in the "Reply to Motion to Dismiss/Notice of Appeal." The Applicant argues this case involves a miscarriage of justice and that "it is not in the Court's interest to imprison persons who are not guilty, however inconvenient for the Court to have to deal with these issues. The Applicant also states this document serves as a notice of appeal "as it is apparent that the Court does not wish to deal with her petition, and intends to dismiss regardless."

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 a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

This Court notes the Applicant pled guilty to armed robbery, conspiracy, and murder on February 16, 1997 and was sentenced on February 17, 1997. As this action was filed on January 25, 2011, it was clearly filed outside the expiration of the statute of limitations. See S.C. Code Ann. § 17-27-45(a) (Supp. 2003). This is the Applicant's third application for post-conviction relief. This Court notes that successive PCR applications are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). This Court finds the Applicant had the opportunity to litigate all issues related to her case at the evidentiary hearing for her first PCR application on June 23, 1998. See Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999) ("[A]n applicant is entitled to a full adjudication on the merits of the original petition, or 'one bite at the apple.'").

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

This Court advises the Applicant that she must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if she wants to secure appropriate appellate review. Her 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.

AND IT IS SO ORDERED this 25 day of May, 2011.

~~Robin B. Stilwell~~ D. Garrison Hill
Chief Administrative Judge, Acting
Thirteenth Judicial Circuit

Greenville, South Carolina.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated S. Hall (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT OF PERSONAL SERVICE**
COUNTY OF Greenwood)

On this 6th day of April **2011**, I served the **_Conditional Order of Dismissal_**, on ***Inmate*** **__Brenda Nesbitt__**, ***SCDC Inmate #*** **__139726__**, by delivering personally and leaving a copy of the same at **___Leath___** ***Correctional Institution,*** Greenwood, SC. Deponent is not a party to this action.

s/ S. Hall
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 6 day of April, **2011**

Jean B Smiley (L.S.)
Notary Public for South Carolina
My Commission Expires: 04-14-2015

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal** is admitted at the South Carolina Department of Corrections (Leath ***Correctional Institution***), Greenwood, Greenwood County, SC this 6th day of April, ***2011.***

s/ Brenda Nesbitt
Inmate
SCDC *Inmate #*: 139726

2011-CP-23-0547

STATE OF SOUTH CAROLINA

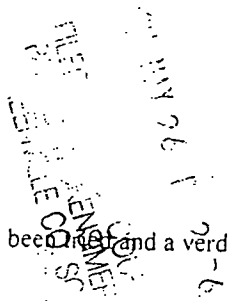
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2300547

Brenda Nesbitt *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 a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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 Greenville, South Carolina, this .

Court Reporter:

_____

PRESIDING JUDGE

This judgment was entered on the 26th day of May, 2011, and a copy mailed first class this 26th day of May, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

Brenda Nesbitt Leath Corr Instit 2809 Airport Rd
Greenwood, SC 29649

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Ratigan

ATTORNEY(S) FOR THE DEFENDANT(S)

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2300547

Brenda Nesbitt *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), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ 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 Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE -

This judgment was entered on the 25th day of March, 2011, and a copy mailed first class this 25th day of March, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

✓ Brenda Nesbitt Leath Corr Instit 2809 Airport Rd Greenwood, SC 29649

ATTORNEY(S) FOR THE PLAINTIFF(S)

Karen Ratigan

ATTORNEY(S) FOR THE DEFENDANT(S)

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

Brenda Nesbitt, 139726) CASE NO.
☐ Plaintiff) 2011-CP-23-0547

v.) MOTION AND ORDER INFORMATION
) FORM AND COVER SHEET
State Of South Carolina)
☒ Defendant.)

Plaintiff's Attorney:	Defendant's Attorney:
Brenda Nesbitt, 139726, Bar No.	Karen C. Ratigan, Bar No.
Address:	Address:
Leath CI 2809 Airport Rd Greenwood SC 29649	Post Office Box 11549 Columbia SC 29211-1549
phone: fax:	phone: (803) 734-3737 fax: (803) 734-4113
e-mail: other:	e-mail: other:

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☒ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed: Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☐ Written motion attached
☒ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — March 18, 2011 Date submitted

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☒ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☒ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Brenda Nesbitt, S.C.D.C. No. 139726, Applicant, v. State of South Carolina, Respondent.	IN THE COURT OF COMMON PLEAS 2011-CP-23-0547 **CONDITIONAL ORDER OF DISMISSAL**

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 25, 2011. The Respondent made its Return, requesting the application be summarily dismissed.

