

VOLUME II OF II

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Certiorari to Greenville County
Letitia H. Verdin, Circuit Court Judge

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SC Court of Appeals

ORLANDO SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

Appellate Case No. 2012-213673

APPENDIX

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1 MS. RATIGAN: May it please the Court, Your
2 Honor. This is the case of Orlando Smith vs. The State of
3 South Carolina, docket number is 2010-CP-23-7261. He has
4 a bit of a lengthy procedural history, Your Honor, so I
5 would refer you to the facts set forth in our return of
6 the Conditional Order if I --

7 THE COURT: Okay.

8 MS. RATIGAN: Kind of a complicated issue.
9 Mr. Smith filed his PCR application in September 2010. I
10 filed a return and a motion to dismiss arguing that it was
11 both untimely and successive. He was originally indicted
12 in 1998 for murder. He was represented by Tim Sullivan on
13 that charge, the case was brought to trial. He was found
14 guilty. On July 19th of 2000, Judge Patterson sentenced
15 him to 30 years. That case was appealed. It was
16 perfected in the nature of an Anders brief. Court of
17 Appeals dismissed the matter in May of 2002.

18 He then filed his first PCR application in
19 September of 2002. The hearing was held in this
20 courthouse October of 2003. He was represented at that
21 time by John O'Leary. Your Honor, actually presided over
22 that hearing and denied the application after the hearing
23 by Order filed March of 2004. That application was
24 appealed, effected in the nature of a Johnson petition.
25 The Supreme Court denied the petition in June of 2006.

1 He then filed a subsequent petition for Writ of
2 Habeas Corpus in the Federal District Court. That matter,
3 after going through the court recommendation stage, was
4 ultimately dismissed in November of 2008. Mr. Smith has
5 filed a second PCR application. And again, I filed a
6 motion to dismiss and Judge Stilwell initially signed a
7 Conditional Order of dismissal January 5th of this year.

8 Mr. Blanchette is counsel for Mr. Smith and
9 filed a response. At some point, and we haven't been able
10 to determine exactly when, it was communicated to me by
11 Judge Stilwell or his office that the matter should be set
12 for a hearing. So we would argue our initial motion that
13 the case should be dismissed because it is not timely.
14 The original murder trial was back in 2000. The appeal
15 was dismissed 2002. Thus, is untimely. Further, it's
16 successive. He had his full bite at the apple during his
17 first PCR application which was fully litigated and
18 appealed. So, we would argue the Conditional Order should
19 become final and the case should be dismissed.

20 Alternative, Ms. Blanchette, she's going to raise some
21 additional issues that I'll address after she raises them.

22 THE COURT: Okay. All right.

23 Yes, ma'am.

24 MS. BLANCHETTE: Thank you, Your Honor, I'm

25 Tricia Blanchette here on behalf of Orlando Smith. Just

1 for the record, I wanted to confirm that the Court
2 received my letter dated October 24th raising the issue
3 that you had heard his prior PCR hearing. That he had
4 concerns that that may present a conflict. But I assume,
5 since I didn't hear anything back from the Court, that
6 isn't a conflict.

7 THE COURT: I don't understand how it would be a
8 conflict. Is there some -- something I'm missing?

9 MS. BLANCHETTE: No, I explained to him that
10 it's usually a conflict if you were either the sentencing
11 or trial Judge. But I've handled many PCR's where the
12 Judge had heard a prior PCR. But he had concerns so I
13 just wanted to make sure I brought that to your attention.

14 THE COURT: Thank you, very much.

15 MS. BLANCHETTE: Before we went forward. Thank
16 you, Your Honor.

17 THE COURT: All right.

18 MS. BLANCHETTE: In this case we have filed a
19 response to the Conditional Order of Dismissal. And most
20 recently, after talking to the State, filed a motion for
21 discovery. And I assume, Your Honor, has copies of both
22 of those there?

23 THE COURT: Uh-huh.

24 MS. BLANCHETTE: What I'm going to do is just
25 hit the highlights that covers both of those motions as to

1 why we're here today and how we've gotten here today.

2 THE COURT: Okay.

3 MS. BLANCHETTE: And hopefully I can cover both
4 of those by just doing a brief overview. How we got here
5 today is my client found out about the Access to Justice
6 Post-Conviction DNA Testing Act that was passed back in
7 January of 2009. He wrote to the Greenville County Clerk
8 of Court to get an application. He also wrote to SLED to
9 get a copy of his complete file because he thought that
10 would be necessary for that application process. SLED
11 responded to him with a fee on 5/7/09. And he actually
12 received his file from SLED on September 16th, 2009. And
13 the wrong date is supplied for that in the Conditional
14 Order of Dismissal Response.

15 After receiving that he filed his DNA
16 Application in December of 2009 and it was returned to him
17 in January -- I'm sorry, January 2010, with a copy of the
18 South Carolina Supreme Court Order saying that those would
19 not be processed until funding was accessed by the
20 legislature. When he discovered that his DNA Application
21 would not be processed, he hired me and he also hired
22 Dr. Robert Bennett out of Charleston. His circa vitae was
23 attached to the responsive COD to have the testing done
24 himself. Since it wouldn't be done through the DNA
25 Application process.

1 Why this is important, and most of this is
2 reflected in the transcript, but prior to trial his
3 attorney had informed him that no hairs in this murder
4 case were taken into evidence that matched his sample.
5 And that's reflected in the record that I have on page 55.
6 Looking at his trial, even Kimberly Black from SLED
7 testified as follows.

8 I received the hair samples that was actually
9 collected from a ligature with a small stick. There was
10 some miscellaneous hairs taken from the victim's body.
11 One hair from the victim's stomach, hair from the victim's
12 navel and hair from the victim's knee.

13 And that's on page 30 through 31 of the
14 transcript. She also explained that those hairs were
15 never tested because it was SLED's policy that if there
16 was blood evidence, they wouldn't test hair.

17 What we've done is we've attached a number of
18 documents to both the COD response and the application
19 that set forth how this issue is important today. First,
20 the evidence inventory sheets that are attached to the
21 application, those sheets reflect that this ligature with
22 a small stick but they don't reference the hair that was
23 referenced at trial. They also reference the instructions
24 to test the ligature and small stick. There's two sheets.
25 One's undated and one is dated. But again, there's no

1 mention of this hair and that was in the original
2 discovery.

3 Also attached to the application is a case note
4 coversheet from SLED. There there's a note from 2/9 of
5 '99 that indicates that the agent is to look for hair on
6 item 18, which is again the ligature. And then a note is
7 entered two hours later to collect that hair and return it
8 to the agency. The note on that sheet from 6/29 of '99,
9 indicate that Gene Donahue wants the panties and ligature
10 tested and everything else can be returned because most of
11 the evidence would not need to be processed.

12 Now, attached to the Conditional Order of
13 Dismiss, we put a letter that his prior counsel received
14 saying that all the evidence was returned to Greenville
15 County Sheriff's Department in March of 1999. Upon
16 reviewing these SLED documents, there's a contradiction
17 there and that was not known to the Applicant prior to
18 trial.

19 Now, there is one document that we failed to
20 attach. I believe I previously provided this to the
21 State, it's an additional case note coversheet. If, Your
22 Honor, would like for me to hand that up at this time?

23 THE COURT: Sure.

24 MS. BLANCHETTE: And if it's appropriate with
25 the motion, I would mark this as Applicant's number one.

1 THE COURT: Okay.

2 MS. BLANCHETTE: I have another copy.

3 THE COURT: Okay.

4 (WHEREUPON, Applicant's Exhibit No. 1 was marked
5 for identification and received into evidence.)

6 THE COURT: Was there any objection to that?

7 MS. RATIGAN: No, Your Honor.

8 THE COURT: Okay.

9 MS. BLANCHETTE: On this case notice coversheet,
10 just the note that I'd like to point out, it says that
11 item 18 was not processed for blood. But they want DNA
12 run on the hair. And it's processed -- or it's placed on
13 the shelf to be processed for blood and hair. Then it
14 also says to let processing know to return the hair with
15 evidence that blood on 18, they won't need to analyze the
16 hair. We'll wait to hear from the officer on how to
17 proceed with hair.

18 Now, why all these matters are so important and
19 why we're pointing out these sheets that we've attached in
20 our -- explain throughout the Conditional Order of
21 Dismissal response is because this information was not
22 known to my client at the time of his trial or his prior
23 PCR. He just received a complete copy so the SLED file
24 and has started to notice these inconsistencies about the
25 testing of the hair in this case.

1 Finally, the Trace Department Report dated
2 January 21st, 1999 is attached to the application in this
3 case. Here, the report lists the ligature that's item 18
4 that I keep referring to. But it does not reference the
5 hair. What this report interestingly says is that The
6 hair evidence would be preserved for future testing if the
7 need ever arises. Our argument today is the need has
8 arisen. There's hair evidence in this case that needs to
9 be tested. And my client try to do it through the DNA
10 Application but since the legislature hasn't funded that,
11 this is his only avenue to do it.

12 Finally, there's a Trace Worksheet, and that's
13 attached to the application. It lists that there's hairs
14 from the panties and a small hair on the ligature which
15 was returned to the agency untested.

16 Now finally, Your Honor, I'd like to explain why
17 all this matters. I know this is an old case but we do
18 have the trial transcript. And vehemently throughout the
19 trial transcript, Mr. Sullivan argues third party guilt.
20 And I have spoken with him and he absolutely believes in
21 Mr. Smith's innocence. In the trial they went through and
22 developed a third part guilt claim of another individual,
23 Ted Waldman. They found his prints at the scene. And
24 there was a number of evidence against him which I can go
25 through from the transcript if the Court would like.

1 Also, Erica Burts was another individual that they
2 investigated. And Mr. Smith presented the third party
3 guilt claim on at trial. They obtained actually a belt
4 from him that they thought could have been used in the
5 strangulation of the victim.

6 Now, here, as far as my Applicant is concerned,
7 he was viewed by an officer the next morning and there
8 were no scratches. Even though the reports indicated that
9 there must have been a fight. There was also no matches
10 to him on the rape kit. A swab they took from the table,
11 a cushion where she was found, there was no matches to him
12 but to Mr. Waldman.

13 When the Court was making his remarks at the end
14 of the trial he said, I've never seen a case like this.
15 There's nothing in the record to show why or how this
16 defendant did it.

17 And the reason why I just point out these small
18 parts of the trial is that's why it's so important that we
19 get these tested. There are hairs that have never been
20 tested in this case. Where there was a viable third party
21 guilt. And even the Court, after hearing all the
22 evidence, truly questioned whether or not he could be
23 guilty of the crime. Even though the jury had found him
24 guilty.

25 What we have filed is a response to the State's

1 Conditional Order of Dismissal, which goes through a
2 number of these documents I referenced, as well as the
3 application. Then the final thing that we filed is a
4 motion for discovery. Where there we were specifically
5 asking for the hairs referenced by Agent Kimberly Black.
6 And any other DNA evidence that may be available for
7 testing. As well as, at my client's request, a full copy
8 of the Rule 5. Because now that he's discovered that
9 they're all these documents with very important
10 information in them in the SLED file, he feels that it's
11 very pertinent. And I agree with him that he -- we had
12 the opportunity to review the entire Rule 5 to make sure
13 there's not other matters that he wasn't aware of prior..

14 THE COURT: What do you mean, refer to the
15 entire Rule 5.

16 MS. BLANCHETTE: Any discovery materials that
17 the Solicitor's Office may have. Typically they turn them
18 over to the defense attorneys.

19 THE COURT: Yeah.

20 MS. BLANCHETTE: Your Honor, my primary request
21 is for the DNA evidence. That is just as a safeguard, not
22 a fishing expedition. As far as asking for the discovery
23 materials.

24 I do have some case law I can argue but--

25 THE COURT: Well, do you have some -- just so I

1 can get settled on that issue, is there something to show
2 that Mr. Sullivan did not get all of the discovery
3 pursuant to Rule 5?

4 MS. BLANCHETTE: Well, I actually, asked
5 Mr. Smith for a copy because typically an inmate will
6 still have a copy that I can go through.

7 THE COURT: Right.

8 MS. BLANCHETTE: Unfortunately, due to an, and
9 he can correct me if I'm wrong, but due to his moving
10 inside the prison, he does not have a copy available at
11 this time. So, it was just a matter of prove of something
12 for me to review as his attorney.

13 THE COURT: Did you contact Mr. Sullivan?

14 MS. BLANCHETTE: I had contacted Mr. Sullivan
15 and he does not have it. He was very helpful but he did
16 not have a full copy of it.

17 THE COURT: Okay. All right.

18 MS. BLANCHETTE: And I do have some argument on
19 case law, but I assume the State would like to respond to
20 all the information I've put forth.

21 THE COURT: Okay.

22 MS. RATIGAN: Thank you, Your Honor, may it
23 please the Court. Basically, the way that the State's
24 viewing this is that Ms. Blanchette is trying to argue
25 that in order to circumvent the statute of limitations and

1 presumption against successive applications, that this is
2 after discovery evidence. That will get you around the
3 statute. However, we would argue that it doesn't meet the
4 standard for being after discovered evidence. If for no
5 other reason, the hairs are mentioned at trial.

