

LAW OFFICE OF
TRICIA A. BLANCHETTE

RECEIVED

JAN 25 2017

S.C. SUPREME COURT

January 25, 2017
VIA HAND DELIVERY

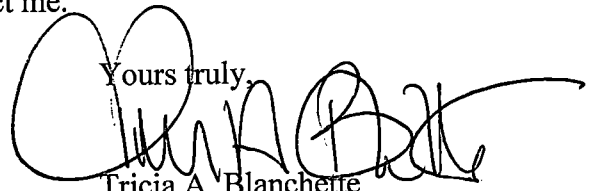
The Honorable Daniel E. Shearouse
Clerk, Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

RE: Trevor Fishburne v. State; Docket No.: 2012-CP-15-0604

Dear Sir:

In response to your letter dated January 10, 2017, I have attached for filing an original and six copies of an Explanation, with an attachment. I have also attached for filing the original Certificate of Service. Finally, in response to your request, I have attached the Order dated March 25, 2013. If anything further is needed, please contact me.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Ruston Neely, Office of the Attorney General
Trevor Fishburne

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 25 2017

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Post Conviction Relief
Honorable Frank R. Addy, Jr., Circuit Court Judge
Honorable R. Lawton McIntosh, Circuit Court Judge

S.C. SUPREME COURT

Case No.: 2012-CP-15-0604
App. Case No.: 2017-000026

Trevor Fishburne, 340902,.....Petitioner,

vs.

State of South Carolina,.....Respondent.

EXPLANATION PURSUANT
TO RULE 243 & 203, SCACR

Pursuant to the letter of this Court dated January 10, 2017, undersigned counsel makes the following explanation pursuant to Rule 243 (c), and Rule 203 (d)(1)(B), SCACR.

As to the Rule 203(d)(1)(B), SCACR, explanation counsel would request that Petitioner be given 20 days from the date of the receipt of this response to provide an explanation as to issues he wanted raised on direct appeal. Since plea counsel failed to preserve any issues during the course of the guilty plea or file for reconsideration, the record does not provide meritorious issues for counsel to assert. Nevertheless, at the evidentiary hearing, Applicant did provide testimony that his plea was not made knowing and voluntarily, which may support grounds for a basis for a meritorious issue on belated

direct appeal. Additionally, at the evidentiary hearing, counsel argued that the bifurcated plea proceedings and severity of the sentence provided a basis on which on appeal should be perfected.

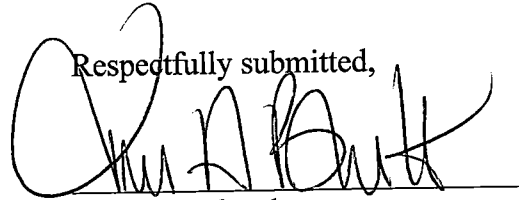
As to the Rule 243 (c), SCACR, explanation, counsel would first assert that the lower court erred in finding the Application untimely. As was argued in detail in the hearing held in front of the Honorable R. Lawton McIntosh on March 2, 2016, Petitioner attempted to file his Application in a timely manner and was unaware it was not filed until undersigned counsel informed him of such. Therefore, under Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (2008), counsel submits and argued to the lower court that Petitioner should have been entitled to equitable tolling, especially since no prejudice was established by the State.¹ As a result, counsel would ask that this Court allow an appeal to go forward on the lower court's finding that the Application was untimely filed and barred as a "matter of law."

Secondly, by way of the Supplemental Response to Conditional Order of Dismissal and/or Amendment to Application for Post Conviction Relief, attached herein, Petitioner has raised a claim of newly discovered evidence, which the lower court refused to hear testimony on despite Petitioner attaching an Affidavit attesting to the newly discovered evidence. As was argued at the motion hearing on March 2, 2016, counsel submits that Petitioner is entitled to a hearing on the merits of his claim of newly discovered evidence pursuant to S.C. Code Ann. 17-27-45 (c) and the lower court erred in summarily dismissing this claim by way of the Order dated May 17, 2016.