I.

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Greenville County. The Applicant was indicted at the November 1986 term of the Greenville County Grand Jury for armed robbery (1986-GS-23-6212), murder (1986-GS-23-6213), and conspiracy (1986-GS-23-6214). She was represented by C. Carlyle Steele, Esquire and William T. Dunn, Esquire.

On February 16, 1997, the Applicant pled guilty and sentencing was deferred to the following day. On that date, the Honorable William T. Howell sentenced the Applicant to consecutive terms of twenty-five (25) years for armed robbery, life imprisonment for murder, and five (5) years for conspiracy. The Applicant did not appeal.

1996-CP-23-1745

The Applicant filed a PCR application on June 25, 1996 (1996-CP-23-1745). The Applicant raised the following issues:

1. Ineffective assistance of counsel:
   a. Failure to file an appeal.
2. Court did not consider the Applicant's individual circumstances.
3. After-discovered evidence.

An evidentiary hearing was convened on June 23, 1998 at the Greenville County Courthouse. David W. Holmes, Esquire represented the Applicant. The Honorable Jackson V. Gregory denied and dismissed the PCR application by order dated October 5, 1998.

The Applicant filed a notice of appeal. Daniel T. Stacey, Esquire of the South Carolina Office of Appellate Defense perfected the appeal. The South Carolina Supreme Court denied the petition for writ of certiorari on July 10, 2000.

2001-CP-23-3854

The Applicant filed a PCR application on June 18, 2001 (2001-CP-23-3854). The Applicant raised the following issues:

1. Ineffective assistance of counsel.
2. Trial court error.
3. Denial of due process.
4. Prosecutorial misconduct.

An evidentiary hearing was convened on March 27, 2003 at the Greenville County Courthouse. Efia Nwangaza, Esquire represented the Applicant. The Honorable Edward W. Miller denied and dismissed the PCR application by order filed May 12, 2003.

The Applicant filed a pro se notice of appeal at the South Carolina Supreme Court. By order dated April 12, 2004, the Supreme Court dismissed the matter due to the Applicant's

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failure to properly file and serve the notice of appeal.

II.

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

1. Ineffective assistance of counsel:
   a. Failed to address co-defendant's mental instability and drug addiction and how that would affect the Applicant's case.
2. Involuntary guilty plea.
3. Admission of co-defendant's statement to police was the result of either an abuse of discretion by the trial court or ineffective assistance of counsel.
4. The Post-Conviction Relief Act is in part unconstitutional.

III.

This Court finds this matter should be summarily dismissed because the Applicant has failed to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). Specifically, 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 pled guilty to the offenses she challenges in this application on February 16, 1997 and was sentenced the following day. This application was filed on January 25, 2011, which was several years after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. See McDonnell v. Consolidated Sch. Dist. Of Aiken, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from

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the pleadings . . . that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law."

IV.

This Court further finds the current application should also be dismissed because it is successive to the previous applications for post-conviction relief. Successive applications for post-conviction relief are disfavored. See Land v. State, 274 S.C. 243, 246, 262 S.E.2d 735, 737 (1980). South Carolina Code Ann. § 17-27-90 (2003) states:

> All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 450, 409 S.E.2d 392, 394 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." Id. (emphasis in original). If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Id.

As the Applicant has failed to present any reasons why she could not have raised the current allegations in either of her previous post-conviction relief applications, the application is dismissed.

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4)

V.

Based upon its review of the pleadings in this matter, this Court expresses its intent to summarily dismiss this matter unless the Applicant advises this Court with specific reasons, factual or legal, why it should not dismiss the matter in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final by filing any reasons he may have with the Clerk of Court for Greenville County, South Carolina, and also by filing a copy of his reasons with the Office of the Attorney General, Attn: Karen C. Ratigan, Post Office Box 11549, Columbia, South Carolina, 29211.

AND IT IS SO ORDERED this 23 day of March, 2011.

Robin B. Stilwell
Chief Administrative Judge
Thirteenth Judicial Circuit

Greenville, South Carolina.