6 Therefore, this issue could have been argued at the first
7 PCR and it was not.

8 And as, Your Honor, knows, one of the issues of
9 proving after discovered evidence is, it could not in the
10 exercise of due diligence, have been discovered prior to
11 trial. So, we'd argue in terms of that getting her around
12 the statute after discovered evidence hasn't been proven.

13 Further, in terms of the motion for discovery, I
14 don't have the file, I don't even know if this evidence is
15 still in existence. Kayce McCall has started looking into
16 it. However, she was in trial this week. So, she could
17 not come and inform the Court about it. We'd argue
18 against a full copy of the Solicitor's file. I think it's
19 irrelevant at this point. But that discovery of
20 re-testing -- of testing the hair samples is not mandated
21 because it's not after discovered and he should not be
22 allowed to reopen the case when he had a full bite at the
23 apple, with a confident defense attorney to argue this on
24 his behalf several years ago. And again, we state that
25 he hadn't met his burden of being able to go forward and

1 that the Conditional Order should be held final.

2 THE COURT: Okay.

3 MS. BLANCHETTE: Your Honor, the case of The
4 State typically relies upon, I believe, it was in their
5 COD, is Aims vs. State. And there's an interesting quote
6 in that. It says that At some point judicial review must
7 stop but there's a rare exception. When the stomach has
8 failed the Defendant and where it's continued his
9 imprisonment without further review amounts to a
10 miscarriage of justice. This is the situation. We're
11 honestly just asking to have these hairs tested. If the
12 legislature had funded the DNA Application, we wouldn't be
13 here today.

14 This issue is newly discovered in the fact that
15 he obtained the SLED file and as result of these reports,
16 which I've attached to the application to the COD response
17 in the one I gave today, he's discovered these
18 inconsistencies about whether these hairs were tested or
19 not tested. Whether what was said at trial was true or
20 not. Whether the information given to his attorney at
21 trial on the PCR was correct. This was not known to him
22 at any prior stage and that's why he's bringing the claim
23 now. Not as a matter of convenience to him, but because
24 this has just been discovered by him.

25 Furthermore, I have a copy of the case Skinner

1 vs. Switzer. Which is actually a Supreme Court of the
2 United States case that came out in March of 2011. There
3 it deals with the State of Texas has similar DNA
4 applications type act. And Mr. Skinner had applied for it
5 twice in that case. When he didn't get it, he actually
6 filed under Section 1983 for injunctive relief. And our
7 Supreme Court found that it was due process violation by
8 refusing to give him that evidence to test for DNA.

9 The real question is here, what does the State
10 have to lose? If Mr. Smith has been properly convicted of
11 this crime, there's no reason that the State should be
12 fighting me in trying to get this evidence tested. He's
13 paid me, he's willing to pay for the expert to have it
14 tested. All we're asking for is the evidence that, I
15 believe, should be readily available. Because along with
16 the application for DNA testing is the preservation act
17 that requires it to be preserved. I hope that Mr. Smith
18 wouldn't have to take [sic] around Mr. Skinner to take
19 this into Federal Courts and that's why we started here.
20 Because this is, in fact, newly discovered, this is
21 information that's known to him. And if newly known to
22 him, if the Court would like to hear from him, I'm sure
23 he'll be happy to explain that.

24 THE COURT: Well, how is it newly discovered? I
25 mean, I'm having a problem with that. I mean, you know,

1 if it's mentioned in the original trial, how did he not
2 know about it?

3 MS. BLANCHETTE: Your Honor, I went through so
4 many sheets so quickly, I may have, you know, been
5 confusing in that regard. But they are fully explained in
6 the response and in the request for discovery. But he has
7 never had a complete copy of his SLED file. Everything I
8 referred to came from the SLED file. And it shows
9 inconsistencies as to this evidence from what he knew.
10 All he knew was when he went to trial, his attorney told
11 him, this is reflected in the prior PCR, that no hairs
12 matched him. He did not know the hairs had not been
13 tested.

14 At trial, Agent Kimberly Black goes into certain
15 testimony about hairs. That it's not their policy to test
16 them. But when we look at the evidence inventory sheets,
17 the case notes coversheet, the Trace Department Report,
18 that's not their policy. It appears that Greenville
19 County called and said, send us back those hairs, don't
20 test those hairs. So, for some reason, if you look at all
21 these notes that I pointed out, there's phone calls being
22 made to the agency to put those aside, we don't need
23 those. I could infer it's, we have him on other evidence
24 so just set that aside. Well, the problem is that
25 evidence could have freed him. That could have been

1 exculpatory evidence.

2 He didn't discover the fact until he had these
3 evidence inventory sheets, the case note cover sheets, all
4 these notes that were just recently given to him by SLED.
5 What Agent Black stated at trial was not correct. So,
6 that's how it's recently discovered to him. Is that he's
7 told one thing by his attorney, no match. So, that infers
8 they tested it. Then Kimberly Black gets up and says we
9 did not test the hairs because it's a policy when we have
10 blood. He accepted that to be true. Then, he finally has
11 the opportunity to get a complete copy of the SLED file
12 and he sees that that is not correct.

13 And there's a conflict with where they say they
14 told his attorney that all the evidence was returned to
15 Greenville County in March of 1999 and it was clearly
16 still at SLED at that time. All of these things were not
17 known to him prior to him getting the SLED file. And he
18 got that on September 16th, 2009.

19 And if I could beg the Court's indulgence, he
20 keeps trying to get my attention.

21 THE COURT: Yeah, go ahead.

22 MS. BLANCHETTE: If the Court would like to hear
23 from Mr. Smith about his discovery process, I wasn't part
24 of that, he actually retained me afterwards. If he would
25 be given the opportunity to speak, that may be able to

1 clear it up.

2 THE COURT: Well, okay. I'll let him talk.
3 Well, wait a minute.

4 Yes, ma'am.

5 MS. RATIGAN: If I may, Your Honor. And I did
6 neglect to mention that the issue of whether Mr. Sullivan
7 should have tested the hair samples was brought up at the
8 first PCR hearing. I'm looking at the Order and it's
9 states, The Applicant claims also that his trial counsel
10 never requested a psych evaluation and never requested
11 that the hairs recovered at the scene be tested
12 independently. And that that was later ruled upon as the
13 failure to test the hair samples does not create a valid
14 ineffective assistance of counsel.

15 So, we would argue that while Mr. Smith maybe
16 kind of gathering more evidence, piecemeal, that issue of
17 the hairs was known to him at trial. And it was certainly
18 known to him at the first PCR hearing and he just hasn't
19 met his burden of proving this. And this is truly after
20 discovery.

21 THE COURT: Okay.

22 MS. BLANCHETTE: Your Honor, if you'd like to
23 hear from him as to when he received and why he received
24 the SLED file when he did.

25 THE COURT: Sure.

1 MR. SMITH: Judge Miller, after my PCR, I
2 received -- you turned it down. And later on down the
3 road after the DNA Act, Post-conviction Act came about, I
4 had wrote my PCR attorney, O'Leary, and I actually have a
5 copy of the letter that I wrote him. And I was asking for
6 my complete SLED report. To make a long story short, I
7 never -- the entire SLED report that I received in 2009,
8 after I paid SLED, and they told me that I have all the
9 records, they told me that they finally found it, I have
10 been trying to get it for like a year. I -- is -- and all
11 that's in Rule 5 violation because this was never in my
12 discovery.

13 When I received -- when I received my complete
14 SLED report, that's when all the conversations came about.
15 The recorded telephone conversations and a lot of DNA
16 tests that were done that I never knew about. They're a
17 lot of test in the SLED report that were not in my
18 original discovery. And my original defense attorney
19 agrees that he never saw any of these. There were a lot
20 of things that were mentioned in my trial, that I still
21 today, 13 years later, have never even seen. That's why
22 I, after I put in for the Post-Conviction Act, then I
23 received all of this. And now, instead of three hairs,
24 now I know there's a total of five hairs.

25 There are a lot of inconsistent statements that

1 the SLED reporters got up and testified about that the
2 jury should have known about. There are unidentified
3 fingerprints at the scene that I never knew about. And I
4 can go on and on. And like I said, 2009 was the first
5 time that I ever saw that. And according to the law, all
6 of that was a Rule 5 violation. I should have known about
7 all of that. And I was never given a chance to see that.
8 And my lawyer never had that. And the proof is in the
9 record and I have everything here today.

10 THE COURT: Okay.

11 MR. SMITH: It started off three hairs and now
12 there's five hairs. They said this was tested. They have
13 actual tests in this SLED report that we can't even read.
14 I'm not educated in DNA testing or any type of testing but
15 they're right here. And I never had those at my trial.
16 It's just a bunch of stuff and we were never given those.

17 THE COURT: Okay.

18 MS. BLANCHETTE: Your Honor, just as a follow
19 up, I did provide his complete SLED file to Dr. Robert
20 Bennett in Charleston to conduct a review to ensure that
21 this one type of case that he could conduct testing on and
22 to get his expert opinion as to whether or not this -- he
23 would deem it necessary as an expert. And he did attach a
24 letter, along with his circa vitae to the original
25 application. With it being a motion hearing I didn't

1 think it was necessary to have him present here today. I
2 didn't know if the Court would want testimony from him or
3 not. But he has reviewed the SLED file, has seen the same
4 problems with it that Mr. Smith and I have recognized and
5 attempted to bring to the Court's attention today.

6 In going through this quickly I think it may
7 have been confusing, but I did set them out, all of these
8 documents in writing in the Conditional Order of Dismissal
9 response as to why those are important to this case. But
10 like Mr. Smith said, it has evolved from us thinking
11 there's just a hair on the ligature to now there maybe
12 anywhere from four to five hairs referenced throughout
13 these notes in the SLED reports. And these hairs have not
14 been tested in a case where there was at least three
15 suspects.

16 THE COURT: Well hypothetically, projecting the
17 future, say I grant your motion and allow you to check the
18 hairs, the only evidence presented to the jury was that
19 they weren't your client's hairs. So what is it that
20 you're going to gain by doing it if I were to grant it?

21 MS. BLANCHETTE: The only evidence presented to
22 the jury is that the hairs were not tested. Agent Black
23 did not say that they weren't my client's hair. That was
24 what his trial attorney told him. But there was no
25 evidence put into the record that they were not his hairs.

1 That potentially exculpatory information was not given to
2 the jury. It's just that the hairs -- her statement was,
3 They do not test hairs in cases where there's blood
4 evidence.

5 THE COURT: Okay, so the hairs did not connect
6 your client to the murder, correct?

7 MS. BLANCHETTE: Those hairs could potentially
8 be exculpatory. And what I'm arguing for today is his
9 ability to be able to test those. I don't know what those
10 results would show.

11 THE COURT: But you're talking about more than
12 that. Because you're talking about asking me to issue
13 a -- basically allow you to do that and then to require
14 these other third party guilt suspects to submit to some
15 kind of DNA test. I mean, how are you going to connect
16 that dot?

17 MS. BLANCHETTE: Your Honor --

18 THE COURT: That doesn't happen.

19 MS. BLANCHETTE: Your Honor, what we actually
20 ask for in the Discovery Order, was for all the samples.
21 Because it's my understanding they took a sample from my
22 client and they actually had samples reflected in the SLED
23 report.

24 THE COURT: So, let's say you do the testing and
25 it comes back that it is not Mr. Smith's hair, what then?

1 The hairs were not used to convict him, if I'm not
2 mistaken.

3 MS. BLANCHETTE: Then we would ask to be able to
4 proceed to a full evidentry hearing on our claim of newly
5 discovered evidence. At this point it is essentially, and
6 the State was correct when we made discussions of
7 discovery motion. Because we must test those hairs to
8 determine what their value is. I don't know that at this
9 point.

10 THE COURT: Well, how is this not been addressed
11 as Ms. Ratigan said at the prior hearing? Mr. O'Leary
12 apparently raises the ground. I don't remember.

13 MS. BLANCHETTE: Mr. O'Leary, I did speak with
14 him. Of course, it's been some time so his memory wasn't
15 entirely clear on it, but you did, in that case, enter a
16 Order to compel production of testing for scientific
17 testing as part of that PCR. What they did test at that
18 time was the blood. They wanted to test to see if the
19 ligature, was a small stick, was positive or negative for
20 blood. That is all testing they did. They didn't do any
21 type of DNA testing, they didn't do any testing on the
22 hair at that time. I asked Mr. O'Leary and I don't know
23 the reasoning as to why the test was just done as a
24 positive/negative test for blood. But in the Order that
25 you issued in that case, you did issue the Order saying

1 that all samples to be turned over. And that's
2 essentially what we're asking for here. But that this is
3 just to DNA in the hairs.

4 THE COURT: Well, doesn't that make this
5 successive?

6 MS. BLANCHETTE: Your Honor, it could be
7 construed that way and I didn't want to ignore what is in
8 the record in the Order that you previously issued. But
9 the main factor that I would argue that makes this not
10 successive, is that he did not have the SLED file. He was
11 not aware of this information as to the hairs. And the
12 reasons they were not tested. The only Information he had
13 at trial was Kimberly Black saying it's our policy. If
14 you read these notes, it's not their policy, it's an
15 instruction given by Greenville County, Don't mind testing
16 those hairs, we have enough evidence. Put them on the
17 shelf, maybe we'll need them later. And the note even
18 says, If the need arises.

