

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Greenville
Honorable Leticia H. Verdin, Circuit Court Judge

RECEIVED

MAR 28 2014

Appellate Case # 2012-213673
1998 GS-23-5212

S.C. Supreme Court

RECEIVED

MAR 28 2014

ORLANDO SMITH,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

SC Court of Appeals

**MOTION TO ENLARGE TIME FOR FILING
RETURN TO PETITION FOR WRIT OF CERTIORARI**

The State of South Carolina, above-named, hereby make a fourth and final motion to this Court to extend the time for filing the Return to the Petition for Writ of Certiorari involving an appeal from a denial of DNA testing pursuant to S.C. Code Ann. Section 17-28-90 (G) from March 28, 2014 for thirty days up to and including April 28, 2014. Respondent submits that extraordinary circumstances have been shown for this extension.

The primary reason for the request for this extension is to insure that the practice within the State concerning **THE ACCESS TO JUSTICE POST-CONVICTION DNA ACT, S.C. Code Section 17-28-10 et seq.**, and the interpretation of statute of limitations set forth in Sections 17-28-30(A)(B) and the effect of the similar proviso in Section 17-28-320(C) in this case are consistent with the legislative intent of 2008 Act No. 413 with members of this Office and others dealing with the effect of this Act. Resolution will be accomplished by the requested April 28, 2014 due date.

In this petition, Smith raises the following claim:

Did the lower court err in applying the seven-year time limit found in Section 17-28-30(B) of the South Carolina Code, which applies to individuals who pled guilty or no contest by its clear and unambiguous language, to Orlando Smith's application for post-conviction DNA testing where Smith pled not guilty requiring application of Section 17-28-30(A) of the South Carolina Code, which has no time limit?

Pertinent to this assertion is an interpretation of Section 17-28-30(A) which sets forth:

(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: . . .

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And section 17-28-30(B) which states:

(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**.

The initial question is whether Section 17-28-30(B) and its seven year statute of limitations applies to all stated crimes which resulted in convictions or only those where a guilty plea was entered. Stated another way, does Section 17-28-30(A) provide no statute of limitations concerning seeking DNA testing under the Act for any conviction which resulted from a jury trial.

The second and underlying question is if the seven year provision does apply to all convictions, is there a tolling of its effect for seven years from the effective date of the act, similar to the treatment of the amendments to the PCR act which created a statute of limitations as decided in Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996) and if

so, what is the time of tolling or did the legislature intend to exclude its applicability and the right to seek DNA testing for all crimes that were over seven years old at the time of the enactment (i.e., pre-2001 convictions). This is pertinent because the record reveals that Smith sought an application for DNA testing from the Clerk of Court on February 17, 2009 and advised that the applications were not available by Court Administration on March 19, 2009 and then made an initial application on December 16, 2009. App.p. 444-452. The Applicant was advised by Order of the Supreme Court that the form would not be accepted by any Clerk of Court until the legislature had provided funding for the implementation of the Act. An intervening PCR application which also requested DNA testing in 2010, 2010-CP-23-7261, had been barred as successive and untimely. App.p. 530-536. Yet in an appeal from the decision, on May 12, 2012, the Supreme Court issued an order stating:

However, [Smith] 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. § 17-2-10, et seq. (Supp. 2011), and that application should be processed as set forth in the Act.

App. 566. At that time, the Petitioner had already made the application for DNA testing on March 20, 2012 that is presently before this Court.

II.

The Past Time Period.

Since the prior request, counsel filed a preparation and travel to Sumter for argument in Anthony Woods v. State (argued by Ed Salter) before Judge James on February 27, 2014, travel to Spartanburg for depositions in Torres v. State on February 21, review of petition for certiorari and filing an informal response in Billy W. Cope v. South Carolina on February 27,

2014 in the U.S. Supreme Court, travel to Spartanburg for depositions in Torres v. State on February 28; preparation and oral argument in the South Carolina Supreme Court in State v. Damien Inman on March 4, 2014; preparation and filing of Return to Certiorari in the South Carolina Supreme Court in State v. Johnnie Gaskins on March 7, 2014, preparing a Return for filing in the federal habeas action of Jabbar Straws v. Warden, preparation of a Brief in Opposition for the U.S. Supreme Court in Billy W. Cope v. State due to be filed April 7, 2014, travel to Bishopville, SC on March 21 for a status conference in the death penalty PCR of Quincy Allen v. State before Judge Cothran, filed a Final Brief of Respondent and Supplemental Record filed on March 25, 2014 in State v. Daniel D'Angelo Jackson, filed a Supplemental Return in the federal habeas matter in Therl Taylor v. Warden on March 27, 2014, and filed a Supplemental Return in Joshua Jeter v. Warden in federal court on March 27, 2014 and on March 27, 2014 filed a motion to alter and amend in Fredrick Evins v. State – a death penalty PCR action before Judge Gary Hill.