(5)

Jend ott
4-25-11

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF COMMON PLEAS
2011-CP-23-0547

BRENDA NESBITT, Applicant

Against

STATE OF SOUTH CAROLINA, Respondent

ORDER DISMISSING PCRA SHOULD NOT BE MADE FINAL
NOTICE OF APPEAL

BRENDA NESBITT is in receipt of this Court's CONDITIONAL ORDER OF DISMISSAL dated: March 23, 2011 and submit's the following reasons as to why dismissal is in error. Because of delay in mail from the prison, this answer may be late through no fault of the Applicant and she requests this court's indulgence.

The PCRA permits raising of issues not adequately raised in prior actions before this court as a result of ineffective assistance of counsel. (See: PCRA: 17-27-90) These issues were not adequately raised by counsel. Kindly re-read the PCRA. Applicant notes that under Constitutional law habeas corpus cannot be suspended, and under the PCRA habeas corpus was subsumed by the Act, therefore the Applicant seeks habeas relief under the Act, which has no time bar and is incorporated under the provisions of the Act. And further, case law, referring to her PCRA provides for relief for cases of miscarriage of justice, as it is not in the Court's interest to imprison persons who are not guilty, however inconvenient for the Court to have to deal with these issues.

Applicant submits this document as NOTICE OF APPEAL as it is apparent that the Court does not wish to deal with her petition, and intends to dismiss regardless.

Respectfully submitted,

Brenda Nesbitt, 139726
Leath Correctional Institution, PA 101 A
2809 Airport Road
Greenwood, S.C. 29649

Brenda Nesbitt

To: Attorney General, P.O.B. 11549, Columbia, S.C. 29211-1549
Court Clerk, County of Greenville, 133 South Main Street, Greenville, S.C. 29601

I certify under penalty of perjury that I mailed a copy of this document to the Attorney General.

Mark Marvin
135 Mills Road
Walden, N.Y. 12586 Dated: April 18, 2011

Brenda

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS
2011-CP-23-0547

BRENDA NESBITT, 139726

Against

REPLY TO MOTION TO DISMISS

STATE OF SOUTH CAROLINA

NOTICE OF APPEAL

BRENDA NESBITT, Applicant is in receipt of Respondent's Return and Motion to Dismiss dated: March 18, 201, and replies:

1. With reference to respondent's section IV, Applicant was denied effective assistance of counsel resulting in prior frivolous applications and appeal, and is not guilty. Since the Post-Conviction Relief Act subsumed habeas corpus relief, which under this State's Constitution cannot be suspended by the Act, the Applicant is entitled to relief. See Application.

2. In the event this court dismisses her Application for relief she herewith files this document as a NOTICE OF APPEAL.

Respectfully submitted,

Sending out
Brenda Nesbitt 4-4-11

Brenda Nesbitt 139726
Leath Correctional Institution, PA 101A
2809 Airport Road
Greenwood, S.C. 29649

I mailed a copy of this Reply and Notice of Appeal to the Attorney General, P.O.B. 11549, Columbia, S.C. 29211-1549

Affirmed as true under penalty of perjury,

Mark Marvin

Mark Marvin
135 Mills Road
Walden, N.Y. 12586
Dated: March 29, 2011

To: Court of Common Pleas, 135 South Main Street, Greenville, S.C. 29601

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Rule 4(d)(2) of the South Carolina Rules of Civil Procedure, the Director of the South Carolina Department of Corrections has designated S. Hall (*Server*) as his duly authorized agent for the purpose of making service of the process on the below named individual.

STATE OF SOUTH CAROLINA)
) **AFFIDAVIT OF PERSONAL SERVICE**
COUNTY OF Greenwood)

On this 6th day of April **2011**, I served the **Conditional Order of Dismissal**, on *Inmate* **Brenda Nesbitt**, *SCDC Inmate #* **139726**, by delivering personally and leaving a copy of the same at **Leath** *Correctional Institution*, Greenwood, SC. Deponent is not a party to this action.

s/ S. Hall
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME
this 6 day of April, 2011

Jean B Smiley (L.S.)
Notary Public for South Carolina
My Commission Expires: 04-14-2015