19 Our argument today is that the need has arisen.
20 We have a man serving a life sentence with hairs that have
21 never been tested.

22 THE COURT: Thirty year sentence, I believe.
23 Isn't that right?

24 MS. BLANCHETTE: I'm sorry, Your Honor,
25 essentially a life sentence for him.

1 THE COURT: Well.

2 MS. BLANCHETTE: Your Honor, one thing that
3 Mr. Smith keeps bringing up over and over and over again
4 is I do have the prior PCR transcript and I've reviewed
5 it. The main focus in that was there was this ligature,
6 this stick, that had never been turned over. And there
7 was blood on the back steps. That had never really been
8 turned over, discussed at trial. And that was
9 Mr. O'Leary's focus on as far as the evidence was trying
10 to look into that matter and compel the evidence as to the
11 blood on the back steps and the ligature on the stick.

12 THE COURT: Well, a minute and talk to him, make
13 sure we get all this.

14 (WHEREUPON, an off-the-record discussion was
15 held between Ms. Blanchette and Mr. Smith.)

16 MS. BLANCHETTE: Okay, Your Honor.

17 THE COURT: Yeah.

18 MS. BLANCHETTE: I did make copies of the prior
19 Order, all the affidavits that was done in the prior PCR,
20 but I assume those are all part of the Court's record in
21 this case. One thing that he's also asking me to point
22 out is Mr. O'Leary did an affidavit that he submitted to,
23 Your Honor, after the testing was done, indicating that
24 the ligature was positive for blood. And why that
25 ligature was important is because it was considered the

1 murder weapon in this case, the device used for
2 strangulation. And at trial they said there was no blood
3 on it. And in Mr. O'Leary's testing, it showed there was
4 blood. So, my client wanted me to clarify that that was
5 the point of the prior testing. And that's how that issue
6 had been presented to the jury, then was found otherwise
7 at that the PCR. That is also the ligature that I keep
8 referring to that has one of the hairs that we would like
9 tested.

10 And as I referenced to the Court, there were two
11 suspects in great detail in the trial they go through both
12 of them had been present at her apartment that night.
13 Both of them had motive. Mr. Sullivan, I think, did an
14 excellent job of showing how they both had opportunity to
15 commit this crime. And I have to say--

16 THE COURT: So let's say -- the hairs were not
17 evidence that pointed the finger to your client, am I
18 right about that?

19 MS. BLANCHETTE: They were not used to convict
20 him, Your Honor.

21 THE COURT: So, you know, that is significant in
22 my mind. But let's say that somehow you're able to show
23 that the hair belonged to one of the other persons.
24 They're in there. They're already there. How does
25 that -- how does that free your client?

1 MS. BLANCHETTE: Well, Your Honor, my hope is
2 that we can make a viable claim of newly discovered
3 evidence as to third party guilt. In talking to
4 Mr. Sullivan, he was very adamant that if he just had one
5 more thing, he thought he could get him found not guilty.
6 And if you look at the Judge's comments, the Judge
7 couldn't even put the pieces together as to how he was
8 convicted. That's why I think this testing is so
9 important. It wouldn't be just merely cumulative or
10 impeaching. It could very much change the outcome of this
11 case. It could be that one piece of evidence to show that
12 one of those two other individuals were present. These
13 hairs were found on the body of the naked victim that was
14 essentially raped and killed in her apartment. Those
15 hairs are very important. They're not just a
16 miscellaneous hair found on a rug in her kitchen. The
17 reports detail where these hairs were found.

18 And I do have a copy of the Skinner case to hand
19 up. And to be honest, in the Skinner case, I don't see
20 how Mr. Skinner had a good claim to get his evidence
21 tested. I don't even see how he could have made a defense
22 once he had the DNA tested, if it was favorable to him.
23 But our Supreme Court found that it validated due process
24 for him to not be allowed to have that test. So, I would
25 just refer back to that as my fundamental argument is I

1 know that under newly discovered evidence we must show the
2 five prongs. But I would just ask that we have the
3 evidence so that we can determine if it does meet those
4 five prongs after it's tested. He's willing to pay for
5 the test at no expense to the State.

6 THE COURT: Okay.

7 MS. BLANCHETTE: And I'd be happy to answer any
8 questions that the Court has but that's, essentially, our
9 case and our plea for the to Court today.

10 THE COURT: Okay.

11 MS. BLANCHETTE: And I do have a copy of the
12 Skinner case for both the Court and the State.

13 THE COURT: Okay.

14 All right, Ms. Ratigan, anything you want to add
15 to it?

16 MS. RATIGAN: I think I've laid out the State's
17 position, Your Honor.

18 THE COURT: Okay. I'll take -- I'll just take a
19 look at the Skinner case. I'll let you know something.

20 MS. BLANCHETTE: Thank you, Your Honor, I
21 appreciate your patience today.

22 THE COURT: You doing all right, Mr. Smith.

23 MR. SMITH: Excuse me?

24 THE COURT: Are you doing okay? I'm asking
25 about you, how are you?

1 MR. SMITH: I'm not well at all, Your Honor.

2 THE COURT: I'm sorry to hear it.

3 MS. RATIGAN: Thank you, Your Honor.

4 (WHEREUPON, the proceedings were concluded.)

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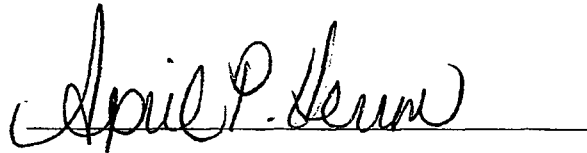
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, APRIL P. HERRON, Official Court Reporter for the
Thirteenth Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the trial of
the captioned case, relative to appeal, in the Court of
Common Pleas for Greenville County, South Carolina, on the
10th day of November, 2011.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto.

June 26, 2013



APRIL P. HERRON, Court Reporter

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Orlando Fonte Smith,)
 S.C.D.C. No. 267982,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2010-CP-23-7261

FILED-CLERK OF COURT
 GREENVILLE CO., S.C.
 PAUL R. WICKENSMEYER
 2011 DEC 29 PM 12:24

**ORDER OF DISMISSAL
 WITH PREJUDICE**

This matter comes before the Court by way of an Application for Post-Conviction Relief (PCR) filed September 1, 2010. The Respondent made its return and motion to dismiss on December 22, 2010. The Honorable Robin B. Stilwell, in his capacity as Chief Administrative Judge, issued a conditional order of dismissal that was filed on January 20, 2011. Judge Stilwell later set this matter for a hearing on the Respondent's motion to dismiss.

A hearing was convened at the Greenville County Courthouse on November 10, 2011 at which time the Applicant was present in court and represented by Tricia A. Blanchette, Esquire. The Respondent was represented by Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General. At the hearing, the Respondent made a Motion to Dismiss on two grounds: (1) the expiration of the statute of limitations and (2) the presumption against successive PCR applications. Counsel for the Applicant made a Motion for Discovery.

I. PROCEDURAL BACKGROUND

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 October 1998 term of the Greenville County Grand Jury for murder (1998-GS-23-5212).

He was represented by C. Timothy Sullivan, Esquire.

After the State called the case to trial, the Applicant was found guilty. On July 19, 2000, the Honorable Larry R. Patterson sentenced the Applicant to thirty (30) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Joseph L. Savitz, III, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of an Anders¹ brief. The Court of Appeals dismissed the appeal. State v. Smith, Op. No. 2002-UP-372 (S.C. Ct. App. filed May 23, 2002).

2002-CP-23-6327

The Applicant filed a PCR application on September 17, 2002 (2002-CP-23-6327). The Applicant raised the following issues:

1. Ineffective assistance of counsel:
 - a. Failed to conduct proper investigation.
 - b. Failed to properly object to denial of directed verdict motion.
 - c. Failed to subpoena witnesses.
 - d. Failed to object to certain State evidence.
 - e. Failed to seek psychological examination.

An evidentiary hearing was convened on October 22, 2003 at the Greenville County Courthouse. John O'Leary, Esquire represented the Applicant. The Honorable Edward W. Miller denied and dismissed the application by order filed March 31, 2004.

The Applicant filed a notice of appeal. Robert M. Pachak, Esquire of the South Carolina Office of Appellate Defense perfected the appeal in the form of a Johnson² petition. The South Carolina Supreme Court denied the petition for writ of certiorari on June 12, 2006.

¹ Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

² Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988).

Federal Habeas Corpus

The Applicant filed a petition for writ of habeas corpus in the United States District Court for the District of South Carolina (6:07-327-RBH-WMC). The Respondent submitted a motion for summary judgment on July 2, 2007. The Honorable William M. Catoe, United States Magistrate Judge, issued a report and recommendation to grant the motion for summary judgment dated January 23, 2008. On March 31, 2008, the Honorable R. Bryan Harwell, United States District Judge, issued an order granting the motion for summary judgment as to all but one (1) issue. On August 12, 2008, Judge Catoe issued a second report and recommendation to grant the motion for summary judgment. On November 12, 2008, Judge Harwell granted the Respondent's motion for summary judgment and dismissed the petition with prejudice.

The Applicant filed a notice of appeal at the United States Court of Appeals for the Fourth Circuit. In an opinion filed August 10, 2010, the Court of Appeals denied a certificate of appealability and dismissed the appeal.

II. ALLEGATIONS

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

1. "After receiving a complete copy of his file from SLED, the Applicant discovered irregularities and information regarding evidence that was not tested. The Applicant attempted to file an Application under the Post-Conviction DNA Testing and Preservation of Evidence Act, which was not accepted due to funding issues. As a result, the Applicant has retained a private forensic scientist and an attorney to address this matter of newly-discovered forensic evidence."
2. "The Applicant is requesting the release of the forensic evidence to Robert Bennett, R.Ph., Ph.D. for forensic testing."

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the records of the Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina Department of Corrections, and the pleadings and makes the following findings of fact and conclusions of law:

A. Statute of Limitations

This Court finds the current PCR application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §§ 17-27-10, et. seq. (2003). 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 South Carolina Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. See Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense he challenges in this application on July 19, 2000 and the South Carolina Court of Appeals dismissed his appeal on May 23, 2002. The Applicant was therefore required to file his application before May 23, 2003. This application was filed on September 1, 2010, which was over seven (7) years and three (3) months after the statutory filing period had expired.

The statute of limitations contained in section 17-27-45(a) sets forth a bright-line test that must be followed by this Court in determining whether an application for PCR was filed in a timely manner. The Applicant has failed to set forth any cognizable reason that would justify disregarding this one-year statute of limitations. As such, all issues related to the Applicant's guilty plea hearing – except for that of a belated appeal – are summarily dismissed.

B. Successive Application

This Court further finds the current application should be dismissed because it is successive to the previous application for PCR. 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 has failed to present any reasons why he could not have raised the current allegations in his previous PCR application. Accordingly, the Applicant has failed to carry his burden of proof. See Aice, 305 S.C. at 450, 409 S.E.2d at 394 (holding the Applicant bears the burden of showing that the allegations could not have been raised previously).

C. Motion For Discovery

Counsel for the Applicant made a motion for discovery. Counsel argued the Applicant

should be allowed to test hairs that were recovered from the scene but never tested prior to trial. Counsel argued that, if testing of the hairs revealed they were not from the Applicant, it would constitute after-discovered evidence and facilitate a third-party guilt argument upon re-trial. Counsel for the Respondent argued these hairs were mentioned during the trial and therefore the fact that were not tested could have been – and was – argued at the first PCR hearing in 2003.

This Court notes that, in non-capital post-conviction relief cases, a party must demonstrate “good cause” in order to be granted leave to conduct discovery. See S.C. Code Ann. § 17-27-150 (Supp. 2006). This Court finds the Applicant has failed to show good cause to justify the forensic testing of the hairs in question. This Court notes the issue was raised in the Applicant’s first PCR hearing that these hairs were never tested by the State. This Court further notes the Applicant was not convicted based upon this hair evidence. Accordingly, the Applicant failed to show good cause why he should be allowed to test this evidence more than ten (10) years after his jury trial.

IV. CONCLUSION

Based on the records, pleadings, the arguments of counsel, and evidence presented this Court finds (1) the Applicant failed to file his PCR application within the time mandated by the Uniform Post-Conviction Procedure Act and (2) the Applicant raised grounds for relief in this application that could have been raised in the prior PCR application. This Court also finds the Applicant has failed to meet his burden of demonstrating the good cause necessary to justify ordering discovery in this case.


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

His 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.

IT IS THEREFORE ORDERED THAT:

1. The Respondent's Motion to Dismiss is hereby **GRANTED** and the post-conviction relief application is **DENIED AND DISMISSED WITH PREJUDICE**.
2. The Applicant's Motion for Discovery is **DENIED**.
3. The Applicant is remanded to the custody of the Respondent for the completion of his sentence.

AND IT IS SO ORDERED this 20 day of December, 2011.


Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

 , South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF GREENVILLE	)	DOCKET NO.: 2010-CP-23-7261
)	
Orlando F. Smith, 267982,)	
Applicant,	)	MOTION FOR REHEARING PURSUANT
v.	)	TO RULE 59(a), SCRCP, AND/OR
State of South Carolina,	)	MOTION TO ALTER OR AMEND
Respondent,	)	PURSUANT TO RULE 59(e), SCRCP
)	

COMES NOW, Applicant, through his undersigned attorney, and requests that this Court direct the entry of a new judgment, pursuant to Rule 59(a)(2), and/or amend the findings of fact and conclusions of law in the standing Order of Dismissal with Prejudice, pursuant to Rule 59(e), SCRCP. On December 20, 2011, an Order of Dismissal with Prejudice was signed by the Honorable Edward W. Miller, and it was filed on December 29, 2011. Applicant, through counsel, received a copy of the signed and filed Order in the mail on January 9, 2012.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on September 1, 2010. The State submitted a Return and Motion to Dismiss and Conditional Order of Dismissal on or about December 22, 2010. On January 5, 2011, the Honorable Robin B. Stilwell signed the Conditional Order of Dismissal, which was filed on January 20, 2011. Applicant, through counsel, submitted a Response to Conditional Order of Dismissal on February 11, 2011, and Motion for Discovery in Post Conviction Relief on October 25, 2011. Thereafter, the Honorable Robin B. Stilwell ordered a hearing on the State's Motion to Dismiss.

A motion hearing was convened at the Greenville County Courthouse on November 10, 2011. Applicant was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Karen C. Ratigan, Assistant Attorney General.

On December 20, 2011, an Order of Dismissal with Prejudice was signed by the Honorable Edward W. Miller, from which this Motion follows.

In Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007), the South Carolina Supreme Court made it clear that a post conviction relief judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. See also S.C. Code Ann. § 17-27-80 (2010). Therefore, Applicant would respectfully request that this Court ensure that specific findings of fact and conclusions of law are entered on the issues and arguments set forth in the written pleadings and presented at the motion hearing. Furthermore, Applicant would respectfully request that this Court carefully review the records, exhibits, and obtain the transcript from the hearing to properly reconsider the findings of facts and conclusion of law set forth in the standing Order of Dismissal. Specifically, Applicant requests that this Court fully address and/or reconsider the following arguments submitted in the pleadings and presented at the motion hearing.

At the motion hearing, Applicant's counsel referred to the written discovery motion and explained that the Applicant was asking for discovery pursuant to S.C. Code Ann. § 17-27-150 (a) (2008) to fully establish his claim of newly discovered evidence. Furthermore, as was addressed in the Application and Response to Conditional Order of Dismissal, Applicant's counsel explained that he was claiming newly discovered evidence due to his recent receipt of his complete SLED file, which brought irregularities and information regarding evidence to his attention that was not previously known to him. Finally, Applicant's counsel explained that upon discovery of said information, Applicant attempted to file an Application under the "Access to Justice Post Conviction

DNA Testing Act”, which was returned by the Greenville County Clerk of Court unprocessed. S.C. Code Ann. §f 17-28-10 (2009). Therefore, Applicant was pursuing the matter through a Post Conviction Relief Application.

Specifically, Applicant’s counsel explained how Applicant discovered the issue, what Applicant was requesting of the Court and why it mattered. As to the “how”, counsel explained that Applicant found out about the “Access to Justice Post Conviction DNA Testing Act” and wrote to the Greenville County Clerk of Court to obtain an Application in February 2009. To ensure that he would have the information needed to complete the Application, Applicant submitted a request to SLED for his file on February 11, 2009. On May 7, 2009, SLED responded to Applicant with the fee for the file, and Applicant received the file from SLED on September 16, 2009. Thereafter, Applicant completed and submitted his DNA Application in December 2009. In January 2010, the Application was promptly returned to him unfiled with a copy of South Carolina Supreme Court Order dated April 10, 2009.¹ When Applicant discovered that his DNA Application would not be processed, he began working on retaining private counsel and forensic scientist.² Applicant also discovered that the SLED file contained information that was not previously known to him regarding the failure to test evidence in his case.

Regarding “what” was at issue, Applicant’s counsel explained that Applicant was informed by counsel prior to trial that no hairs were taken into evidence that matched his hair sample. PCR Transcript p. 55. At trial, Agent Kimberly Black, from SLED, testified as follows: “I received a hair sample that was actually collected from a ligature

¹ By way of this Order, the Supreme Court held the Act inactive until funds were appropriated by the Legislature or federal government. A copy of the Order was attached to the Application for Post Conviction Relief.

² A copy of Dr. Robert Bennett’s curriculum vitae was attached to Applicant’s Response to Conditional Order of Dismissal.

with a small stick... there were some miscellaneous hairs taken from the victim's body, one hair from the victim's stomach, hair from the victim's navel and hair from the victim's right knee". Trial Transcript, Vol.2, p. 30, lines 18-19, 25, p. 31, lines 1-2. Agent Black explained that the hairs were not tested since there was a policy in place that they did not test hair evidence in cases with blood evidence. Trial Transcript, Vol. 2, p. 33, lines 8-11.

Turning to the documentation Applicant obtained from SLED, counsel noted that the Evidence Inventory Sheets reflected a ligature with a small stick, but did not reference any hair found on the ligature. These sheets, which were attached to the Application, also reflected instructions to test the ligature and small stick (Item 18). Applicant's counsel explained that Applicant recalled receiving these evidence sheets reflecting no hair on ligature in the discovery prior to trial.

Applicant's counsel noted the Case Note Cover Sheets, with the examiner initials LGK, a copy of which was attached to the Application. Specifically, the notes from February 9, 1999 indicate that agent is to look for hair on Item 18 (ligature) and then a note is entered two hours later to "collect the hair and return to agency." Subsequent notes from June 29, 1999 indicate that Gene Donahue wants the panties and ligature tested and "everything else can be returned" because "most of the evidence would not need to be processed." Applicant's counsel explained that this note contradicts the letter Applicant's PCR counsel received stating that all evidence was returned to the Greenville County Sheriff's Department in March of 1999, a copy of which was attached to the Response to Conditional Order of Dismissal. Counsel further explained that this

document was not seen by Applicant prior to his recent receipt of it from SLED nor did he have knowledge of the decision to return the evidence without testing.

Applicant's counsel also introduced a Case Note Cover Sheet, with the examiner initials KTB, with notes indicating the following: Item 18 was not processed for blood, he (GeneDonahue) wants DNA run on hair, the evidence was placed on shelf to be processed for blood and hair, let processing know to return hair with evidence, if blood on #18 won't need to analyze hair, will wait to hear from officer on how to proceed with hair. Applicant's counsel explained that this document was not seen by Applicant prior to his receipt of it from SLED nor was he aware of the initial instruction to test the hair, which was not completed.

Applicant's counsel also referenced a Trace Department Report, which was dated January 21, 1999, which was attached to the Application. This report lists the ligature as Item 18, but does not reference the hair testified to at trial. Counsel explained that the Applicant did not see this report prior to trial and was not aware of the results that state that the hair evidence would be preserved for testing "in the future if the need arises." Finally, counsel referenced the Trace Worksheet, which was attached to the Application, that listed the hairs from panties and small hair on ligature as "returned to agency". Counsel explained that this final worksheet and note clearly established that there were multiple hairs that were not only unknown to Applicant but simply returned to the agency without testing.

Relying upon the Trace Department Report, counsel explained that the need had arisen for such testing, and went onto explain "why it mattered" that the testing be conducted. Counsel explained that Applicant was viewed by the officers the next

morning with no scratches despite the evidence of a struggle. Trial Transcript, Vol. 1, pp. 22-23. Furthermore, no matches were made to Applicant's DNA sample from the rape kit, the swabs from the table next to the victim or the couch cushions, and there remained unmatched fingerprints from the scene. Trial Transcript, Vol. 1, p. 43, Vol. 2, pp. 22-24. Most importantly, counsel referenced the trial court's closing comments that he had never seen a case like this and that there was nothing in the record to show why Applicant did it. Trial Transcript, Vol. 2, pp. 189-90. Counsel explained what was in the record, was evidence of third party guilt as to Eric Burts and possibly Ted Waldman.

At trial, it was established that Mr. Waldman was in the victim's apartment when officers arrived and he was taken back to the station for questioning. Trial Transcript, Vol. 1, pp. 16, 72. Also, four prints were matched to Mr. Waldman from a bag of beer in the apartment, but there were other unmatched prints. Trial Transcript, Vol. 1, pp. 43-44. Mr. Waldman testified that he met the victim the week before the murder and he was at the victim's residence on the night in question. Trial Transcript, Vol. 2, pp. 42-44. He explained that he found the victim deceased the following day. Trial Transcript, Vol. 2, pp. 45-6. He admitted that the victim had been using crack and he shared a joint with her on the night in questions. Trial Transcript, Vol. 2, pp. 51-2.

Turning to Eric Burts, it was established at trial that he was in the victim's apartment at 6:00 p.m. and 12:00 a.m. on the night in question and the victim had five pages to him on her phone records. Trial Transcript, Vol. 1, pg. 105. He testified that the victim paged him for crack, and he went and sold it to her. Trial Transcript, Vol. 2, p. 54. He testified that he returned two more times, and the third time was around 12:00 a.m. with Benny Irby and Michael Richardson. Trial Transcript, Vol. 2, pp. 55-6. He testified

that he left out the back door.³ Trial Transcript, Vol. 2, p. 58, ln. 2. He explained that he took Richardson's car from about 12:00 a.m. to 2:15 am, during which time he was at Carolyn Bell's house. Trial Transcript, Vol. 2, pp. 61, 70-1.

Counsel also referenced the trial testimony of Raumell Vaughn and Michael Richardson. Mr. Vaughn testified that he lived at the victim's apartment complex. Trial Transcript, Vol. 2, p. 120. On the night in question, he was in the parking lot and saw three to four guys between buildings, which was by the back of the victim's apartment. Trial Transcript, Vol. 2, p. 122. He recalled seeing two of the guys holding up one guy, identified as Burts, whose pants were falling down. Trial Transcript, Vol. 2, pp. 123-4.

Michael Richardson testified that he provided Burts a ride to the victim's apartment complex, where he dropped him off at the back of the victim's apartment. Trial Transcript, Vol. 2, pp. 131-2. He also explained that Burts borrowed his car for two hours. Trial Transcript, Vol. 2, p. 132.

Turning briefly to the PCR transcript, counsel highlighted the testimony of Carolyn Bell, where she explained that Burts' testimony regarding being with her was a lie. PCR Transcript pp. 35-7. She explained that she only saw him for twenty minutes and was not clear if it was even on the night in question. PCR Transcript pp. 35-7.

After briefly addressing the prior testimony, counsel argued that the trial and PCR transcript in conjunction with Applicant's discovery of the information contained in the SLED file clearly demonstrate that without his knowledge key evidence has remained untested, which is vital to his trial claim of third party guilt and continued claim of innocence. In the words of the SLED report, counsel argued that the need has arisen for

³ At trial, it was established that the ligature was found on the victim's back porch by the dumpster. Trial Transcript, Vol. 1, p. 91.

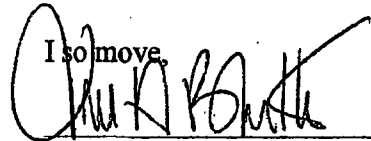
these untested hairs to be tested. Counsel further argued that if Applicant would have had this information at the time of his trial or PCR hearing, he would have requested that these hairs be tested. Unfortunately, the funds have not been made available for the Applicant to obtain this testing through the "Access to Justice Post Conviction DNA Testing Act," but it is clear from this Act that the legislature understands the technological advancements made in the area of forensic science and the risk of wrongful imprisonment without the use of such advancements. Applicant has not abandoned his claim due to the lack of funding and has retained private counsel and a private forensic scientist to conduct the testing. Therefore, Applicant's counsel urged this Court to find that good cause existed for the requested discovery and scientific testing and for his Application to proceed under a claim of newly discovered evidence.

Applicant's counsel also asked this Court to consider the recent United States Supreme Court decision in Skinner v. Switzer, 131 S.Ct. 1289 (2011), a copy of which was provided to this Court. Defendant (Skinner) was convicted of murdering his girlfriend and her two sons after he was found in the home. At trial, he claimed that an alcohol and drug mix rendered him incapacitated at the time of the murders. Id. at 1293-4. After Texas enacted a statute six years after his conviction for post conviction DNA testing, defendant moved twice unsuccessfully for DNA testing of an untested knife, axe handle, vaginal swabs, fingernail clippings and hair. Id. at 1295. After determining that defendant had a cognizable claim under 42 U.S.C. §1983, the Court remanded to the lower court for a ruling on defendant's due process argument for the requested testing. Id. at 1298-99. After briefly addressing Skinner, counsel asked this Court to consider that Skinner's claim was recognized by the U.S. Supreme Court and urged this Court to

address Applicant's request for testing at the state level, so he did not have to appeal to the federal courts.

Based upon the foregoing arguments, in conjunction with those presented in the pleadings and at the motion hearing, Applicant respectfully requests that this Court direct the entry of a new judgment and allow Applicant to proceed with discovery and his claim on newly discovered evidence.⁴ Alternatively, Applicant requests that this Court ensure that the Order of Dismissal with Prejudice fully addresses Applicant's issues and arguments pursuant to Marlar v. State, 375 S.C. 407, 653 S.E.2d 266 (2007).

