

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Greenville County
Letitia H. Verdin, Circuit Court Judge
1998-GS-23-5212
APPELLATE CASE NO. 2012-213673

RECEIVED

MAY 27 2014

THE STATE,

Respondent,

SC Court of Appeals

V.

ORLANDO SMITH,

Petitioner

**MOTION TO RELAX SCACR RULE 247 (f) FOR FILING A RETURN TO PETITION
FOR WRIT OF CERTIORARI IN SUPPORT OF CERTIORARI
IN EXCESS OF 25 PAGES**

The Respondent State of South Carolina hereby makes a Motion to Relax SCACR Rule 247 to allow filing of a Return to the Petition for Writ of Certiorari in support of Certiorari. Rule 247(f) allows for the filing of a Return in certiorari involving DNA applications up to 25 pages. On May 15, 2014, Respondent filed a 34 page document in the Court. Below-signed counsel subsequently were advised by Petitioner's counsel, Appellate Defender, Susan Hackett, of her consent to allow filing of the Return in excess of 25 pages upon her review of the Return last week. Respondent request leave of the Court to allow filing of the Return as is.

In the Return, below-signed counsel, in support of the granting of certiorari review and merit consideration of the issue before it reviews in depth the history of the Petitioner's case and attempts at having certain items tested, as well as the history of the "Access to Justice Post-

Conviction DNA Testing Act” from pages one through twenty. In the argument in favor of certiorari, Respondent asserts the following in pages 20 through 34.

ARGUMENT IN FAVOR OF CERTIORARI20

This Court should resolve whether under the “Access to Justice Post-Conviction DNA Testing Act” the seven year statute of limitations application limit applies to any jury-tried conviction after a not guilty plea to a defined crime.

The application of the seven year statute of limitations to Petitioner’s 2000 trial conviction is likely an error of law.

If the decision is a correct statement of the law, it will have far-reaching implications and preclude consideration under the DNA application Act to any conviction at least prior 2002 whether by jury trial or guilty plea. In light of the language of the Preservation of Evidence Act as well as the information on the court-created DNA application, this action is likely not the intent of the General Assembly when the Act was created. This issue should be resolved.20

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BACKGROUND20

A. Is §17-28-30(A) limited to applications by persons “who pled not guilty” and restricted to jury trial convictions? Is §17-28-30(B) limited to applications by persons “who pled guilty or nolo contendere” or does it included “not guilty pleas and trial convictions? Does the seven year statute of limitations set forth in §17-28-30(B) apply when the person “pled not guilty?”20

B. STANDARD OF REVIEW AND STATUTORY CONSTRUCTION21
 a. De Novo Review.21
 b. The Intent of the Legislature Controls.22
 c. The Rule of Lenity.23
 d. Statute must be read as a whole and not in isolation to give meaning to the legislative intent.24

LAW26

ANALYSIS27

A. Did the Legislature intend to establish two separate groups – those who pled “not guilty” and those who pled “guilty or nolo contendere”?27

B. The Preservation of Evidence Act Supports the Legislative Intent to Create Two Separate Classes – Those who Pled “Not Guilty” and Those Who Pled Guilty or Nolo Contendre. The intent of the two acts act hand in glove concerning their application to separate groups.29

C. The Circuit Court’s construction failed to recognize that the intent of the legislature was reasonably discovered by the plain language within each section and the creation of a statute of limitations for a limited number on defendant – not every defendant.31

D. The Approved Application Form Is Inconsistent With The Lower Court’s Interpretation and Would Need to Be Revised if Judge Verdin’s Interpretation is Correct.32

E. Assuming arguendo, that the Defendant was subject to the seven year limitation, an issue is created on whether the Legislature intended that any conviction that occurred before the implementation of the Act with the creation of the application and the funding, could a conviction which occurred seven years or more before the implementation of Act be authorized to apply for testing?32

SUMMARY.....33

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Respondent respectfully leave of this Court to allow filing of the Return in excess of twenty-five pages and relaxation of Rule 247(f).

WHEREFORE , Respondent Requests this motion be granted.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

WILLIAM W. WILKINS, III
Solicitor, Thirteenth Judicial Circuit

By: 
DONALD J. ZELENKA

ATTORNEYS FOR RESPONDENT

May 27, 2014

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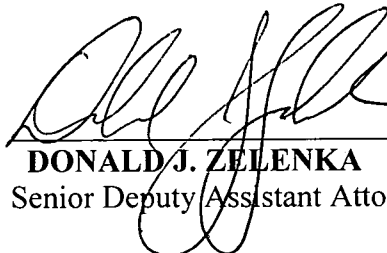
CERTIFICATE OF SERVICE

I, **Donald J. Zelenka**, counsel for the Respondent, certify that I have served the within MOTION TO RELAX SCACR RULE 247 (f) FOR FILING A RETURN TO PETITION FOR WRIT OF CERTIORARI IN SUPPORT OF CERTIORARI IN EXCESS OF 25 PAGES on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record:

Susan B. Hackett
Appellate Defender
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served.

This 27th day of May, 2014.



DONALD J. ZELENSKA
Senior Deputy Assistant Attorney General