ADMISSION OF SERVICE

Service of a copy of the within **Conditional Order of Dismissal** is admitted at the South Carolina Department of Corrections (Leath *Correctional Institution*), Greenwood, Greenwood County, SC this 6th day of April, *2011*.

s/ Brenda Nesbitt
Inmate
SCDC *Inmate #*: 139726

2011-CP-23-0547

2011-CP-23 547

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

COURT OF GENERAL SESSIONS

THE STATE OF SOUTH CAROLINA

Against

BRENDA NESBITT
(GUY DOUGLAS FRANKLIN)

86-GS-23-6093, 6094, 6095
86-GS-23-6212, 6213, 6214

APPLICATION FOR POST-CONVICTION RELIEF

This is an application for post-conviction relief under S.C. Code Ann. S. 17-27-10, et seq. in that the defendant BRENDA NESBITT has been convicted of a crime and claims that the conviction was in violation of the laws of South Carolina and The United States of America and she has only recently discovered that trial counsel was ineffective, that ineffective counsel prevailed upon her to wrongly, and unintelligently to plead guilty, and that she is not guilty, and has experienced a miscarriage of justice, and in support thereof says:

1, She was indicted November, 1986 for armed robbery, conspiracy, and murder following the stabbing death of Larry Gene Barnes on June 11, 1986. On February 16, 1987, while being represented by C. Carlyle Steele, Esq. and Will T. Dunn, Esq. she pled guilty to the charges and was sentenced by Hon. William P. Howell to confinement for a period of life for murder, twenty-five (25) years consecutive, for armed robbery and five (5) years consecutive, for criminal conspiracy. Counsel did not advise her of her right to appeal, and none was filed by counsel. Application for Post-conviction relief, filed June 25, 1996 was denied after an evidentiary hearing on June 23, 1998 where she was represented by David Holmes, Esq.. Appeal to the South Carolina Supreme Court was denied.

I. CO-DEFENDANT FRANKLIN'S STATEMENT TO POLICE WAS SO IRRATIONAL THAT IT WAS APPARENT THAT FRANKLIN WAS INCOMPETENT TO MAKE ANY RELAIBLE STATEMENTS AND THE STATEMENT HE DID MAKE SHOULD HAVE BEEN SUPPRESSED AND TO NOT SUPPRESS SUCH A STATEMENT WAS AN ABUSE OF DISCRETION COMPOUNDED BY AND OR A RESULT OF INEFFECTIVE ASSISTANCE OF COUNSEL, RESULTING IN A DEFECTIVE PLEA OF GUILT BY DEFENDANT NESBITT.

2, That she had a co-defendant named Guy Douglas Franklin. Terry Christy and William Hawkins of the Greenville City Police Department, on June 11, 1986 questioned Franklin about his involvement in the death of Barnes. During the Jackson Denno hearing, Officer Christy testified that Franklin told Officer Christy "THAT THE REASON HE ROLLED THE VICTIM, (WAS TO) GET A HIT OF COCAINE." "AT THAT TIME HE DID NOT KNOW HER NAME ... (WHO WAS INVOLVED WITH HIM)...HE JUST STATED IT WAS A GIRL THAT WAS IN THE BAR." The officer continued to testify that Franklin stated: "THAT SHE HAD THE KNIFE INITIALLY. THEN HE STATED HE TOOK IT AWAY FROM HER. AT FIRST THE VICTIM AND HER WAS FIGHTING OVER THE KNIFE, AND HE GOT CUT ON THE HAND AND THAT'S WHEN HE TOOK THE KNIFE FROM THE GIRL. (Q. AFTER HE GRABBED THE KNIFE FROM THE GIRL...HE SAID SHE GOT IT BACK FROM HIM AND THAT'S WHEN SHE STABBED HIM." (Hearing February 16, 1987, pp. 18, 19, 20) The officer testifies that the deceased got cut taking the knife from "the girl" then he she got it back from him, then she stabbed him. She apparently did not get cut taking the knife "back" from the deceased. The Officer further testified that Franklin stated: "HE STATED THAT SHE HAD GOT THE WALLET.... THAT SHE HAD DONE THE STABBING AND THAT SHE HAD ALSO GOTTEN THE WALLET." (p. 20) He denied stabbing the victim, "BUT HE DID ADMIT BEING PRESENT. (Answer:) ... YES." (p. 21)