I so move,



Tricia A. Blanchette
Attorney for the Applicant
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008

January 13, 2012
Columbia, South Carolina

⁴ Applicant also respectfully requests that this Court conduct a hearing on the instant motion before issuing a decision.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Orlando F. Smith, 267982,)
 Applicant,)
 v.)
)
 STATE OF SOUTH CAROLINA,)
 Respondent,)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2010-CP-23-7261

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for the Applicant, hereby certify that placed in the United States Mail on this 18th day of January 2012, a copy of a Motion for Rehearing and/or Motion to Alter or Amend, with postage prepaid and the return address clearly shown on said envelope to Karen C. Ratigan with the Office of the Attorney General at:

Office of the Attorney General
 ATT: Karen C. Ratigan, Esq.
 P.O. Box 11549
 Columbia, SC 29211



Tricia A. Blanchette
 PO Box 12725
 Columbia, SC 29211
 (803) 988-0008
 Attorney for Applicant

January 18, 2012

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Orlando Fonte Smith,)
 S.C.D.C. No. 267982,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2010-CP-23-7261

**RETURN TO MOTION FOR REHEARING
 AND/OR TO ALTER OR AMEND
 THE ORDER OF DISMISSAL**

TO: TRICIA A. BLANCHETTE, ESQ., ATTORNEY FOR THE APPLICANT

Respondent, by and through undersigned counsel, making Return to Applicant’s “Motion for Rehearing Pursuant to Rule 59(a), SCRPC, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRPC,” would respectfully show unto this Court:

1. The matter is before the Court by way of post-conviction relief action filed September 1, 2010.
2. A motion hearing was held on November 10, 2011 at the Greenville County Courthouse.
3. Applicant was present at the hearing and represented by Tricia A. Blanchette, Esquire. Respondent moved for summary dismissal of the action, arguing it was untimely and successive. Applicant objected to dismissal and made a motion for discovery.
4. After a full review of the evidence presented at the motion hearing, the post-conviction relief court issued an order dated December 20, 2011 and filed December 29, 2011. This order granted Respondent’s motion to dismiss and denied Applicant’s motion for discovery.

5. Applicant – through counsel – filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCPP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCPP dated January 18, 2012 (which was received by Respondent on January 19, 2012).

6. Applicant moves this Court to ensure “that specific findings of fact and conclusions of law are entered on the issues and arguments set forth in the written pleadings and presented at the motion hearing.” Applicant then recounts all of the evidence raised in the PCR application and exhibits and at the motion hearing.

7. Applicant moves this Court to “direct the entry of a new judgment and allow Applicant to proceed with discovery and his claim on newly discovered evidence.”

8. Respondent submits the Motion should be denied because it is not necessary for the final order to include a detailed recitation of all of the arguments advanced by Applicant. The order rules upon the issue raised and notes that the pleadings were reviewed by the Court.

9. Respondent submits the Motion should be denied because Applicant failed to meet his burden of proving he is entitled to discovery during this second PCR application stemming from a July 2000 trial.

10. Respondent submits the Motion should be denied because post-conviction relief should not be used as a remedy merely because the Post-Conviction DNA Testing and Preservation of Evidence Act was not funded by the General Assembly.

11. Respondent submits that, to the extent Applicant filed the Motion under Rule 59(e), SCRCPP, he is not requesting either an alteration or amendment to the final order. Rather, Applicant is asking the Court to reverse its decision and grant relief. Such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues

raised to but not ruled upon by the trial court)

12. Respondent submits the post-conviction relief court fully reviewed and properly ruled upon all issues and that the Motion should be denied.

13. Respondent further submits Applicant's request for a hearing on this Motion should be denied as unnecessary.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

January 23, 2012

STATE OF SOUTH CAROLINA)
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 COUNTY OF GREENVILLE)
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 ORLANDO FONTE SMITH, 267982)
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 Applicant,)
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 vs)
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 STATE OF SOUTH CAROLINA,)
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 Respondent.)
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IN THE COURT OF COMMON PLEAS

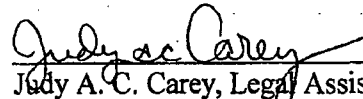
2010-CP-23-7261

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 to Motion for Rehearing and/or to Alter or Amend the Order of Dismissal** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Tricia A. Blanchette, Esquire
 Post Office Box 12725
 Columbia SC 29211

DATED this 23rd day of January, 2012.


 Judy A. C. Carey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 Orlando Fonte Smith,)
 S.C.D.C. No. 267982,)
)
 Applicant,)
)
 v.)
)
 State of South Carolina,)
)
 Respondent.)

IN THE COURT OF COMMON PLEAS
 2010-CP-23-7261

ORDER

FILED-CLERK OF COURT
 GREENVILLE CO., S.C.
 PAUL B. WICKFASINGER
 2012 FEB - 8 PM 1:03

The above-captioned case is a post-conviction relief matter arising from an application filed September 1, 2010. A motion hearing was convened on November 10, 2011 and the final order of dismissal was signed by this Court on December 20, 2011 and filed on December 29, 2011.

This matter is back before the Court by way of Applicant's Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP dated January 18, 2012. Respondent made its return to this motion on January 23, 2012.

Based upon reconsideration of the evidence in this case and upon full consideration of both Applicant's motion and supporting memorandum and Respondent's return, this Court is not persuaded to alter or amend the judgment.¹ In issuing the order of dismissal in this case, this Court considered both the filings and arguments from both parties. The order of dismissal fully comports with the requirements of Rule 52(a) SCRCP and contained proper findings of fact and conclusions of law. Further, this Court finds Applicant's motion was not requesting an alteration

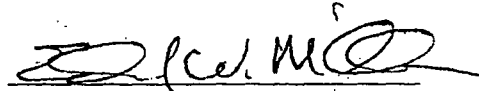
¹ This Court does not find that a hearing on this motion is necessary.

or amendment to the final order but was instead asking this Court to reverse its decision and grant relief. This Court finds such a request is more properly addressed through the appellate process. See Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e) motion is to preserve issues raised to but not ruled upon by the trial court).

IT IS THEREFORE ORDERED:

1. That Applicant's motion is denied and dismissed.

AND IT IS SO ORDERED this 7 day of February, 2012.



Edward W. Miller
Presiding Judge
Thirteenth Judicial Circuit

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED

MAR 21 2012

Honorable Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

Case No.: 2010-CP-23-7261

Orlando Fonte Smith,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

NOTICE OF APPEAL

Orlando Fonte Smith, Petitioner, through undersigned counsel, appeals the Order of Dismissal with Prejudice issued by the Honorable Edward W. Miller on December 20, 2011, which was filed on December 29, 2011. The Petitioner, through counsel, received notice of the entry of the Order of Dismissal via mail on January 9, 2012. The Petitioner, through counsel, also appeals the Order issued by the Honorable Edward W. Miller on February 7, 2012, which was filed on February 8, 2012. The Petitioner, through counsel, received notice of this Order via mail on February 21, 2012.



Tricia A. Blanchette
PO Box 12725
Columbia, SC 29211
(803) 988-0008
Attorney for Petitioner

Other Counsel of Record:

Karen C. Ratigan
Assistant Attorney General
PO Box 11549
Columbia, SC 29211

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

Honorable Edward W. Miller, Circuit Court Judge

Case No.: 2010-CP-23-7261

RECEIVED

MAR 21 2012

S.C. Supreme Court

Orlando Fonte Smith,.....Petitioner,

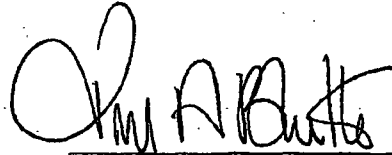
vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney for Petitioner, hereby certify that I placed in the United States Mail on this 21st day of March 2012, a copy of the Notice of Appeal, with postage prepaid and the return address clearly shown on said envelope to Karen C. Ratigan with the Office of the Attorney General at:

Office of the Attorney General
Att: Karen C. Ratigan, Ast. AG
P.O. Box 11549
Columbia, SC 29211



Tricia A. Blanchette
Attorney for Petitioner
PO Box 12725
Columbia, SC 29211

March 21, 2012



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

April 2, 2012

Tricia A. Blanchette, Esquire
Law Office of Tricia A. Blanchette, LLC
P.O. Box 12725
Columbia, SC 29211

Re: Smith, Orlando Fonte v. The State

Dear Ms. Blanchette:

This Office has received a notice of appeal in the above post-conviction relief action. Since the order of the circuit court determined that this action is barred as being successive and as being untimely under the statute of limitations, Rule 243(c), SCACR, requires you to provide a written explanation as to why this determination was improper. This explanation must contact sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. The failure to make a sufficient showing may result in the dismissal of this matter.

In the event you determine that you do not have a good faith explanation to provide pursuant to Rule 243(c), you must provide this Court with a letter stating that as an officer of the Court you are unable to set forth any arguable basis for asserting the determination by the PCR judge was improper. The letter should also advise petitioner that he has twenty (20) days from the date of the letter to file a *pro se* explanation as to why the petitioner believes that this determination by the circuit was improper. Dennison v. State, 371 S.C. 221, 639 S.E.2d 35 (2006). The letter filed with this Court should include proof of service showing that a copy of the letter has been sent to the petitioner.

I ask that you either provide the explanation required by Rule 243(c) or the response permitted by Dennison within ten (10) days of the date of this letter.

Very truly yours,



CLERK

DES/jj

cc: Appellate Defense
Orlando Forte Smith #267982
Assistant Attorney General Karen Ratigan

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Post Conviction Relief

RECEIVED

APR 12 2012

Honorable Edward W. Miller, Circuit Court Judge **S.C. Supreme Court**

Case No.: 2010-CP-23-7261

Orlando Fonte Smith,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

EXPLANATION PURSUANT
TO RULE 243(c), SCACR

Pursuant to Rule 243(c), SCACR, Petitioner, through undersigned counsel, provides the following explanation to show that there is an arguable basis for asserting that the determination by the lower court regarding the statute of limitations, successive nature of his Application and discovery motion is improper.

This matter comes before the Court by way of an Application for Post Conviction Relief filed on September 1, 2010, a copy of which is attached. The State submitted a Return and Motion to Dismiss and Conditional Order of Dismissal on or about December 22, 2010. On January 5, 2011, the Honorable Robin B. Stilwell signed the Conditional Order of Dismissal, which was filed on January 20, 2011. Petitioner, through counsel, submitted a Response to Conditional Order of Dismissal on February 11, 2011, and Motion for Discovery in Post Conviction Relief on October 25, 2011, a copy of each is

attached. Thereafter, the Honorable Robin B. Stilwell ordered a hearing on the State's Motion to Dismiss.

A motion hearing was convened at the Greenville County Courthouse on November 10, 2011. Petitioner was present and represented by Tricia A. Blanchette, Esquire. The State was represented by Karen C. Ratigan, Assistant Attorney General. On December 20, 2011, an Order of Dismissal with Prejudice was signed by the Honorable Edward W. Miller, which was filed on December 29, 2011.

On January 20, 2012, Petitioner, through counsel, filed a Motion for Rehearing Pursuant to Rule 59(a), SCRCP, and/or Motion to Alter or Amend Pursuant to Rule 59(e), SCRCP. On January 23, 2012, the State submitted a Return to Motion for Rehearing and/or to Alter or Amend. On February 7, 2012, the Honorable Edward W. Miller signed an Order denying Petitioner's Motion, which was filed on February 8, 2012. On March 21, 2012, Petitioner filed a Notice of Appeal, from which this Explanation follows.

Explanation

During the motion hearing before the Honorable Edward W. Miller, Petitioner's counsel referenced the written discovery motion and explained that Petitioner was asking for discovery pursuant to S.C. Code Ann. § 17-27-150 (a) (2008) to fully establish his claim of newly discovered evidence. Also, as was addressed in the Application and Response to Conditional Order of Dismissal, Petitioner's counsel explained that he was claiming newly discovered evidence due to his recent receipt of his complete SLED file, which brought irregularities and information regarding evidence to his attention that was not previously known to him. Finally, Petitioner's counsel explained that upon discovery

of said information, Petitioner attempted to file an Application under the "Access to Justice Post Conviction DNA Testing Act", which was returned by the Greenville County Clerk of Court unprocessed. S.C. Code Ann. §f 17-28-10 (2009). Therefore, Petitioner was pursuing the matter through a Post Conviction Relief Application.

Specifically, Petitioner's counsel explained how Petitioner discovered the issue, what Petitioner was requesting of the lower court and why it mattered. As to the "how", counsel explained that Petitioner found out about the "Access to Justice Post Conviction DNA Testing Act" and wrote to the Greenville County Clerk of Court to obtain an Application in February 2009. To ensure that he would have the information needed to complete the Application, Petitioner submitted a request to SLED for his complete file on February 11, 2009. On May 7, 2009, SLED responded to Petitioner with the fee for the file, and Petitioner received the file from SLED on September 16, 2009. Thereafter, Petitioner completed and submitted his DNA Application in December 2009. In January 2010, the Application was promptly returned to him unfiled with a copy of South Carolina Supreme Court Order dated April 10, 2009.¹ When Petitioner discovered that his DNA Application would not be processed, he began working on retaining private counsel and a forensic scientist.² Petitioner also discovered that the SLED file contained information that was not previously known to him regarding the failure to test evidence in his case.

