

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

---

Appeal from Orangeburg County

Maite Murphy, Circuit Court Judge

---

**RECEIVED**

JUN 30 2016

**SC SUPREME COURT**

GREGORY D. BENJAMIN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000414

---

APPENDIX

---

ROBERT M. PACHAK  
Appellate Defender

South Carolina Commission on Indigent  
Defense  
Division of Appellate Defense  
PO Box 11589  
Columbia, SC 29211-1589

ATTORNEY FOR PETITIONER

ALAN WILSON  
Attorney General

CLAY MITCHELL  
Assistant Attorney General

P. O. Box 11549  
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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FORM 5

STATE OF SOUTH CAROLINA )  
 )  
County of Orangeburg )  
 )  
Gregory D. Benjamin #234091 )  
Full name and prison number (if any) of Applicant )

IN THE COURT OF COMMON PLEAS

v. )

State of South Carolina )

APPLICATION FOR  
POST-CONVICTION RELIEF

2011 OCT 20 PM 2:53

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Allendale Correctional Institution,  
Fairfax, South Carolina
2. Name and location of Court which imposed sentence General Sessions  
Court, Orangeburg County, South Carolina
3. Name(s) of co-defendant(s) (if any) John Lee
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
  - (a) 95-GS-33-217, Murder
  - (b) 95-GS-33-216, Armed Robbery

ATTEST: TRUE COPY  
Wingia B. Clark  
CLERK OF COURT  
ORANGEBURG COUNTY, SC

(c) 95-GS-38-215, Assault & Battery w/ Intent to Kill

5. The date upon which sentence was imposed and the terms of the sentence:

- (a) May 8, 1996, Life imprisonment
- (b) May 8, 1996, 20 years, Consecutive
- (c) May 8, 1996, 30 years, Consecutive

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty \_\_\_\_\_
- (b) after a plea of not guilty  \_\_\_\_\_
- (c) after a plea of nolo contendere \_\_\_\_\_

7. Did you appeal from the judgment of conviction or the imposition of sentence?

NO

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

- i. N/A
- ii. N/A
- iii. N/A

(b) the result in each such Court to which you appealed:

- i. N/A
- ii. N/A
- iii. N/A

(c) the date of each such result:

- i. N/A
- ii. N/A
- iii. N/A

(d) if known, citations of any written opinion or orders entered pursuant to such results:

- i. N/A
- ii. N/A
- iii. N/A

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Trial Counsel failed to file Notice of Appeal.

(b) \_\_\_\_\_

(c) \_\_\_\_\_  
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See 3-A, attached

(b) See 3-A, attached

(c) \_\_\_\_\_

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) See 3-A, attached

(b) See 3-A and 3-B, attached

(c) \_\_\_\_\_

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? Yes

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO

(d) any other petitions, motions or applications in this or any other Court? NO

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. Federal Habeas Corpus

ii. State Post-Conviction Relief

iii. State Habeas Corpus

iv. \_\_\_\_\_

(b) the name and location of the Court in which each was filed:

i. U.S. District Court, Beaufort Division

ii. Court of Common Pleas, Orangeburg County

iii. Supreme Court of South Carolina

iv. \_\_\_\_\_

## 10. &amp; 11. GROUNDS FOR RELIEF WITH SUPPORTING FACTS

10(a) 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.

11(a) Immediately following sentencing, Applicant requested that trial Counsel file an appeal. Trial Counsel assured Applicant that he would file a Notice of Appeal, but failed to do so, and Applicant was denied his right to direct appeal. Applicant contends trial counsel had a duty to perfect a direct appeal after being requested to do so, Frasier v. State, 410 S.E.2d 572 (S.C.1991), and that his failure to do so deprived Applicant of his right to a direct appeal under State and federal law.

10(b) Applicant was denied Counsel appointment to his previous PCR in violation of the Sixth Amendment to the U.S. Constitution and South Carolina law.

11(b) Applicant raised the issue of denial of direct appeal in his previous PCR Application. The Court, however, failed to appoint Counsel and issue a Conditional Order Directing Applicant to explain why the Application should not be dismissed on the ground that Applicant failed to comply with the one-year Statute of Limitations. Because Applicant failed to respond to the Conditional Order in a timely manner, Applicant's PCR Application was dismissed.

