

STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Gregory D. Benjamin, 234091,  
 Plaintiff

v.

State Of South Carolina  
 Defendant.

IN THE COURT OF COMMON PLEAS

2012 APR 10 PM 3:10

CASE NO.  
2011-CP-38-1540

FILED  
WINN  
CLERK  
COURT

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Plaintiff's Attorney: Clarissa W. Joyner, Bar No. Address: Post Office Box 1724 Orangeburg SC 29115 phone: (864) 534-8393 fax: e-mail: other:	Defendant's Attorney: Mary S. Williams, Bar No. Address: Post Office Box 11549 Columbia SC 29211-1549 phone: (803) 734-3737 fax: (803) 734-4113 e-mail: other:
--	---

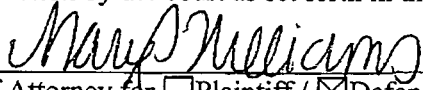
MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

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

**SECTION II: Motion/Order Type**

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

  
 Signature of Attorney for  Plaintiff /  Defendant March 2, 2012  
Date submitted

**SECTION III: Motion Fee**

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

**JUDGE'S SECTION**

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

JUDGE

CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

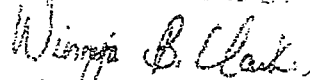
Collected by: \_\_\_\_\_

Date Filed:

ATTEST: TRUE COPY

MOTION FEE COLLECTED: \_\_\_\_\_

CONTESTED - AMOUNT DUE: \_\_\_\_\_

  
 CLERK OF COURT  
 ORANGEBURG COUNTY, SC

STATE OF SOUTH CAROLINA )  
COUNTY OF ORANGEBURG )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

Gregory D. Benjamin, #234091, )  
Applicant, )

2011-CP-38-1540

v. )

**CONDITIONAL ORDER OF DISMISSAL**

State of South Carolina, )  
Respondent. )

2012 APR 10 PM 3:11  
CLERK OF COURT  
FIRST JUDICIAL CIRCUIT  
ORANGEBURG COUNTY  
SOUTH CAROLINA

This matter comes before this Court by way of an application for post-conviction relief filed December 20, 2011. In its Return, the Respondent requested the application be summarily dismissed.

**PROCEDURAL HISTORY**

Before this Court are the records of the Orangeburg County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, and records from Applicant's prior applications for relief. The records before this Court indicate that the Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Orangeburg County. The Applicant was indicted at the March 1995 term of the Orangeburg County Grand Jury for Murder (1995-GS-38-0217), Armed Robbery (1995-GS-38-0216), and Assault and Battery with Intent to Kill (1995-GS-38-0215). A Notice of Intent to Seek the Death Penalty was filed. Applicant was represented at the trial level by Michael Culler, Esquire, and Luther J. Battiste, Esquire. After a jury trial, Applicant was convicted

WINGS B. CLERK  
CLERK OF COURT  
FIRST JUDICIAL CIRCUIT  
ORANGEBURG COUNTY  
SOUTH CAROLINA

as indicted. On May 8, 1996, the Honorable Charles Whetstone sentenced Applicant to life imprisonment for Murder where aggravating circumstances were found, to thirty (30) years for Armed Robbery, and to twenty (20) years ABWIK. All sentences were to be served consecutively. Applicant did not appeal his conviction or sentence.

Applicant subsequently filed a Federal Petition for Writ of Habeas Corpus on April 10, 2006 (C.A. No. 9:06-1154-TLW-GCK). Applicant raised the following grounds for relief:

1. Denial of effective assistance of counsel.
  - a. Trial counsel never filed a notice of appeal from his conviction and sentence of May 8, 1996.
  - b. Counsel failed to advise him of his right to appeal.
2. Denial of right to appeal.
  - a. Due process and equal protection violated when notice of appeal was not made.
  - b. In 2005, Petitioner recalled that one of the attorneys told the trial judge that he was going to appeal, but that the judge said "Noted."; however, no notice of appeal was ever filed.
  - c. In June 2004, Petitioner began requesting his files, initially, from counselor Luther J. Battiste and then [from] counselor Michael Culler.
3. Conviction was obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
  - a. The State failed to show that Petitioner was ever in actual or constructive possession of the alleged murder weapon.
  - b. A constitutionally-infirm search and seizure was conducted by the police.
  - c. Witness statements did not describe Petitioner nor was an out-of-court, non-photo line-up ever conducted.
  - d. Hearsay testimony about an alleged gun sale was allowed into evidence without Petitioner being allowed to confront and cross-examine the alleged non-testifying witness.
  - e. Counsel failed to move to suppress the in-court identification.
4. The conviction was obtained by the action of an improperly empaneled Grand or Petit Jury.

On September 20, 2007, United States Magistrate George C. Kosko issued Report and

Recommendation recommending that the Petition be denied. On November 28, 2007, the Honorable Terry L. Wooten, United States District Judge for the District of South Carolina, filed an Order accepting the recommendation and denying the Petition. The Applicant did not appeal.

Applicant next filed a PCR application on April 30, 2008 (2008-CP-38-0716). In this application, Applicant set forth the following grounds for relief:

1. Ineffective assistance of counsel.
  - a. "...failure to file a notice of appeal.
2. "Out of court hearsay testimony without Petitioner being allowed to confront and cross-examine the non-testifying witness."
  - a. "Hearsay testimony about an alleged gun sale was allowed into evidence."
3. "Counsel failed to move to suppress the in-court identification."
  - a. "Counsel was prejudicial because failed to move to suppress the in-court identification."
4. "Fourth Amendment."
  - a. "Counsel was ineffective for failure to suppress illegally seized evidence in violation of the Fourth Amendment."

Respondent moved for summary dismissal. A Conditional Order of Dismissal was signed on December 10, 2010, and filed on December 16, 2010. Applicant appealed the Conditional Order, and the matter was remitted to the lower court on March 15, 2011. A Final Order of Dismissal dated June 1, 2011, and filed June 10, 2011, followed. Applicant filed a notice of appeal. The appeal was dismissed as untimely filed. The Remittitur was sent on September 6, 2011.

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

1. "Applicant was denied due process and equal protection of the law in violation of the State and Federal Constitution when he was denied a direct appeal."
  - a. "Applicant was denied Counsel appointment to his previous PCR in violation of the Sixth Amendment to the U.S. Constitution and South Carolina law."

2. Applicant requested trial counsel file an appeal, but none was filed.
  - a. Applicant attempted to raise this issue in a previous application but because he did not respond to the Conditional Order in a timely manner, the application was dismissed. Applicant should have been appointed counsel in the prior PCR application.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court finds that the current Application should be summarily dismissed because it is successive to the previous Petition for Writ of Habeas Corpus and barred by the doctrine of res judicata. Claims raised in prior federal habeas corpus, or which could have been raised there, are barred in subsequent state post-conviction proceeding. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981) (Emphasis added). Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 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.

As stated in Foxworth, *supra*. at 618, 274 S.E.2d 416 (1981):

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in Land v. State, *supra*. to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Pursuant to §17-27-90, 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, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id

The Applicant did raise or could have raised the new grounds for relief in his prior Petitioner for Writ of Habeas Corpus. The Applicant has failed to present any reasons why he could not have raised the current allegations in his previous filing. Therefore, the application should be summarily dismissed.

This Court finds, further, that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. § 17-27-10 to -160. S.C. 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 that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on May 8, 1996. This

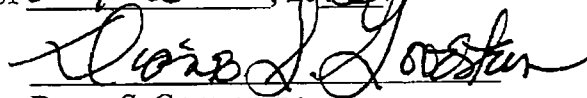
Application was filed on December 20, 2011, which was well after the statutory filing period had expired.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. §17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute and for being successive.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have, factual or legal, with the Orangeburg County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Mary S. Williams, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 25 day of March, 2012



DIANE S. GOODSTEIN  
Chief Judge for Administrative Purposes  
First Judicial Circuit

Junnamille, South Carolina.