Regarding "what" was at issue, Petitioner's counsel explained that Petitioner was informed by counsel prior to trial that no hairs were taken into evidence that matched his

¹ By way of the Order dated April 10, 2009, this Court held the Act inactive until funds were appropriated by the Legislature or federal government. Petitioner submits that the question of how to proceed with a DNA claim in light of this Court's Order is a novel question involved in the instant appeal.

² A copy of Dr. Robert Bennett's curriculum vitae was attached to Petitioner's Response to Conditional Order of Dismissal.

hair sample. PCR Transcript p. 55. At trial, Agent Kimberly Black, from SLED, testified as follows: "I received a hair sample that was actually collected from a ligature with a small stick... there were some miscellaneous hairs taken from the victim's body, one hair from the victim's stomach, hair from the victim's navel and hair from the victim's right knee". Trial Transcript, Vol.2, p. 30, lines 18-19, 25, p. 31, lines 1-2. Agent Black explained that the hairs were not tested since there was a policy in place that they did not test hair evidence in cases with blood evidence. Trial Transcript, Vol. 2, p. 33, lines 8-11.

Turning to the documentation Petitioner obtained from SLED, counsel noted that the Evidence Inventory Sheets reflected a ligature with a small stick, but did not reference any hair found on the ligature. These sheets, which were attached to the Application, also reflected instructions to test the ligature and small stick (Item 18). Petitioner's counsel explained that Petitioner recalled receiving these evidence sheets reflecting no hair on the ligature in discovery prior to trial.

Petitioner's counsel also noted the Case Note Cover Sheets, with examiner initials LGK, a copy of which was attached to the Application. Specifically, the notes from February 9, 1999 indicated that the agent was to look for hair on Item 18 (ligature) and then a note was entered two hours later to "collect the hair and return to agency." Subsequent notes from June 29, 1999 indicated that Gene Donahue wanted the panties and ligature tested and "everything else can be returned" because "most of the evidence would not need to be processed." Petitioner's counsel explained that this note contradicted the letter Petitioner's PCR counsel received stating that all evidence was returned to the Greenville County Sheriff's Department in March of 1999, a copy of which was attached to the Response to Conditional Order of Dismissal. Counsel further

explained that this document was not seen by Petitioner prior to his recent receipt of it from SLED nor did he have knowledge of the decision to return the evidence without testing it.

Petitioner's counsel also introduced a Case Note Cover Sheet, with the examiner initials KTB, with notes that indicated the following: Item 18 was not processed for blood, he (Gene Donahue) wants DNA run on hair, the evidence was placed on shelf to be processed for blood and hair, let processing know to return hair with evidence, if blood on #18 won't need to analyze hair, will wait to hear from officer on how to proceed with hair. Petitioner's counsel explained that this document was not seen by Petitioner prior to his receipt of it from SLED nor was he aware of the initial instruction to test the hair, which was not completed.

Petitioner's counsel also referenced a Trace Department Report, which was dated January 21, 1999, which was attached to the Application. This report lists the ligature as Item 18, but does not reference the hair that was testified about at trial. Counsel explained that Petitioner did not see this report prior to trial and was not aware of the conclusion that stated that the hair evidence would be preserved for testing "in the future if the need arises." Finally, counsel referenced the Trace Worksheet, which was attached to the Application, that listed the hairs from panties and small hair on ligature as "returned to agency". Counsel explained that this final worksheet and note clearly established that there were multiple hairs that were not only unknown to Petitioner but simply returned to the agency without testing.

Relying upon the Trace Department Report, counsel explained that the need had arisen for such testing, and went onto explain "why it mattered" that the testing be

conducted. Counsel explained that Petitioner was viewed by the officers the next morning with no scratches despite the evidence that the victim struggled with her assailant. Trial Transcript, Vol. 1, pp. 22-23. Furthermore, no matches were made to Petitioner's DNA sample from the rape kit, the swabs from the table next to the victim or the couch cushions, and there remained unmatched fingerprints from the scene. Trial Transcript, Vol. 1, p. 43, Vol. 2, pp. 22- 24. Most importantly, counsel referenced the trial court's closing comments that he had never seen a case like this and that there was nothing in the record to show why Petitioner did it. Trial Transcript, Vol. 2, pp. 189-90. Counsel explained what was in the record, was evidence of third party guilt regarding Eric Burts and possibly Ted Waldman.

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After briefly addressing the prior testimony, counsel argued that the trial and PCR transcript in conjunction with Petitioner's discovery of the information contained in the SLED file clearly demonstrated that without his knowledge key evidence had remained

³ At trial, it was established that the ligature was found on the victim's back porch by the dumpster. Trial Transcript, Vol. 1, p. 91.

untested, which was vital to his trial claim of third party guilt and continued claim of innocence. In the words of the SLED report, counsel argued that the need had arisen for these untested hairs to be tested. Counsel further argued that if Petitioner would have had this information at the time of his trial or PCR hearing, he would have requested that these hairs be tested. Additionally, counsel explained that the funds had not been made available for Petitioner to obtain this testing through the "Access to Justice Post Conviction DNA Testing Act," but it is clear from the Act that the legislature understands the technological advancements made in the area of forensic science and the risk of wrongful imprisonment without the use of such advancements. Petitioner did not abandon his claim due to the lack of funding, and he retained private counsel and a private forensic scientist to conduct the testing. Therefore, Petitioner's counsel urged the lower court to find that good cause existed for the requested discovery and scientific testing and for his Application to proceed under a claim of newly discovered evidence.

Petitioner, through counsel, also asked the lower court to consider the recent United States Supreme Court decision in Skinner v. Switzer, 131 S.Ct. 1289 (2011). Defendant (Skinner) was convicted of murdering his girlfriend and her two sons after he was found in the home. At trial, he claimed that an alcohol and drug mix rendered him incapacitated at the time of the murders. Id. at 1293-4. After Texas enacted a statute six years after his conviction for post conviction DNA testing, defendant moved twice unsuccessfully for DNA testing of an untested knife, axe handle, vaginal swabs, fingernail clippings and hair. Id. at 1295. After determining that defendant had a cognizable claim under 42 U.S.C. §1983, the Court remanded to the lower court for a ruling on defendant's due process argument for the requested testing. Id. at 1298-99.

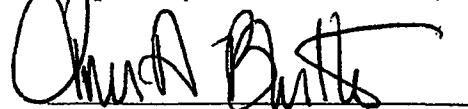
After briefly addressing Skinner, counsel asked the lower court to consider that Skinner's claim was recognized by the U.S. Supreme Court and urged the lower court to address Petitioner's request for testing at the state level, so he did not have to appeal to the federal courts.

Based upon the foregoing explanation of what was argued to the lower court, Petitioner submits that the lower court's ruling regarding the statute of limitations, successive nature of the Application and discovery motion is not supported by the record and an arguable basis exists for his appeal on the lower court's error to proceed. Interestingly, in the Order the lower court issued denying Petitioner's Motion for Rehearing and/or to Alter or Amend, the lower court reasoned that Petitioner's request "is more properly addressed through the appellate process." Therefore, Petitioner would urge this Court to allow his case to be properly addressed through the appellate process.

Conclusion

In conclusion, Petitioner would urge this Court to allow his case to proceed on appeal and/or remand to the lower court for the requested DNA testing and a full evidentiary hearing on the merits of his claim of newly discovered evidence.

Respectfully submitted,



Tricia A. Blanchette
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008
Attorney for Petitioner

This 9 day of April, 2012.

The Supreme Court of South Carolina

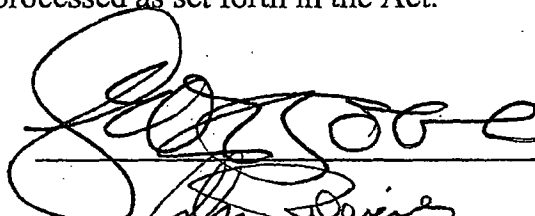

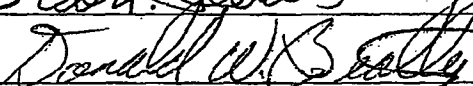
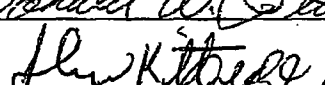
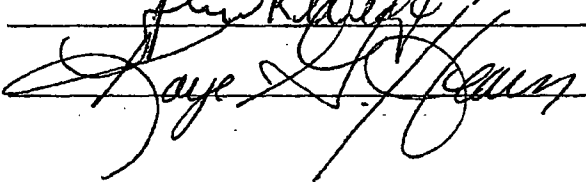
Orlando Fonte Smith, Petitioner,
v.
State of South Carolina, Respondent.

Appellate Case No. 2012-210211

ORDER

In the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, this matter is dismissed.

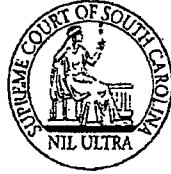
However, petitioner may submit another Application for DNA Testing to the Greenville County Clerk of Court pursuant to the Access to Justice Post Conviction DNA Testing Act, see S.C. Code Ann. § 17-28-10, et seq (Supp. 2011), and that application should be processed as set forth in the Act.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	J.

Columbia, South Carolina

May 29, 2012

cc: Tricia A. Blanchette
Karen Christine Ratigan



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 15, 2012

Paul B. Wickensimer
Courthouse
305 E North St
Greenville SC 29601-2121

REMITTITUR

Re: Orlando Fonte Smith v. The State
Lower Court Case No. 2010CP2307261
Appellate Case No. 2012-210211

Dear Mr. Wickensimer:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

cc: Tricia A. Blanchette
Karen Christine Ratigan

STATE OF SOUTH CAROLINA

COUNTY OF Greenville

Orlando F. Smith #267982
Name of applicant and Inmate number (if applicable)

OR

IN THE INTEREST OF

Juvenile

v.

State of South Carolina

) IN THE COURT OF (Select one)
) GENERAL SESSIONS
) FAMILY COURT
) JUDICIAL CIRCUIT

) APPLICATION FOR
) FORENSIC DNA TESTING

) ORIGINAL INDICTMENT NO.
) 98 -GS- 23- 5212

OR

) ORIGINAL PETITION NO.

) -JU-

FILED IN CLERK OF COURT
PAUL E. WICKENS
CLERK
GREENVILLE CO. SC

2012 MAR 29 PM 3:17

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may continue an answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the end of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted or adjudicated.

I understand that DNA testing is only available if I have been convicted or adjudicated of an offense listed in S.C. Code Ann. § 17-28-30, that I am currently incarcerated for that offense, and that I am asserting that I am innocent of the offense. Further, if the conviction or adjudication was the result of a plea of guilty or nolo contendere, the application must be filed within seven years of the date of sentencing.

- 1. Identify the proceedings in which the applicant was convicted or adjudicated:

Jury Trial

2. Give the date of the entry of the judgment and sentence: July 19, 2000
- and current place of incarceration: Kershaw Correctional Institution
3. Identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication:
- (a) Direct Appeal: Failure To Direct A Verdict of Acquittal
- (b) PCR: Ineffective Assistance of Counsel
- (c) Petition For Writ Certiorari: SAME AS (B) cont. on Back
4. Make a reasonable attempt to identify the physical evidence or biological material that should be tested:
- Hairs, Ligature, Finger Prints, & Blood
- Identify the specific type of DNA testing being sought: Test In Which
Identifiable Information Can Be Obtained
5. Explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity:
- There Was 2 other Individuals That
Where With The Victim And DNA
Testing Can Exclude Applicant
6. Explain why the physical evidence or biological material sought to be tested was not previously subjected to DNA testing, or if the physical evidence or biological material sought to be tested was previously subjected to DNA testing, provide the results of the testing and explain how the requested DNA test would provide a substantially more probative result:
- Before Trial, Applicant Trial Attorney Told Him That

DNA Testing Had Been Done And Nothing Matched Him.
At Trial, Sled Agents Testified That DNA Test Were
Never Done. Nine Years Later, Sled Released All → cont
 on back

7. Explain why if the DNA testing produces exculpatory results, the testing will constitute new evidence that will probably change the result of the applicant's conviction or adjudication if a new trial is granted and is not merely cumulative or impeaching:

There Where 3 suspects IN This Case. DNA
Testing Would Exclude The Applicant And Prove
That Someone Else Did This Crime.

8. I assert that I am actually innocent of the listed offense, that this offense is listed in S.C. Code Ann. § 17-28-30 and that I am currently incarcerated for the listed offense. I attest that this application is made to demonstrate innocence and not solely to delay the execution of a sentence or the administration of justice.

9. If DNA testing is conducted and results are determined to be inculpatory by the Court, I understand that:

- (a) The Court may hold me in contempt of court if it determines that my assertion of actual innocence was intentionally false;
- (b) The Court may assess the cost of any DNA testing against me;
- (c) The South Carolina Department of Corrections may use this determination to deny good conduct credit; and,
- (d) The Department of Probation, Parole, and Pardon Services can use this determination to deny parole.