¹ Petitioner obtained a copy of the trial and plea transcript to ensure it was not destroyed during the pendency of his Application and a copy was provided to the lower court at each hearing.

For the above stated reasons, counsel would respectfully ask that this Court allow Petitioner's appeal to go forward to ensure that he is given "one full bite of the apple." See Poston v. State, 339 S.C. 37, 528 S.E.2d 422 (2000), Wilson v. State, 348 S.C. 215, 218, 559 S.E.2d 581, 582-83 (2002).

Respectfully submitted,



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 25 2017

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JAN 25 2017
S.C. SUPREME COURT

APPEAL FROM COLLETON COUNTY
Court of Common Pleas
Post Conviction Relief
Honorable Frank R. Addy, Jr., Circuit Court Judge
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Case No.: 2012-CP-15-0604
App. Case No.: 2017-000026

Trevor Fishburne, 340902,.....Petitioner,

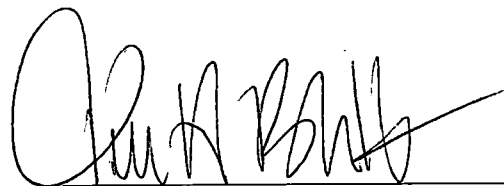
vs.

State of South Carolina,.....Respondent.

CERTIFICATE OF SERVICE

I, Tricia A. Blanchette, Attorney at Law, hereby certify that a copy of a
Explanation, with attachments was hand delivered this 25th day of January 2017 to the
Office of the Attorney General addressed to Ruston Neely, Assistant Attorney General, as
follows:

Office of the Attorney General
Att: Ruston Neely, Ast. AG
1000 Assembly Street, Rm. 519
Columbia, SC 29201



Tricia A. Blanchette
Bar #74904
PO Box 2147
Leesville, SC 29070
(803) 908-3266

January 25, 2017

STATE OF SOUTH CAROLINA

COUNTY OF COLLETON

Trevor Fishburne, 340902,

Plaintiff

v.

State Of South Carolina

Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.
2012-CP-15-0604

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney:
Tricia A. Blanchette, Bar No. 74904
Address:
PO Box 12725
Columbia, SC 29211
phone: 803-988-0008 fax: 803-988-8070
e-mail: blanchettelaw@gmail.com other:

Defendant's Attorney:
Rutledge Johnson, Bar No.
Address:
PO Box 11549
Columbia, SC 29211
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: Response to COD

Estimated Time Needed: 15 minutes 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

September 21, 2015
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

Date Filed:

Collected by: _____

- MOTION FEE COLLECTED: _____
- CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

TREVOR FISHBURNE, 340902,)
Applicant,)
v.)
)
STATE OF SOUTH CAROLINA,)
Respondent,)
_____)

IN THE COURT OF COMMON PLEAS

DOCKET NO.: 2012-CP-15-0604

SUPPLEMENTAL
RESPONSE TO CONDITIONAL
ORDER OF DISMISSAL AND/OR
AMENDMENT TO APPLICATION

This matter comes before the Court by way of an Application for Post Conviction Relief filed on August 2, 2012. The State submitted a Return and Motion to Dismiss and Conditional Order of Dismissal on March 21, 2013. On March 25, 2013, the Honorable Perry M. Buckner signed the Conditional Order of Dismissal (COD). Prior to date on the Affidavit of Service on the COD, Applicant submitted a pro-se response to the unsigned COD on April 9, 2013.

On March 3, 2015, undersigned counsel sent written notice to the Office of the Attorney General and the Colleton County Clerk of Court that she had been retained to represent Applicant and requesting that she be copied on all filings. Prior to and after being retained, counsel exchanged several phone calls and email correspondence with Ashleigh Wilson, Assistant Attorney General, by which she was informed that there was not a signed COD and counsel would be copied on such when it was signed. Counsel was also informed that a Final Order of Dismissal had not be submitted for this reason. Counsel also contacted the Colleton County Clerk of Court and was also informed that there was not a signed COD to be sent to her.