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by


II.

In the next thirty days, below-signed counsel has the following matters scheduled: State v. Tavoris Hurst –response to motion to remand for reconstruction – due March 31, 2014, on April 1, 2014 – oral argument in S.C. Supreme Court in State v. Jaquin Brewer, a Brief in Opposition in the United States Supreme Court in Billy Wayne Cope v. South Carolina on April 7, out of state travel on personal leave from April 2 through April 10, oral arguments on April 10 in State v. Richy Boyd (10:00) and State v. Lamar Williams (10:30), travel to Spartanburg on April 11 for witness preparation in Andres Torres v. State, travel to Spartanburg from April 12-14, 2014 for the PCR hearing in Andres Torres v. State before Judge Derham Cole, federal habeas return due on April 16, 2014 in Tyco Jacobs v. State (extended once), federal habeas

return on April 17, 2014 in Jabbar Straws v. State (extended twice), initial brief in opposition on April 21 in State v. Thomas Stewart (extended once), a federal habeas corpus return due on April 21 in Kenny Sowell v. Warden, an initial brief of respondent due on April 23, 2014 in State v. Kevin Letmon (extended once), an initial brief of respondent in State v. Cleopus Edwards (3 extensions) due April 23, 2014, a federal habeas corpus return due in Bryan Ladner v. Warden on April 28, 2014 and a Return to Petition for Writ of Certiorari in Herman Hughes v. State in the Court of Appeals projected to be due on April 28, 2018.

III.

Respondent's below-signed counsel establishes the following priority for pleadings:

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1. Brief in Opposition in the United States Supreme Court in Billy Wayne Cope v. South Carolina on April 7.
 2. Return to Certiorari – Orlando Smith v. State (DNA Access Appeal) (4th extension) – projected due April 28.
 3. Initial Brief of Respondent in State v. Cleopus Edwards (3 extensions) due April 23, 2014.
 4. Return to Petition for Writ of Certiorari in Herman Hughes v. State in the Court of Appeals projected to be due on April 28, 2018.
 5. Federal Habeas Return on April 17, 2014 in Jabbar Straws v. State (extended twice).

IV.

Below-signed counsel attempted to speak with opposing counsel Susan B. Hackett on March 28, but learned that she was out of the office until April 4. Counsel left a message concerning the matter on her voicemail. Respondent submits that extraordinary circumstances have been shown for this extension.

V.

Wherefore Respondents respectfully request an extension of a period of time of thirty (30) days up to and including **March 28, 2014** for good cause to file the Return of Respondent to the Petition for A Writ of Certiorari.

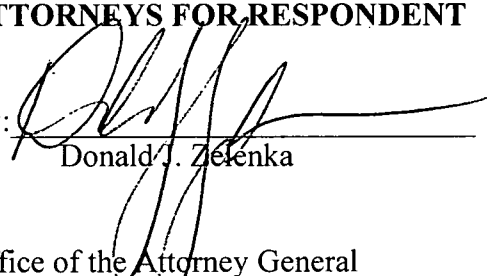
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

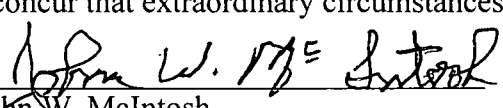
DONALD J. ZELENKA
Assistant Deputy Attorney General

ATTORNEYS FOR RESPONDENT

By: 
Donald J. Zelenka

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I concur that extraordinary circumstances have been shown.


John W. McIntosh
Chief Deputy Attorney General


March 28, 2014.

CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, hereby certify that I have served the **MOTION TO ENLARGE TIME FOR FILING RETURN OF PETITION** in the foregoing action by depositing one (1) copy in the U.S.Mail, postage prepaid to:

Appellate Defender Susan B. Hackett
South Carolina Office of Indigent Defense
P. O. Box 11589
Columbia, S.C. 29211-1589

This 28th day of March, 2014.



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