Orlando F. Smith
 Print Applicant Name

Orlando F. Smith
 Signature of Applicant

STATE OF SOUTH CAROLINA)

County of Greenville)

VERIFICATION

I Orlando F. Smith, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; and that the matters and allegations set forth are true.

Orlando F. Smith
Signature of Applicant

SWORN to and subscribed before me this 23rd
day of February, 2012

Mischa Michel (L.S.)
Notary Public

My Commission Expires: 9-3-2014

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Rafando F. Smith, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Rafando F. Smith
Signature of Applicant

SWORN to and subscribed before me this 23rd
day of February, 2012

Mischa Michel (L.S.)
Notary Public

My Commission Expires: 9-3-2014



Office of the Clerk of Court
Greenville, South Carolina

Paul B. Wickensimer
Clerk of Court

Circuit Court Division
Greenville County Courthouse
305 East North Street
Greenville, South Carolina 29601
(864) 467-8551 FAX (864) 467-8540

COPY

March 20, 2012

Orlando F. Smith #267982
K.C.I.
PA-10
4848 Goldmine Hwy
Kershaw, SC 29067

Re: Application for Forensic DNA Testing 98-GS-23-5212

Dear Mr. Smith:

We are in receipt of your Application for Forensic DNA Testing. Your application has been filed and a copy forwarded to the Administrative Judge for General Sessions and to the Solicitor's Office. Enclosed please find a copy of your clocked application as you requested.

Sincerely,
Paul B. Wickensimer
Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Orlando F. Smith #267982,

v.

The State of South Carolina,

Defendant

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

ORIGINAL INDICTMENT #: 1998-GS-23-05212

E658057

ORDER APPOINTING SCACR 608 COUNSEL

FILED-CLERK OF COURT
PAUL E. WOODENBARGER
GREENVILLE, SC
2012 MAR 21 PM 4:00

IT IS SO ORDERED that the next counsel on the Rule 608 Appointment list be appointed as counsel for the movant in this matter.

March 21, 2012



Letitia H. Verdin
Circuit Judge

STATE OF SOUTH CAROLINA)
)
 COUNTY OF GREENVILLE)
)
 STATE OF SOUTH CAROLINA)
)
 vs)
)
 ORLANDO FONTE SMITH,)
)
 DEFENDANT.)

IN THE COURT OF GENERAL SESSIONS

1998 GS 23 5212

E658057

**STATE'S RESPONSE TO
DEFENDANT'S APPLICATION
FOR FORENSIC DNA TESTING**

FILED
 IN THE
 COURT
 2012 JUN 19 PM 2:05

This matter comes before the Court by way of Defendant's Application for Forensic DNA Testing pursuant to Section 17-28-10 et seq. of the South Carolina Code of Laws.

Defendant was convicted after a jury trial on July 19, 2000 for the offense of murder.

The Access to Justice Post Conviction DNA Testing Act (Section 17-28-10 et seq.) authorizes the application by convicted defendants for forensic DNA testing that may affect their conviction. The Act describes the form and content of the defendant's application as well as the procedure by which the testing is to be conducted.

The Act also addresses the extent to which costs of post conviction DNA testing are to be borne by the applicant or, if the applicant is deemed indigent, the State. S.C. Code § 17-28-60 and § 17-28-90(F). Specifically, "[i]f the applicant is unable to pay court costs and expenses of counsel, these costs and expenses shall be made available to the applicant in the amounts and to the extent provided pursuant to Section 17-27-60." S.C. Code § 17-28-60. Section 17-27-60 notes that "these costs and expenses shall be made available to the applicant in the trial court, and on review, in amounts and to the extent funds are made available to indigent defendants by

the General Assembly." The State is not aware of any funding made available by the General Assembly to supply the associated costs of either representation or DNA testing.

Furthermore, the State maintains that Defendant's application is not timely. According to Section 17-28-30(B), "[a] person who pled guilty or nolo contendere to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing" (emphasis added).

Defendant/Applicant was convicted and sentenced on July 19, 2000. The State received Defendant's application for DNA testing on February 23, 2012, which is well beyond seven years from the date of sentencing.

In addition, the Act requires that the applicant specifically articulate the basis for his request for additional testing, noting that the applicant must make a reasonable attempt to identify the physical evidence that should be tested and the specific testing sought. On the application, Defendant lists only "hairs, ligature, finger prints and blood." The State maintains that this mere listing of items does not identify the particular items of evidence of which Defendant requests testing. To the extent that any of these items can be subjected to DNA analysis, Defendant has not described the specific testing sought. Defendant requests "test in which identifiable information can be obtained."

The Act requires that the applicant explain why the identity of the applicant was or should have been a significant issue during the original proceedings. Defendant explains in his application that "there was 2 other individuals that where with the victim and DNA testing can exclude applicant" [sic]. Without more, Defendant's application fails to indicate how any additional DNA testing would inculcate anyone other than Defendant.

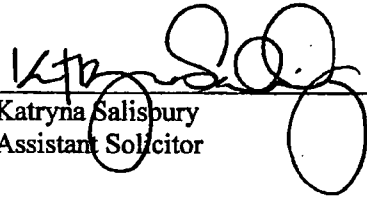
The Act also requires that the applicant explain why material to be tested was not previously subjected to testing or why additional testing would provide a substantially more probative result. Defendant indicates in his application that at trial, testimony was presented that DNA testing was not performed. Defendant's remarks are not responsive as to the issue of why additional testing would provide probative results.

Finally, the Act requires that the applicant explain why, if the testing were to produce exculpatory results, the results will constitute new evidence that would change the results of the applicant's conviction. Defendant has not explained why the results of this test would constitute new evidence or why the results would implicate someone else. Defendant's application notes that "there where 3 suspects in this case. DNA testing would exclude the applicant and prove that someone else did this crime" [sic]. The mere presence of other DNA at the crime scene would not change the evidence presented at trial. Specifically, at trial, the State presented expert testimony regarding a fingerprint on the victim's arm. That print had been made in blood. The expert testimony offered was that the print belonged to Defendant. If DNA results were to demonstrate that other individuals had been inside the victim's apartment, that information would not provide evidence inconsistent with the State's theory of the case. More importantly, it would not demonstrate evidence that would suggest

anyone other than Defendant was responsible for the murder. Defendant does not describe how DNA testing would exclude Defendant to the extent that it would change the outcome of the trial.

The State respectfully asks that the Court deny Defendant's Application for Forensic DNA Testing based on the fact that the authorizing legislation has not been funded by the General Assembly; that Defendant's application is not timely; and Defendant has not articulated why DNA testing would prove probative or change the outcome of his trial.

Respectfully submitted,



Katryna Salisbury
Assistant Solicitor

June 19, 2012

State of South Carolina
County of Greenville

Orlando F. Smith #267982

v.

State of South Carolina

In The Court of General
Sessions

13th Judicial Circuit
Affidavit For Entry of
Default Judgement

2012 JUN 18 PM 4:09

Comes Now, Pro Se who By And Through Himself
In The Above Entitled Action, Pursuant To Rule 55
(a), SCRCP And Post-Conviction DNA Testing & Preser-
vation of Evidence Article 1, Post Conviction DNA
Procedures Section 17-28-50 (a) & (b)

- 1) That He Is Representing Himself Pro Se Without
The Assistance of Counsel.
- 2) That The State of South Carolina, County of
Greenville Was Served With A Copy of Petition For
DNA Testing, A Copy File Dated March 20, 2012
With The Greenville County Clerk of Court.
- 3) That This Matter Is Pending Before The And
That It Has Been Over Ninety (90) Calendar Days
That The State Has Not Responded or Otherwise
Offered To Respond.
- 4) That The Defendant Is Entitled By Law
To Have A Judgement of Default Entered
In His Favor.

State of South Carolina
County of Greenville
Orlando F. Smith #267982,
V.
State of South Carolina

In The Court of General Sessions

CA/NO 98GS-23-5212

Motion For Entry of Default Judgement

2012 JUL 13 PM 4:09

The Applicant moves this Honorable Court Pursuant to Rule 55(a) S.R.C.P. For Entry of Default Judgement on the following grounds: The Respondent has failed to comply with clearly established procedure outlined in Art. 1 17-28-50 (a) + (B) Post Conv. DNA Procedure.

Orlando F. Smith

ORLANDO F. SMITH #267982
KCI OAKA-4
4848 Gold Mine Hwy.
Kershaw, SC 29067

Sworn To And Subscribed Before Me. this ~~Day~~ Day of July, 2012

Catherine A. Crosser
Notary Public

My Commission Expires My Commission Expires December 22, 2018

cc: Solicitor of the Thirteenth Judicial Circuit
Administrative Judge For General Sessions
Greenville County Clerk /

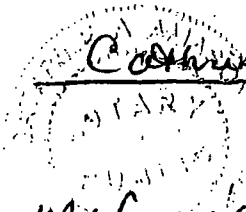
Respectfully Submitted,

Orlando F. Smith

ORLANDO F. SMITH #267982

K.C.I Oak A-4
4848 Goldmine Highway
Kershaw, SC 29067

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 5 DAY OF JULY,
2012

 Catherine A. Carrara
Notary Public

My Commission Expires My Commission Expires December 22, 2018

CC: Solicitor of The Thirteenth Judicial Circuit
Administrative Judge For General Sessions
Greenville County Clerk of Court



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Orlando Fonte Smith #267982,

Plaintiff,

v.

State of South Carolina,

Defendant.

) IN THE COURT OF GENERAL SESSIONS
) THIRTEENTH JUDICIAL CIRCUIT

Case No.: 1998-GS-23-05212


F 658051

ORDER

2012 AUG 8 PM 4:15

This matter comes before the Court on Applicant Smith's Application for Post-Conviction DNA Testing pursuant to S.C. Code § 17-28-10 et seq. Applicant filed this application on March 20, 2012. Applicant was convicted of murder and sentenced on July 19, 2000. Therefore, this Court finds that this Application for Post-Conviction DNA Testing is time-barred pursuant to S.C. Code § 17-28-30(B) ("A person who...was...convicted...for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing...no later than seven years from the date of sentencing.")

Therefore, Applicant Smith's Application for Post-Conviction DNA Testing is DENIED.



Letitia H. Verdin
Circuit Judge

August 8, 2012
Greenville, South Carolina

STATE OF SOUTH CAROLINA	) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	) FOR THE THIRTEENTH JUDICIAL CIRCUIT
)
Orlando F. Smith, #267982,	) Case No.: 1998-GS-23-05212
Plaintiff,)
v.	) MOTION TO ALTER/AMEND PURSUANT TO
State of South Carolina,	) Rule 59 (e), S.C.R.Civ.P.
<u>Defendant.</u>)

Now comes the above named Plaintiff, pro se, requesting this Honorable Court to direct the entry of a new judgement pursuant to 59(e), Motion to Alter and Amend the findings of fact and conclusions of law in the standing Order of Denial, signed by the Honorable Letitia H. Verdin, filed August 10, 2012. Which was received by the plaintiff on August 17, 2012. See Attachment (A).

This matter comes before the Court by way of Application for Post-Conviction DNA Testing, pursuant to S.C. Code Ann. §17-28-10 et sq. Plaintiff filed the application on March 20, 2012. Pursuant to section §17-28-50(a) & (b), The Defendant had (90) days to Answer but failed to. Plaintiff then filed for a Motion of Default on July 5, 2012. This Honorable Court then filed an Order of Dismissal pursuant to §17-28-30(B), from which this motion follows.

In Marlar v. State, 653 SE2d 266(2007), the State Supreme Court made it clear that a post-conviction judge must make specific findings of fact and state the conclusions of law relating to each issue presented. See also, S.C. Code Ann. § 17-27-80(2010). Therefore, plaintiff would respectfully request that this court ensure that specific findings of fact and conclusion of law are entered on the issue and the arguments set forth in these written pleadings. Furthermore, applicant would respectfully request that this Court carefully review the attachments to properly reconsider the findings of fact and conclusions of law set forth in the standing Order of Dismissal.

On the Court's Order of Dismissal, this Honorable Court states that the plaintiff's Post-Conviction DNA application was time barred pursuant to S.C.Code §17-28-30(B). This Honorable Court has applied the wrong code of law plaintiff's action.

If the Court may, please review the attachments (B & C), you will find

that the plaintiff does not fall under §17-28-30(B), but rather, §17-28-30(A), which states that a person who PLEAD NOT GUILTY to at least one of the following offenses: (1) Murder and asserts he is innocent of the offense may apply for DNA testing...