3, Officer Christy testified that Franklin: "HE JUST KEPT REPEATING THAT HE JUST WANTED A HIT OF COCAINE... OVER AND OVER AGAIN." (p. 20, 31) We are not clear whether he participated in the robbery to get a hit of cocaine, or whether he was in the police station and WANTED A HIT OF COCAINE(or both ?), for a period of about one hour. (p. 35). Upon cross examination, Officer Christy testified: "LIKE I SAY, HE KEPT SAYING OVER AND OVER AGAIN HE JUST WANTED SOME COCAINE BUT NOT NO REAL OUTBURST." (p. 33)

4, Officer Christy testified that Franklin: "HE ALSO STATED SEVERAL TIMES THAT HE WANTED TO KILL THE GIRL IF HE COULD GET HIS HANDS ON HER." (p. 34)

5, Now Officer Hawkins testified at the same hearing, but there was no statements made of what Franklin said regarding the death of Barnes because they did not tell him at that point that Barnes was dead. But when asked: "Q. DID HE MAKE ANY STATEMENT TO YOU THAT HE NEEDED A HIT OF COCAINE? A. YES, SIR. HE STATED SEVERAL TIMES

THAT'S WHAT HE WANTED...(NOT TO ME BUT TO DETECTIVE CHRISTY) (p. 48) but "NO SIR. (HE DID NOT DEMONSTRATE ANY SIGNS OF DRUG ABUSE IN (HIS) PRESENCE.)" (p. 48)

6, The Court ruled on the motion to suppress Franklin's statement to police. The court stated: "THE OFFICER AFFIRMATIVELY TESTIFIED THAT HE DIDN'T APPEAR TO BE INTOXICATED. IT WAS WITHIN A MATTER OF HOURS AFTER HIS ARREST, I THINK LESS THAN TWO HOURS ACCORDING TO THE OFFICER. SO, I DON'T FIND ANY PROBLEM WITH HIS STATEMENT WHATSOEVER. (p. 54)

7, At the plea allocution: "DEFENDANT FRANKLIN (stated he had no complaints about his treatment) "NO, BUT THEY TOOK MY CIGARETTES AWAY FROM ME." (p. 79)

8, The defendant is exhibiting such pronounced addictive behavior that he is actually asking the police to help him get cocaine, and the Court doesn't find any problem with the admission of the statement.

9, Mr. Steele for Nesbitt argued to the court: " YOUR HONOR, PLEASE. THE POSITION OF THE DEFENDANT MRS. NESBIT IS THAT THERE HAS BEEN AN INADEQUACY OF SHOWING BY THE STATE OF ONE, THE VOLUNTARINESS OF HER STATEMENT TO LAW ENFORCEMENT OFFICERS; AND SECONDLY, THAT THE SHOWING THEY HAVE MADE AS TO WHETHER OR NOT SHE WAS ADVISED OF HER RIGHT TO COUNSEL AND HER RIGHT TO REMAIN SILENT WAS INADEQUATE. FOR BOTH OF THESE REASONS, WE WOULD RESPECTFULLY RENEW OUR MOTION TO SUPPRESS THAT STATEMENT." (p. 53) [Nesbitt's statement was that she left the bar with Barnes and that Franklin snuck up on them and demanded money from Barnes who had been seen in the bar with a quantity of money. Franklin did not know Nesbitt's name, but suggests a cooperative effort to rob a man when he did not know what his co-conspirator's name was. It is illogical to believe that two persons would conspire to rob someone when they did not know who each other was.] Counsel does not address the admissibility of the statement of the co-defendant Franklin that would be used at trial to implicate your applicant (Nesbitt). Defendant submits that counsel's performance was deficient in failing to address the obvious mental instability and apparent unreliability of Franklin's statements when taken in the context of a drug addict of deficient mental state when interrogated by police. HE ASKED THE POLICE FOR COCAINE. Franklin cannot be taken seriously.

10, Mr. Ehlies, Esq counsel for Franklin stated: "... THE OFFICER TESTIFIED

THAT HE (Franklin) DEMONSTRATED OR AT LEAST ASKED ABOUT COCAINE, MAY HAVE BEEN INVOLVED WITH IT." (p. 52) Is he kidding? Franklin was so wacky that he asked the police to get him get cocaine. It is deficient counsel to ignore Franklin's addictive mental state.