Applicant contends that because he was attempting to raise the issue of direct appeal, the PCR Court should have appointed

Counsel. There is no question that had Trial counsel filed a Notice of Appeal, Applicant would have been appointed Appellate Counsel. Applicant has a right under the State and Federal Constitution to be represented by Counsel on direct appeal. Applicant would not have been forced to represent himself in a direct appeal, or otherwise "thrown to the wolves". Further, Applicant was penalized twice because of Counsel's failure to file a Notice of Appeal. First, by being denied a Direct Appeal; and, second, when he was denied Counsel and forced to fend for himself when attempting to assert his right to a Direct Appeal in a PCR Action. Applicant contends that under these circumstances the denial of PCR Counsel was fundamentally unfair and violated the State and Federal Constitution.

(c) the disposition thereof:

- i. Petition Dismissed
- ii. PCR Denied
- iii. Petition Denied
- iv. \_\_\_\_\_

(d) the date of each such disposition:

- i. November 28, 2007
- ii. June 1, 2011
- iii. October 19, 2011
- iv. \_\_\_\_\_

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. Benjamin v. S.C. Attorney General, C/A No. 9:06-1154-TLW-G-CK
- ii. Benjamin v. State, C/A No. 2008-CP-38-0716
- iii. Benjamin v. Byars, C/A No. —
- iv. \_\_\_\_\_

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

Yes

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

- i. Denial of due process and Equal protection/denial of
- ii. Direct Appeal
- iii. \_\_\_\_\_

(b) the proceedings in which each ground was raised:

- i. Federal Habeas
- ii. State PCR
- iii. State Habeas Corpus

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

- (a) Denial of right to appellate Counsel in violation of
- (b) State & Federal Constitutions. Issue pertains to
- (c) previous denial of PCR Counsel.

17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? No
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?  
No

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:
  - i. Michael Culler, Esquire, Address unknown  
Luther J. Battiste, Esquire, Address unknown
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_
- (b) the proceedings at which each such attorney represented you:
  - i. Trial & Sentencing
  - ii. \_\_\_\_\_
  - iii. \_\_\_\_\_

19. State clearly the relief you seek in filing this application:

A review pursuant to White v. State, 208 S.E.2d, 35 (1974); A belated direct appeal; Any other or further relief the Court deems just.

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA )

County of Allendale )

VERIFICATION

I, Gregory Benjamin, # 234091, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Gregory D Benjamin

SWORN to and subscribed before me this 14 day of December, 2011.

Helen P. Keem (L.S.)  
Notary Public

My Commission Expires: 5/18/14

FILED  
CLERK OF COURT  
2011 DEC 20 PM 2:53

APPLICATION TO PROCEED WITHOUT PAYMENT  
OF COSTS AND AFFIDAVIT  
IN SUPPORT THEREOF

I, Gregory Benjamin, # 234091, hereby apply for leave to  
proceed in this action without prepayment of fees or costs or security therefor. In support of my  
application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Gregory B Benjamin  
Applicant

SWORN or affirmed to and subscribed before me this  
14 day of December, 2011.  
Helen P. [Signature]  
Notary Public

My Commission Expires: 5/18/14

2011 DEC 20 PM 2:53  
FILED FOR RECORD  
WITNESS  
CLERK  
COURT

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF ORANGEBURG )  
 )  
 Gregory D. Benjamin. #234091 )  
 )  
 Applicant. )  
 )  
 v. )  
 )  
 State of South Carolina, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
 FIRST JUDICIAL CIRCUIT

2011-CP-38-1540

**RETURN AND MOTION TO DISMISS**

In response to the post-conviction relief application filed December 20, 2011, the Respondent would show this Court:

I.

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 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.

## II.

In his current application for post conviction relief the 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.

For the purpose of this Return, the Respondent incorporates the Orangeburg County Clerk of Court records, the South Carolina Department of Corrections' records, and the prior PCR records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## III.

The Court should summarily dismiss the current Application because it is successive to the previous Petition for Writ of Habeas Corpus and prior PCR application. 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). 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 (1985) 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 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 post-conviction relief applications. Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

#### IV.

The Respondent submits that this Application for Post-Conviction Relief should also 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, et. seq. 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, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

## V.

Moreover, the Applicant has filed this application more than 15 years after he was convicted. The Respondent submits that the doctrine of laches bars the Applicant from raising these allegations in a post-conviction relief application. Absent some explanation or justification for the delay in seeking post-conviction relief, laches will prevent an Applicant from seeking collateral review of his conviction, especially where the delay affects the availability of evidence to refute the applicant's claims. McElrath v. State, 276 S.C. 282, 277 S.E.2d 890 (1981); Honeycutt v. Ward, 612 F.2d 36 (2nd Cir. 1979). Whitehead v. State, 352 S.C. 215, 574 S.E.2d 200 (2002).