A review of the record reveals that plaintiff invoked his Constitutional Right to trial, and was found guilty by a jury on July 19, 2000. Plaintiff has always claimed his innocence, and still does. Therefore, since applicant has shown, by preponderance of evidence (Attachments and Trial Records) that S.C. Code, Ann. § 17-28-30(A) applies to this action, plaintiff asks this Honorable Court to Alter and Amend the Judgment of this action to reflect the correct conclusion of law and facts. As a result of such, applicant now requests this Honorable Court to issue and Order permitting applicant to proceed with the DNA testing prescribed by the statute. As held by the Supreme Court's Order of May 29, 2012. See Attachment (D)

131 Orlando F. Smith

Orlando F. Smith, #267982

Kershaw Corr. Inst. / MA-14

4848 Goldmine Hwy.

Kershaw, SC 29067

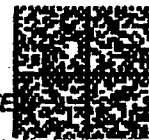
August 21, 2012

Attach (A)

AFTER FIVE DAYS RETURN TO
PAUL B. WICKENSIMER
GREENVILLE COUNTY CLERK OF COURT
305 EAST NORTH STREET
GREENVILLE, SOUTH CAROLINA 29601

RETURN SERVICE REQUIRED

REGISTERED
FIRST CLASS

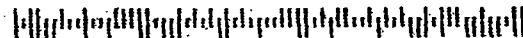


UNITED STATES POSTAGE
EAGLE
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0008003907 AUG14 2012
MAILED FROM GREENVILLE 29607

MAY

Orlando Fonte Smith #267982
K.C.I.
PA-10
4848 Goldmine Hwy
Kershaw, SC 29067

6688RMP 29067



RECEIVED
AUG 16 2012
KerCI
MAILROOM

Attach (B)

CHAPTER 28.

POST-CONVICTION DNA TESTING AND PRESERVATION OF EVIDENCE

ARTICLE 1.

POST-CONVICTION DNA PROCEDURES

SECTION 17-28-10. Citation of Article.

This article may be cited as the "Access to Justice Post-Conviction DNA Testing Act".

SECTION 17-28-20. Definitions.

For purposes of this article:

- (1) "Biological material" means any blood, tissue, hair, saliva, bone, or semen from which DNA marker groupings may be obtained. This includes material catalogued separately on slides, swabs, or test tubes or present on other evidence including, but not limited to, clothing, ligatures, bedding, other household material, drinking cups, or cigarettes.
- (2) "Custodian of evidence" means an agency or political subdivision of the State including, but not limited to, a law enforcement agency, a solicitor's office, the Attorney General's Office, a county clerk of court, or a state grand jury that possesses and is responsible for the control of evidence during a criminal investigation or proceeding, or a person ordered by a court to take custody of evidence during a criminal investigation or proceeding.
- (3) "DNA" means deoxyribonucleic acid.
- (4) "DNA profile" means the results of any testing performed on a DNA sample.
- (5) "DNA record" means the tissue or saliva samples and the results of the testing performed on the samples.
- (6) "DNA sample" means the tissue, saliva, blood, or any other bodily fluid taken at the time of arrest from which identifiable information can be obtained.
- (7) "Incarceration" means serving a term of confinement in the custody of the South Carolina Department of Corrections or the South Carolina Department of Juvenile Justice and does not include a person on probation, parole, or under a community supervision program.
- (8) "Law enforcement agency" means a lawfully established federal, state, or local public agency that is responsible for the prevention and detection of crime and the enforcement of penal, traffic, regulatory, game, immigration, postal, customs, or controlled substances laws.
- (9) "Physical evidence" means an object, thing, or substance that is or is about to be produced or used or has been produced or used in a criminal proceeding related to an offense enumerated in Section 17-28-30, and that is in the possession of a custodian of evidence.

SECTION 17-28-30. Offenses for which post-conviction DNA testing available.

(A) A person who pled not guilty to at least one of the following offenses, was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication:

- (1) murder (Section 16-3-10);
- (2) killing by poison (Section 16-3-30);
- (3) killing by stabbing or thrusting (Section 16-3-40);
- (4) voluntary manslaughter (Section 16-3-50);

Attach(C)

- (5) homicide by child abuse (Section 16-3-85(A)(1));
 - (6) aiding and abetting a homicide by child abuse (Section 16-3-85(A)(2));
 - (7) lynching in the first degree (Section 16-3-210);
 - (8) killing in a duel (Section 16-3-430);
 - (9) spousal sexual battery (Section 16-3-615);
 - (10) criminal sexual conduct in the first degree (Section 16-3-652);
 - (11) criminal sexual conduct in the second degree (Section 16-3-653);
 - (12) criminal sexual conduct in the third degree (Section 16-3-654);
 - (13) criminal sexual conduct with a minor (Section 16-3-655);
 - (14) arson in the first degree resulting in death (Section 16-11-110(A));
 - (15) burglary in the first degree for which the person is sentenced to ten years or more (Section 16-11-311(B));
 - (16) armed robbery for which the person is sentenced to ten years or more (Section 16-11-330(A));
 - (17) damaging or destroying a building, vehicle, or property by means of an explosive incendiary resulting in death (Section 16-11-540);
 - (18) abuse or neglect of a vulnerable adult resulting in death (Section 43-35-85(F));
 - (19) sexual misconduct with an inmate, patient, or offender (Section 44-23-1150);
 - (20) unlawful removing or damaging of an airport facility or equipment resulting in death (Section 55-1-30 (3));
 - (21) interference with traffic-control devices or railroad signs or signals resulting in death (Section 56-5-1030(B)(3));
 - (22) driving a motor vehicle under the influence of alcohol or drugs resulting in death (Section 56-5-2945);
 - (23) obstruction of railroad resulting in death (Section 58-17-4090); or
 - (24) accessory before the fact (Section 16-1-40) to any offense enumerated in this subsection.
- (B) A person who pled guilty or nolo contendere to at least one of the offenses enumerated in subsection (A), was subsequently convicted of or adjudicated delinquent for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing of his DNA and any physical evidence or biological material related to his conviction or adjudication no later than seven years from the date of sentencing.

SECTION 17-28-40. Form and contents of application.

- (A) The application must be made on such form as prescribed by the Supreme Court.
- (B) The application must be verified by the applicant and filed under the original indictment number or petition with the clerk of court of the general sessions court or family court in which the conviction or adjudication took place. Facts within the personal knowledge of the applicant and the authenticity of all documents and exhibits included in or attached to the application must be sworn to affirmatively as true and correct.
- (C) The application must, under penalty of perjury:
 - (1) identify the proceedings in which the applicant was convicted or adjudicated;
 - (2) give the date of the entry of the judgment and sentence and identify the applicant's current place of incarceration;
 - (3) identify all previous or ongoing proceedings, together with the grounds therein asserted, taken by the applicant to secure relief from his conviction or adjudication;
 - (4) make a reasonable attempt to identify the physical evidence or biological material that should be tested and the specific type of DNA testing that is sought;
 - (5) explain why the identity of the applicant was or should have been a significant issue during the original court proceedings, notwithstanding the fact that the applicant may have pled guilty or nolo contendere or made or is alleged to have made an incriminating statement or admission as to identity;

Attach (D)

The Supreme Court of South Carolina

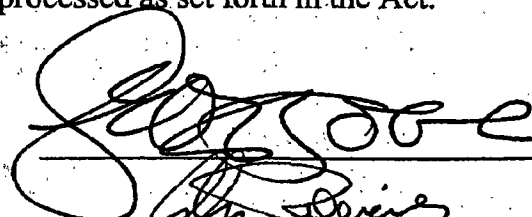

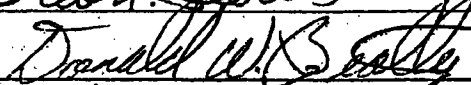
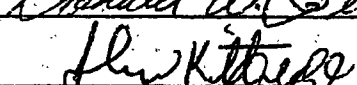
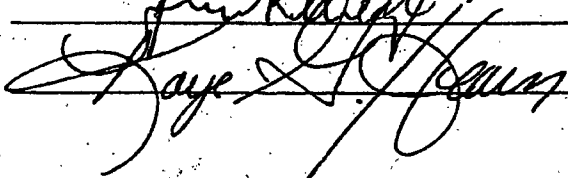
Orlando Fonte Smith, Petitioner,
v.
State of South Carolina, Respondent.

Appellate Case No. 2012-210211

ORDER

In the explanation required by Rule 243(c) of South Carolina Appellate Court Rules (SCACR), petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, this matter is dismissed.

However, petitioner may submit another Application for DNA Testing to the Greenville County Clerk of Court pursuant to the Access to Justice Post Conviction DNA Testing Act, see S.C. Code Ann. § 17-28-10, et seq (Supp. 2011), and that application should be processed as set forth in the Act.

	_____	C.J.
	_____	J.
	_____	J.
	_____	J.
	_____	J.

Columbia, South Carolina

May 29, 2012

cc: Tricia A. Blanchette
Karen Christine Ratigan

27

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)
)
The State,)
)
Vs.)
)
Orlando Smith)

IN THE COURT OF GENERAL SESSIONS
THIRTEENTH JUDICIAL CIRCUIT

CASE NO: 1998-GS-23-05212


ORDER

THIS MATTER comes before the Court by Defendant's motion to reconsider its order of August 8th, 2012, denying Defendant Smith's Application for Post-Conviction DNA Testing pursuant to S.C. Code § 17-28-10 et seq. Defendant argues that the seven-year limit for application for DNA testing proscribed in § 17-28-30(B) does not apply to him because he did not plead guilty to the charge, but was instead convicted at trial. This Court reiterates its finding that § 17-28-30(B) applies to those applicants who entered a plea of not guilty and were convicted at trial ("A person who...was...convicted...for the offense, is currently incarcerated for the offense, and asserts he is innocent of the offense may apply for forensic DNA testing...no later than seven years from the date of sentencing.").

THEREFORE, Defendant Smith's motion to reconsider is DENIED.

IT IS SO ORDERED.

FILED
2012 OCT 14 AM 11:09



Letitia H. Verdin
Circuit Judge

December 13, 2012
Greenville, South Carolina

The State of South Carolina
IN The Supreme Court

Appeal From Greenville County
Court of General Sessions
D.N.A Post Conviction Testing

RECEIVED
DEC 31 2012

Honorable Letitia H. Verdin, Circuit Judge

S.C. SUPREME COURT

Case No. 1998-GS-23-05212

Orlando Fonté Smith, Petitioner,

vs.
state of South Carolina, Respondent.

RECEIVED

JAN 02 2013

SC Court of Appeals

Notice of Appeal

Now Comes Petitioner, Orlando F. Smith, Pro-Se, Appeals
The Order of Dismissal Issued By The Honorable Letitia
H. Verdin On August 8, 2012. The Petitioner, Also Appeals The
Order Issued By The Honorable Letitia H. Verdin, which was
Filed On Dec 14, 2012. The Petitioner received The Notice
of This Order via Mail On Dec 18, 2012.

Orlando F. Smith

ORLANDO F. Smith 267982
Keshaw CORA. Inst. /MA-14
4848 Goldmine Hwy.
Keshaw, SC 29067

cc. office of
Attorney General
Solicitor, 13th Judicial Circuit
Greenville County Courthouse
305 East North St. Suit 325
Greenville, SC 29601-21855



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 17, 2013

Orlando Forte Smith #267982
Kershaw Corr. Inst.
4848 Goldmine Hwy.
Kershaw SC 29067

Re: The State v. Orlando Fonte' Smith
Appellate Case No. 2012-213673

Dear Counsel:

Upon reviewing your proof of service, the following deficiency or deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- Your notice of appeal must be timely served on the respondent.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Robert Michael Dudek X
Salley W. Elliott

The State of South Carolina
Court of Appeals

Appeal From Greenville County
 Court of General Sessions
 D.N.A Testing Post-Conviction

Honorable Letitia H. Verdin, Circuit Judge

Case No. 1998-GS-23-05212

Orlando F. Smith, ----- Petitioner

vs.

State of South Carolina, ----- Respondent

Notice of Appeal

Now Comes Petitioner, Orlando F. Smith, Pro-Se,
 Appeals The Order of Dismissal Issued By The
 Honorable Letitia H. Verdin On August 8, 2012.
 The Petitioner, Also Appeals The Order Issued By
 The Honorable Letitia H. Verdin, Which Was Filed
 On Dec 14, 2012. The Petitioner Received The Notice
 of This Order Via Mail On Dec 18, 2012.

Orlando F. Smith

Orlando F. Smith #267982
 Kershaw Corr. Inst / MA-14
 4948 Gold Mine Hwy.
 Kershaw, SC 29067

FILED CLERK OF COURT
 PAUL F. LANGRISH
 GREENVILLE CO. SC
 2013 MAR -4 PM 2:35

The State of South Carolina
Court of Appeals

Appeal From Greenville County
 Court of General Session's
D.N.A Post-Conviction Testing

Honorable Letitia H. Verdin, Circuit Judge

Case No. 1998-GS-23-05212

Orlando F. Smith Petitioner,
 vs.

State of South Carolina Respondent

Certificate of Service

I Herby Certify That I Have Served A Notice
 of Appeal on The Following Individual By
 Placing A Copy of The Same IN The United
 States Mail, Postage Prepaid, And Sent To The
 Respondents Address As Follows:

First Class Mail
 Robert M. Dudek
 Asst. Attorney General
 P.O. Box 11549
 Columbia, S.C. 29211

S/ Orlando F. Smith
 Orlando F. Smith
 #267982
 KCI Mag A-14
 4848 Goldmine Hwy.
 Kershaw, S.C 29067

FILED CLERK OF COURT
 PAUL H. WOODWARD
 GREENVILLE, S.C.

2003 MAR -11 AM 2:35