11, At his plea allocution, Franklin stated: "I WAS HYPED UP ON PILLS.... I DON'T KNOW WHAT HAPPENED." (p. 88) If he did not know what happened, how can the State take his statement seriously, and how can defense counsel use it to persuade defendant Nesbitt to plead guilty?

12, Officer Hawkins testified: (Q. DID MR. FRANKLIN DEMONSTRATE ANY SIGNS OF DRUG ABUSE IN YOUR PRESENCE?) A. NO, SIR." (p. 48) Officer Christy testified: ("WAS HE NOT DISPLAYING SYMPTOMS OF BEING A DRUG ABUSE VICTIM?) "A. NO, SIR, NOT AT THAT TIME" (p. 31) Both officers are obviously incompetent to testify if they cannot notice drug addictive behavior and mentality in drug addicts, especially when Franklin repeatedly asked for the police to provide him with cocaine . Asking the police for cocaine is not a sign of drug addiction?

13, The Court in an abuse of discretion, erred in failing to suppress Franklin's statements that implicated Nesbitt, to her prejudice as a result of ineffective assistance of counsel, and resulted in her unintelligent plea, based on the admissibility of Franklin's implication of her (Nesbitt). This is a violation of right to counsel that rises to Constitutional dimensions, and should have been appealed and raised on post conviction review, under the counsel of David Holmes, Esq.

14, Mr. Partee, Esq. for defendant Franklin, argued to the judge: "AS FAR AS WHO HAD THE KNIFE, THERE IS NO WAY FOR ME TO KNOW. WE TALKED A LOT WITH WITNESSES, AND NOBODY SAW HIM WITH A BIG KNIFE, STICKING IN HIS PANTS. AS SHE SAID. HE SAYS THAT SHE HAD A FOLD UP BIG KNIFE THAT SHE HAD IN HER BRA. SO, I DON'T KNOW." (p. 87) Mr. Watson , Esq. Solicitor for the State stated: "THE ONE STAB WOUND PENETRATED THE FRONT PART OF THE CHEST, WENT THROUGH AND ACTUALLY WENT OUT THE BACKPART OF THE CHEST. IT WAS A VERY LONG KNIFE." (p. 70) It is illogical to believe that Nesbitt hit a folding knife that size in her bra, and logical to believe that Franklin hid a long knife in his pants, where it would not be seen by anyone. To penetrate from front to back would require a blade about 12 inches long. With a twelve inch blade, the unfolded knife would be about two feet long, half of which would be handle.. It is questionable whether there is made a folding knife, two feet long when open.

II. DEFENDANT IS ENTITLED TO RELIEF

15, That she has been convicted and sentenced under the laws of this state and that her conviction was in violation of the Constitution of the State of South Carolina and of the United States of America and that her conviction requires vacation in the interest of justice and that she is a victim of a fundamental miscarriage of justice that has only recently been discovered as a result of due diligence, that her conviction was contrary to or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States Supreme Court and that the decision was based on an unreasonable determination of facts in light of evidence presented in the state court proceeding. (28 U.S.C 2254(d)(1)(2); Williams v. Taylor, 529 U.S. 362, 410, Humphries v. Ozmint, 397 F.3d 206, McHone v. Polk, 392 F.3d 691, Butler v. State, 302 S.C. 466, 397 S.E.2d 87)

16, That she had been ineffectively represented by trial counsel and in subsequent applications for post-conviction relief she was subject to layered ineffectiveness at all levels, including the failure of trial counsel to appeal this verdict.

17, Counsel failed to identify or object to the violations of the defendants rights described in this petition and there can be no rational strategy that explains counsel's shortcomings which resulted in the prejudice of a miscarriage of justice as the defendant is not guilty. (Strickland v. Washington, 466 U.S. 668; Lomax v. State, 379 S.C. 93, 665 S.E.2d 164, 2008)

MEMORANDUM OF LAW

THE DEFENDANT WAS A VICTIM OF A MISCARRIAGE OF JUSTICE AND IS ENTITLED TO HER DAY IN COURT.