To ensure finality of litigation, our courts require reasonable diligence in pursuing collateral relief. This requirement "guards the state's legitimate expectation that it will not be called upon without due cause, to defend the integrity of convictions that occurred many years ago, where records and witnesses are no longer available." McElrath, 276 S.C. at 283. Rule 9(a) of the Federal Habeas Corpus Act recognizes the doctrine of laches. The Rule states in pertinent part:

A petition may be dismissed if it appears that the state of which the Respondent is an officer has been prejudiced in its ability to respond to the Petition by delay in its filing unless the Petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

Furthermore the South Carolina legislature has recognized this problem and instituted a one year statute of limitations. See S.C. Code Ann. §17-27-45(a).

The Applicant's delay has greatly prejudiced the Respondent. A transcript of the Applicant's trial is now unavailable. If the Applicant had sought post-conviction relief within a reasonable time after his plea, neither of these problems would exist. Therefore, the Court

should summarily dismiss the Application based on the Applicant's lack of diligence in processing his claim for relief.

## VI.

The Respondent denies each allegation that is not expressly admitted, qualified or explained.

## VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive to the Applicant's prior PCR action and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON  
Attorney General


JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY W. ELLIOTT  
Assistant Deputy Attorney General

MARY S. WILLIAMS  
Assistant Attorney General

P.O. Box 11549  
Columbia, S.C. 29211

By:

  
Attorneys for the Respondents

Columbia, South Carolina


March 7, 2012.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF ORANGEBURG	)	
	)	2011-CP-38-1540
	)	
GREGORY D. BENJAMIN, 234091,	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	
	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

**Clarissa W. Joyner, Esquire**  
**The Law Firm of Clarissa Warren Joyner**  
**1259 Amelia Street, Ste. A**  
**Orangeburg, SC 29115**

DATED this 2<sup>nd</sup> day of March, 2012.

  
 Lauren Meara, Legal Assistant  
 For Respondent

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 FEB 10 PM 3:11

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

**ATTEST: TRUE COPY**  
*Wynya B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY, SC

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.

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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

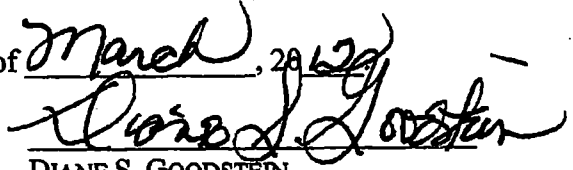
Application was filed on December 20, 2011, which was well after the statutory filing period had expired.

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

Sumner, South Carolina.

STATE OF SOUTH CAROLINA  
COUNTY OF ORANGEBURG

Gregory D. Benjamin, #234091,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-1540

**AMENDED FINAL ORDER  
OF DISMISSAL**

FILED FOR THE COURT  
CLERK OF COURT  
ORANGEBURG COUNTY, SC  
2012 FEB 11 PM 1:05

This matter comes before the Court pursuant to an application for post-conviction relief filed December 20, 2011. Respondent made its Return and Motion to Dismiss on or about March 5, 2012, requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed April 10, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated January 14, 2014, serving the above-mentioned Conditional Order of Dismissal on the Applicant's counsel.

The Applicant made no response to the Conditional Order of Dismissal. This Court has reviewed the original pleadings and finds that a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, this application for post-conviction relief is hereby denied and dismissed with prejudice.

ATTEST: TRUE COPY  
*Wingja B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY, SC

This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review. See Rule 203, SCACR. The Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 8<sup>th</sup> day of April, 2014.



EDGAR W. DICKSON  
Judge, First Judicial Circuit

Orangby, South Carolina.



ALAN WILSON  
ATTORNEY GENERAL

April 10, 2014

The Honorable Winnifa Brown-Clark  
Clerk of Court, Orangeburg County  
Post Office Box 9000  
Orangeburg, South Carolina 29115-9000

Re: Gregory D. Benjamin, #234091 v. State of South Carolina  
2011-CP-38-1540

Dear Ms. Brown-Clark:

Enclosed please find the signed original **Amended Final Order of Dismissal** in the above captioned cases for filing in your office. Please return a clocked copy to me once you have filed this document. If you have any questions or concerns, please contact me at (803) 734-3737 or MHarrigan@scag.gov.

