

Johnson, Janet

From: Clarissa Joyner <joynerlawfirm@aol.com>
Sent: Wednesday, March 23, 2016 4:06 PM
To: Johnson, Janet
Subject: Gregory D. Benjamin v. State of South Carolina (2011-CP-38-1540)
Attachments: joynerlawfirm@aol.com_20160323_145643.pdf; ATT00001.htm

Dear Ms. Johnson:

Please find attached a Motion for Reconsideration and/or Relief from Judgement in the above-referenced matter which was filed on May 19, 2014, and which contains the explanation required by Rule 234(c). If you have any questions or need further information, please do not hesitate to contact me.

Sincerely,

Clarissa Warren Joyner
1259 Amelia Street, Suite A
Post Office Box 1724
Orangeburg, SC 2916-1724
(803) 534-8394 Office Phone
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Begin forwarded message:

From: joynerlawfirm@aol.com <joynerlawfirm@aol.com>
Date: March 23, 2016 at 3:56:43 PM EDT
To: joynerlawfirm@aol.com
Subject: Scanned image from Law Firm of Clarissa W Joyner
Reply-To: <joynerlawfirm@aol.com>

Reply to: joynerlawfirm@aol.com <joynerlawfirm@aol.com>
Device Name: Law Firm of Clarissa W Joyner
Device Model: MX-B402
Location: Not Set

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STATE OF SOUTH CAROLINA

COUNTY OF ORANGEBURG

Gregory D. Benjamin, #234091,

Applicant,

vs.

State of South Carolina,
Respondent.

)
) IN THE COURT OF COMMON PLEAS
)
)

) 2011-CP-38-1540
)

) **MOTION FOR**
) **RECONSIDERATION AND/OR**
) **RELIEF FROM JUDGMENT**
)

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CLERK OF COURT
ORANGEBURG COUNTY
SOUTH CAROLINA

2014 MAY 19 PM 4:54

YOU WILL PLEASE TAKE NOTICE that the Applicant, Gregory D. Benjamin, by and through his undersigned attorney, moves the Honorable Edgar W. Dickson for reconsideration of its AMENDED FINAL ORDER OF DISMISSAL and decision in the above entitled case, which was rendered and signed by the Court on April 8, 2014 and served on Applicant's Counsel on May 8, 2014.

Alternatively, Applicant's counsel moves for Relief from Judgment pursuant to Rule 60(b)(1) of the South Carolina Rules of Civil Procedure. Applicant filed an action for post-conviction relief on December 20, 2011. The Respondent made its Return and Motion to Dismiss on March 2, 2012, and at the same time forwarded a Conditional Order of Dismissal to the Honorable Diane S. Goodstein which was thereafter signed. Counsel for the Applicant was not served with the executed Conditional Order of Dismissal, and notified the Respondent of such several times. After the passage of nearly two years, Plaintiff's counsel was served with a Conditional Order of Dismissal on January 16, 2014. Thereafter, counsel for Applicant did not respond to the State's Conditional Order of Dismissal or offer any reason why it should not become final. The reason Applicant's counsel failure to respond was due to mistake, inadvertance and/or

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Wingie B. Clark
CLERK OF COURT
ORANGEBURG COUNTY, SC

excusable neglect. Applicant's counsel's requested and received an extension to respond to the Conditional Order of Dismissal from the Respondent, but counsel's staff failed to calender this matter, and no response was made to the State's Conditional Order. Applicant has a meritorious defense to the claims of the Respondent and moves for reinstatement of his application and for an evidentiary hearing. I support of his motion, Applicant shows the following:

BACKGROUND

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 by 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). Michael Culler, Esquire and Luther J. Battiste, Esquire represented the Applicant on the charges. After a jury trial, the Applicant was found guilty as indicted, and the Honorable Charles Whetstone sentenced Applicant to life imprisonment for Murder, thirty (30) years for Armed Robbery and twenty (20) years for ABWIK. All sentences were to be served consecutively. The Applicant did not appeal his conviction or sentence.

THE FIRST POST-CONVICTION RELIEF APPLICATION

The Applicant subsequently filed his first application for post conviction relief on April 30, 2008 (2008-CP-38-0716) after his Federal Petition for Writ of Habeas Corpus was denied on November 28, 2007. An evidentiary hearing was not convened because the Respondent moved for Summary Dismissal and a Conditional Order of Dismissal was signed on December 10, 2010 and filed on December 6, 2010. The Applicant appealed the

Conditional Order, but the appeal was dismissed as untimely filed. The Remittitur was sent on September 6, 2011. Thus, the Applicant has not had his “one bit at the apple”, particularly because his appeal after conviction was not filed as he requested of counsel, the appeal after the denial of Writ of Habeas Corpus was not properly filed after requested by the Applicant, and his appeal of the 1st PCR Application was dismissed as untimely filed. Thus, Applicant has never been afforded due process and equal protection or the right to an evidentiary hearing or proper review of his convictions.

THE SECOND POST-CONVICTION RELIEF APPLICATION

Because the Applicant has not had his “one bit at the apple”, the Applicant filed a second Application for post-conviction relief on December 11, 2011, again on the ground of 4th amendment violations and ineffective assistance of counsel, but also on the grounds of counsel’s failure to move for suppression of the in-court identification and issues of hearsay testimony concerning a gun sale.

Because the Applicant has not had his “one bit at the apple”, in his current Application, the Applicant alleges that he is being held in custody unlawfully.