"(S)uccessive PCR applications (are permitted) where the defendant was denied due process due to numerous procedural irregularities." (Williams v. Ozmint, 380 S.C. 473, 477; 671 S.E.2d 600, 601) and also "when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of

justice." (Aice v. State, 305 S.C. 448, 451; 409 S.E.2d 392, 394, see: Butler v. State, 302 S.C. 466; 397 S.E.2d 87), and further the trial court's decisions were contrary to clearly established federal law as decided by the United States Supreme Court. (Taylor v. Williams, 529 U.S. 362, 410; Humphries v. Ozmint, 397 F.3d 206, see: Dretke v. Haley, 541 U.S. 386, 393, 124 S.Ct. 1847; Bousley v. U.S. 523 U.S. 614, 623, 118 S.Ct. 1604; Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851; House v. Bell, 547 U.S. 518, 126 S.Ct. 2064) It is never too late to prevent forfeiture of life or liberty. (Sawyer v. Whitley, 505 U.S. 333, citing Brown v. Allen, 344 U.S. 443, 554, also Nelson v. Adams, 529 U.S. 460)

Defendant is a victim of a fundamental miscarriage of justice. Trial counsel did not raise this error with the court and appellate counsel failed to raise this issue on appeal despite a request by the defendant.

The Supreme Court of South Carolina has accepted the holdings of the United States Supreme Court (Anders v. California, 386 U.S. 738, 87 S.Ct. 1396) that right to counsel shall apply to arguable issues on appeal. (Austin v. State, 305 S.C. 453; 409 S.E.2d. 395, 1991 S.C. LEXIS 195) and this is reviewable on the normal "any evidence" standard. (See: Cherry v. State, 300 S.C. 115, 386 S.E.2d 624, 1989) There is no evidence that the trial or appellate counsel sought review of these crucial issues, and as the "statute of limitations does not apply to Austin claims (Austin Id., Odom v. State, 337S.C. 256, 523 S.E.2d 753, 1999, see: Wilson v. State, 348 S.C. 215, 559 S.E.2d 581, affirming Odom) the defendant is not restricted by time limitations. Specifically, the equitable doctrine of laches does not apply to Austin claims as "the statute of limitations found in S.C. Code Ann. 17-27-45(A) does not apply to Austin claims. (Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200, 2002 S.C. LEXIS 251).

The above notwithstanding, "Equitable tolling is reserved for extraordinary circumstances." (Pelzer v. State, 378 S.C. 516, 519, 662 S.E.2d 618, 619, 2008 S.C. App. LEXIS 95) and applies to this case in that "(I)t would be unconscionable to enforce the limitation period against the party and gross injustice would result." (Id. p. 522/p. 621) Frankly, the miscarriage of justice is so repugnant in this matter, it would appear that the State would want, as its duty, to expunge this miscarriage of justice. Defendant is untrained in law, and was to date unable to properly formulate her petition, and these grounds were not raised by court appointed counsel who should have know these errors and raised them as she was to date, unable to raise them herself as a result of her lack of training in the law. In the interests of justice, the defendant is

entitled to her day in court.

The United States Supreme Court has held, and has therefore imposed on the state courts, that the United States Courts of Appeal may recognize a plain error that affects substantial rights, even if that error was not brought to the district court's attention. "Rule 52(b) [Fed. Rule Crim. Proc.] permits an appellate court to recognize a 'plain error that affects substantial rights, even if the claim was not brought to the district court's attention. Lower courts, of course must apply the Rule as this Court has interpreted it . And the cases that set forth our interpretation hold that an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an error, (2) the error is clear and obvious, rather than subject to reasonable dispute, (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings, and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings" (internal quotes omitted, United States v. Marcus, 130 S.Ct. 2159, 2163, 2010 U.S. LEXIS 4163,***6)

The United States courts are charged with granting habeas relief in cases where the underlying state adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on a unreasonable application of the facts in light of the evidence presented at the state court proceeding. (28 U.S.C. 2254(d)(1)(2); see: Williams v. Taylor, 529 U.S. 362, 398; 120 S.Ct. 1495, 2000)

Procedural default may bar a federal claim, but not in the case of actual innocence. (Gray v. Netherland, 518 U.S. 152, 165-66; 116 S.Ct. 2074)