Sincerely,

Megan E. Harrigan  
Assistant Attorney General

MEH/ko

FILED FOR RECORDED  
CLERK OF COURT  
ORANGEBURG, SC  
2014 APR 11 PM 10:04  
CW

STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
 COUNTY OF ORANGEBURG )  
 )  
 ) 2011-CP-38-1540  
 Gregory D. Benjamin, #234091, )  
 )  
 Applicant, )  
 vs. ) **MOTION FOR**  
 ) **RECONSIDERATION AND/OR**  
 ) **RELIEF FROM JUDGMENT**  
 State of South Carolina, )  
 Respondent. )

2014 MAY 19 PM 4:07  
 CLERK OF COURT

**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, inadvertence and/or

**TEST: TRUE COPY**  
*Winnia B. Clark*  
 CLERK OF COURT

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 calendar 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 of the 1<sup>st</sup> 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 4<sup>th</sup> 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 1<sup>st</sup> 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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Clarissa Warrem Joyner  
P.O. Box 1724  
Orangeburg, SC 29116  
(803) 534-8393 Telephone  
(803) 534-7885 Facsimile  
[joynerlawfirm@aol.com](mailto:joynerlawfirm@aol.com)

Orangeburg, South Carolina  
May 19, 2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF ORANGEBURG )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL CIRCUIT

Docket Number: 2011-DR-38-1540

Gregory D. Benjamin, #234091, )  
 )  
Petitioner, )  
vs. )

STATE OF SOUTH CAROLINA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

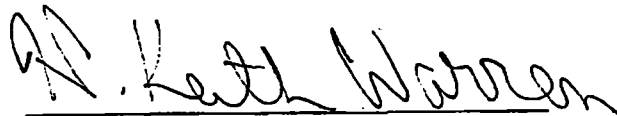
**CERTIFICATE OF SERVICE**

I, H. Keith Warren, legal assistant to Clarissa Warren Joyner, Attorney for  
Petitioner, Gregory D. Benjamin, do hereby certify that on May 19, 2014, I served  
a motion for Reconsideration and/or Relief from Judgment on Megan E.

Harrigan, Assistant Attorney General's Office, at the address referenced below  
by depositing a copy of same in the United States Mail, with a return address  
clearly indicated and addressed as follows:

Megan E. Harrigan, Esquire  
Attorney General's Office  
Post Office Box 11549  
Columbia, South Carolina 29211-1549

**THE LAW FIRM OF CLARISSA W. JOYNER**

  
\_\_\_\_\_  
H. Keith Warren

Orangeburg, South Carolina  
May 19, 2014

STATE OF SOUTH CAROLINA  
COUNTY OF ORANGEBURG

Gregory D. Benjamin, #234091,  
Applicant,

v.

State of South Carolina,  
Respondent.

IN THE COURT OF COMMON PLEAS  
FOR THE FIRST JUDICIAL CIRCUIT

Case No. 2011-CP-38-01540

**ORDER DENYING MOTION TO ALTER  
OR AMEND THE ORDER OF DISMISSAL**

2015 AUG -3  
D 17: 13

This matter comes before this Court by way of an application for post-conviction relief filed December 20, 2011. In its Return and Motion to Dismiss, Respondent requested that the action be summarily dismissed as filed beyond the statute of limitations and successive to his previous applications for post-conviction relief pursuant to S.C. Code Ann. § 17-27-10 through -160. A Conditional Order of Dismissal was filed on April 10, 2012, giving Applicant twenty (20) days to provide sufficient explanation or reason as to why the dismissal should not become final. Applicant was served with the Conditional Order of Dismissal on May 17, 2013. A Final Order of Dismissal was entered by this Court on January 6, 2014. An Amended Final Order of Dismissal was entered on April 11, 2014, as the FOD was improperly served on Applicant and not Applicant's counsel. Applicant, by and through counsel, filed a document captioned "Motion for Reconsideration and/or Relief from Judgement" on May 19, 2014.

In this Motion, Applicant, for the first time, raises objections to the COD becoming final. This Court finds that Applicant failed to raise these objections in a timely manner. Therefore, this Court hereby denies the Applicant's Motion in its entirety, and affirms the previous Order of Dismissal.

This Court advises that if the Applicant desires to secure appellate review of this Order and the Order of Dismissal, a notice of appeal must be filed and served **within thirty (30) days** of the service

TEST: TRUE COPY  
*Winniford B. Clark*  
CLERK OF COURT  
ORANGEBURG COUNTY, SC

of this Rule 59 Order. Applicant is directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of appeal has been timely filed.

AND IT IS SO ORDERED this 28 day of July, 2015.

Maité Murphy  
MAITÉ MURPHY  
Chief Judge for Administrative Purposes  
First Judicial Circuit

St. George, South Carolina

ATTEST: TRUE COPY  
Winnifred B. Clark  
CLERK OF COURT