For reasons of the 1st PCR Counsel’s failure to file the Appeal in the South Carolina Supreme Court in a timely manner, the Applicant was denied the right to appeal the ruling on a meritorious claim that was properly raised before the Court in the Applicant’s original PCR application. The South Carolina Supreme Court in the case of *Pruitt v. State*, stated: “... [F] ailing to address the merits of issues which have been fairly raised in these actions does nothing to alleviate these problems but rather exacerbates them”. That Court ruled that the Petitioner was entitled to file an amended application if necessary, and “... [t] hat the order shall address all issues properly raised at the hearing. *McCray v. State* 305 S.C.

329, 406 S.E.2d 241 (S.C. 191), S.C. Code Section 17-27-80, Rule 52 (A) S.C.R.Civ. Proc.”

The record reflects and testifies to the Applicant’s action of properly raising various claims and failure of the Court Appointed Counsel to properly Appeal the Orders of Dismissal both on the State and Federal level. Trough neglect and omission those issues have never been properly ruled on as directed by the Supreme Court’s opinion in *McCray v. State*, supra.

Where the Applicant was denied the opportunity to effectively and completely preserve a meritorious issue for appeal, and where the record verifies the Applicant’s claim that the issue was properly raised at his original PCR hearing, the predicate for extrinsic fraud upon the court has been established, which supports the Applicant’s claim in this motion.

Applicant relies on the aforementioned case authorities, the South Carolina Rules of Civil Procedure, the South Carolina Code of Laws, and South Carolina Supreme Court Rules in bringing this action and declaring his right to appeal all claims properly presented to the Court in all his claims made before state and federal tribunals. Applicant believes he is entitled to an evidentiary hearing.

ARGUMENTS

First, this Court should find that the current Application for PCR must not be summarily dismissed and must be re-instated because it is not successive to the Applicant's prior applications for PCR – being that these issues have been timely raised; however, have never been ruled on by the courts. The Uniform Post Conviction Procedure Act (the Act) provides that:

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, 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.

S.C. Code Ann. § 17-27-90, 1985, as amended. Although successive applications are disfavored and the burden is on the Applicant to establish that any new ground raised in a subsequent application could not have been raised by him in a previous application, the Applicant has not had his "one bit at the apple" when issues are properly raised and the court does not rule on the issues. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Foxworth v. State 275 S.C. 615, 274 S.E.2d 415 (1981). Here, the Applicant has properly raised PCR issues, which were never ruled upon by the courts; therefore, he has met the burden imposed upon him. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980); Aice v. State, supra; Arnold v. State/Plath v. State, supra. Thus, the Applicant has not had his "full bite at the apple." Therefore, this Court must not summarily dismiss the Application for PCR as successive, but rather reinstate it.

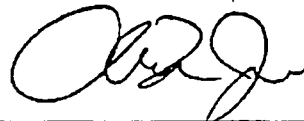
Second, this Court should find that the current application for PCR should not be summarily dismissed in regards to compliance with the filing procedures of the Act. S.C. Code Ann. §§ 17-27-10 to -160 (1976 & Supp. 1997). Although the Applicant was convicted of the offenses on May 8, 1996, he timely raised issues that were never ruled on in his previous applications, which are raised in this Application because the properly raised issues were never ruled on by the courts. Although this Application was filed well

after the one year, the issues raised here were previously timely and properly raised in his previous applications within the statute of limitations, but were never ruled upon by the courts.

A motion for summary judgement 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 PCR 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 judgement as a matter of law." Therefore, because the issues raised here were previously timely and properly raised in his previous applications within the statute of limitations, but were never ruled upon by the courts, this Court must not summarily dismiss the Application for PCR for failure to file within the time mandated by statute.

WHEREFORE, Applicant moves that the Amended Conditional Order of Dismissal be dismissed and that an evidentiary hearing be granted.

Respectfully Submitted,



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Orangeburg, South Carolina
May 19, 2014

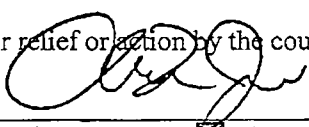
STATE OF SOUTH CAROLINA)
)
 COUNTY OF ORANGEBURG)
)
)
)
Gregory Benjamin, #234091)
) Plaintiff,)
)
) vs.)
)
State of South Carolina)
) Defendant.)

IN THE COURT OF COMMON PLEAS
 FIRST JUDICIAL CIRCUIT
 CASE NO.: 2011-CP-38-1540
 MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET

Plaintiff's Attorney: Clarissa Warren Joyner, Bar No. 0066576 Address: P.O. Box 1724, Orangeburg, SC Phone: 803-534-8393 Fax 803-534-7885 E-mail: joynerlawfirm@aol.com Other: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____
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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: Reconsideration/Rule 60(b)
 Estimated Time Needed: n/a 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 Date submitted: May 19, 2014

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 ORANGEBURG COUNTY
 SOUTH CAROLINA
 2014 MAY 19 PM 4:54
 CW

SECTION III: Motion Fee

PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support	<input checked="" type="checkbox"/> Indigent Status	<input checked="" type="checkbox"/> State Agency v. Indigent Party
<input type="checkbox"/> Domestic Abuse or Abuse and Neglect	<input type="checkbox"/> Sexually Violent Predator Act	<input type="checkbox"/> Post-Conviction Relief
<input type="checkbox"/> Motion for Stay in Bankruptcy	<input type="checkbox"/> Motion for Publication	<input type="checkbox"/> 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 <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
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CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____