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60 SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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Certiorari to Orangeburg County

Honorable Maite Murphy, Circuit Court Judge

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GREGORY D. BENJAMIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000414

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JOHNSON PETITION FOR WRIT OF CERTIORARI

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Robert M. Pachak  
Appellate Defender

South Carolina Commission on Indigent Defense  
Division of Appellate Defense  
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ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether petitioner's second application should have been considered successive?

## STATEMENT

Petitioner was convicted of murder, armed robbery, and assault and battery with intent to kill (ABWIK) after a jury trial held before the Honorable Charles Whetstone in Orangeburg County. On May 8, 1996, petitioner was sentenced to life imprisonment for murder, to thirty (30) years for armed robbery, and to twenty (20) years for ABWIK. He was represented by Michael Culler, Esquire and Luther J. Battiste, Esquire. There was no appeal.

Petitioner filed this current application for post-conviction relief on December 20, 2011. (App. p. 1-9) Respondent filed a return and motion to dismiss dated March 2, 2012. (App. p.10-17) Respondent alleged petitioner's application was successive to a prior PCR application and a previous Petition for Writ of Habeas Corpus. Respondent stated petitioner's application should be barred by the post-conviction relief statute of limitations and the doctrine of laches. On March 25, 2012, a conditional order of dismissal was issued giving petitioner twenty (20) days to show why it should not become final. (App. p. 18-23) On April 8, 2014, a final order of dismissal was issued noting that petitioner did not respond to the conditional order of dismissal. (App. p. 24-25) On May 19, 2014, petitioner filed a motion for reconsideration and/or relief from judgment. (App. p. 27-33) The motion was denied by order dated July 28, 2015. (App. p. 34-35)

This petition follows.

## ARGUMENT

Petitioner second application should not have been considered successive. As noted in the conditional order of dismissal petitioner's application for post-conviction relief raised 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."

(App. p. 20)

Petitioner noted in his motion for reconsideration that he never had an evidentiary hearing for his first application for post-conviction relief. Respondent moved for a summary dismissal and a conditional order of dismissal. Petitioner appealed the conditional order but the appeal was dismissed because it was deemed untimely filed.

In Gamble v. State, 298 S.C. 176, 379 S.E. 2d 118 (1989) the Court held that the "lower court dismissed Gamble's first petition prior to adjudication on the merits with the consent of the State. The Order did not state the application was dismissed with prejudice. Therefore, Gamble

was entitled to make another petition.” The Court went on to comment of the court rules as follows:

These rules, while barring subsequent petitions on grounds available to or waived by an applicant in a prior action or petition, contemplate an adjudication on the merits of the original petition, one bite at the apple, as it were. These rules will not be construed to operate as a trap for the unwary.

In Case v. State, 227 S.C. 474, 289 S.E.2d 413 (1982) the Court held that where a defendant’s first application for post-conviction relief without the assistance of legal counsel and dismissed without a hearing on the basis that it lacked specificity, the defendant’s second application for post-conviction relief warranted a hearing despite its successiveness.

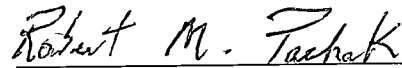
In Austin v. State, 305 S.C. 453, 409 S.E. 2d 395 (1991), the Court held that a defendant can appeal a denial of a PCR application after the statute of limitations has expired if the defendant either requested and was denied the opportunity to appeal, or did not knowingly and intelligently waive the right to appeal.

As can be seen from the above, petitioner’s second application should not have been considered successive.

CONCLUSION

Petitioner's case should be remanded for a full evidentiary hearing on the original grounds listed in his first application for post-conviction relief.

Respectfully submitted,



Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

This 30th day of June, 2016.

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

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Certiorari to Orangeburg County  
Honorable Maite Murphy, Circuit Court Judge

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GREGORY D. BENJAMIN,

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PETITION TO BE RELIEVED AS COUNSEL

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Counsel for Gregory D. Benjamin states:

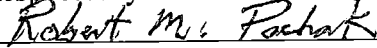
1. HE is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.

2. HE has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on. In his opinion seeking certiorari from the order of dismissal is without merit.

3. HE has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Gregory D. Benjamin.

Respectfully submitted,

  
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Robert M. Pachak  
Appellate Defender  
ATTORNEY FOR PETITIONER

This 30th day of June, 2016

STATE OF SOUTH CAROLINA  
IN THE Supreme Court

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Certiorari to Orangeburg County  
Honorable Maite Murphy, Circuit Court Judge

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GREGORY D. BENJAMIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT


APPELLATE CASE NO. 2016-000414

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CERTIFICATE OF SERVICE

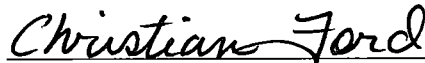
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The undersigned attorney hereby certifies that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case have been served on Clay Mitchell, Esquire and Gregory D. Benjamin, #234091 at Broad River Correctional Institution, 4460 Broad River Road, Columbia, SC 29210, this 30th day of June, 2016.

  
\_\_\_\_\_  
Robert M. Pachak  
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 30th day of June, 2016

 (L.S.)  
Notary Public for South Carolina  
My Commission Expires: March 1, 2026.