THE POST CONVICTION RELIEF ACT IS IN PART UNCONSTITUTIONAL

The Post-conviction Relief Act (S.C. Code Ann. S. 17-27-10, et seq.) at section 17-27-45 provides that "(A) 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 sending of remittitur to the lower court from an appeal or the filing of a final decision upon an appeal , whichever is later." "The Uniform Act encompassed the relief available under the common law writ of habeas corpus, the relief available under the expansion of the writ, and the relief available by collateral attack under any common law, statutory or other writ, motion, petition, proceeding, or remedy....Section 17-27-20(b) states that the Act 'comprehends and takes the place of all other common law,

statutory or other remedies heretofore available for challenging the validity of the conviction or sentence' and provides the Act 'shall be used exclusively in place of them.' We acknowledge we have stated that habeas corpus is available once the petitioner has exhausted all post-conviction remedies, however, this court stated that habeas corpus cannot be used as a substitute for appeal or other remedial procedure for the correction of errors for which a criminal defendant had an opportunity to avail himself. Because we believe the rule in *Tyler* is the appropriate rule, we now hold that a matter which is cognizable under the Act may not be raised by a petition for a writ of habeas corpus before the circuit or other lower courts. Under art. V. S. 5 of the South Carolina Constitution, this Court retains the ability to entertain writs of habeas corpus in our original jurisdiction and grant relief in those unusual instances where there has been a violation which in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." "We are not unaware of art. 1, S. 18 of the South Carolina Constitution which states that the writ of habeas corpus may not be suspended except when, in case of insurrection, rebellion or invasion, the public safety may require it. However, our action today does not suspend the writ, but merely curtails its use to those situations where the Act would not be applicable." (Simpson v. State of South Carolina, Attorney General, 329 S.C. 43, 46-47; 495 S.E.2d, 429, 430-431; 1998 S.C. LEXIS 10 ***5-***7)

The state of habeas corpus is still confused under *Simpson* . The South Carolina Supreme Court states that habeas corpus is subsumed by the post-conviction relief act, and made a part of the relief authorized by the Act, which is available as relief that can be granted by the post-conviction relief court, i.e. the trial court. Our Supreme Court reminds us that, under the South Carolina Constitution, habeas corpus cannot be suspended absent good cause. However, the form of habeas relief that can be granted by the trial court, (habeas corpus) must be granted within the one year statutory time period. In fact, what the Act does, is expand post-conviction relief to include habeas corpus, then suspends its availability after one year. This is of course illegal, that is , the suspension of habeas corpus after one year (absent insurrection, etc.). Our Supreme Court controverts this legislative provision, the expansion of habeas relief to be available to the lower courts, and holds that only the Supreme Court has authority to grant habeas relief, but admits that it can do so indefinitely, irrespective of the legislature's suspension of habeas relief after the one year window of opportunity. It is apparent that the trial courts are unaware of this or chose to remain in plausible denial. A curious consequence of this confusion is that the trial court may believe that it can deny habeas relief, as may the Court of Appeals, but still know that the Supreme

Court has this authority. Of course, the last one to learn this if he ever does, is the defendant-applicant for post-conviction relief, or the defense lawyer who is in cahoots with the Solicitor. (It happens.) The Act is unconstitutional because it suspends habeas relief after one year, and because, combined with the Supreme Court's interpretation so confuses the defendant that he is told by the lower court that he has no relief available that would conform to habeas corpus, and that despite being innocent, must rot in prison for the rest of his life, because he missed that one year opportunity. Some justice?

A further question arises, and that is whether the legislature, with some high minded ideal such as keeping the prisons full, can transgress on the common law right of habeas corpus. Habeas relief is not the product of legislative gratuity, but a right fought for to the death by high minded citizens who would not permit a totalitarian government to lock up innocent persons without due process, (or suspend habeas relief after one stinking year in prison). The court is reminded that the founding fathers took steps in the Second amendment to protect the rights of Englishmen who knew well the propensity of government to resort to arbitrary imprisonment, that is to suspend the right of habeas corpus.

WHEREFORE the defendant should be granted relief from judgment and such other and further relief as is just and proper.

Respectfully submitted,

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Brenda Nesbitt

To: Clerk, Court of General Sessions, Courthouse, County of Greenville, Greenville, S.C. 29601

Sworn and Subscribed to me
This 19 day of January 2011
Notary Public of South Carolina
My Commission Expires 04-14-2011