After Ashleigh Wilson, Assistant Attorney General, was replaced by Rutledge Johnson, Assistant Deputy Attorney General, counsel contacted Mr. Johnson on July 9,

2015 again inquiring as to whether a COD had been signed. After repeated inquiry, counsel received a copy of the signed COD and Affidavit of Service on Applicant via email on September 21, 2015. Counsel also informed Mr. Johnson that she had not received any filings from his office in response to her letter dated March 3, 2015. Thereafter, Mr. Johnson provided a copy of some of the filings via email.

As a result of counsel being informed on September 21, 2015 that there was a signed COD following her diligent efforts to obtain such information, Applicant, through counsel would ask this Court to accept this Supplemental Response and consider such as timely. It is counsel's understanding that Mr. Johnson intends to submit a Final Order of Dismissal within one day, so Applicant would further ask for the opportunity to respond to said Order upon receipt and for this Court to schedule a motion hearing on the matter during the next term of court.

Applicant, through counsel, would respond to the signed Conditional Order of Dismissal by incorporating Applicant's pro-se response and supplementing such with the following:

First, Applicant submits that in the exercise of due diligence his Applicant was filed in as timely manner as the Clerk of Court's Office and Lee Correctional Institution's mailroom allowed. On July 7, 2012, counsel met with Applicant for a free consultation at Lee Correctional Institution. At that time, Applicant explained to counsel that he had submitted his Application on time, but it had been returned to him by the Colleton County Clerk of Court.¹ Thereafter, Applicant had resubmitted the Application, but he

¹ During that meeting, Applicant provided dates of his attempts to file his Application. Since counsel is responding on the same day she was given notice of the signed COD, exact dates cannot be provided at this time but counsel's notes reflect that the original submission would have resulted in a timely filed Application.

had requested and had been waiting on verification that it had been filed. As a result, counsel contacted the Colleton County Clerk of Court's Office as a courtesy to Applicant and discovered that an Application was not on file with their office. As a further courtesy, counsel provided Applicant with a blank Application, which she ensured was properly filed for Applicant on August 2, 2012. Counsel can attest to Applicant's efforts to timely file his Application and that it took her free assistance to ensure that his Applicant was timely filed. Therefore, Applicant would ask for this Court to find that his efforts allow for the doctrine of equitable tolling to be applied and the statute of limitations to be relaxed. See Pelzer v. State, 378 S.C. 516, 662 S.E.2d 618 (2008) (Finding equitable tolling is available if such tolling is necessary to prevent unfairness to a diligent plaintiff.).

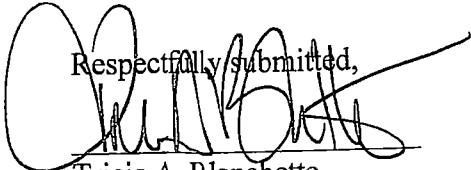
Additionally, Applicant submits that the State should be estopped from arguing prejudice from Applicant's delay in filing when no reason has been shown as to why the State has failed to submit a Final Order of Dismissal following the signing of the COD in March of 2013 (2 ½ years delay) or in responding to counsel's written notice and repeated requests for Applicant's filings since March of 2015 (nearly 7 month delay). As a result, Applicant would submit that he is the party that has been prejudiced by delay, which is further evidenced by the State planning to submit a Final Order within one day of counsel receiving notice of a signed COD and when counsel received some of the Applicant's filings via email.

As to the merits of Applicant's case, Applicant submits that there are material facts at issue which would preclude the State from "judgment as a matter of law." S.C. Code Ann. § 17-27-70(c) (2003). In addition to the allegations set forth by Applicant's

prior filings, Applicant would amend his Application to clearly request a belated direct appeal pursuant to White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974). Applicant has obtained signed statement from Wanda Glover, a copy of which is attached, attesting to Applicant's request for a direct appeal. Additionally, Applicant has obtained a signed statement from alleged victim, Jermaine VanDyke, a copy of which is attached, which supports allegations of ineffective assistance of counsel, involuntary guilty plea and newly discovered evidence pursuant to S.C. Code Ann. § 17-25-45 (B) (Supp. 2009), which Applicant would move to amend his Application to reflect. Finally, Applicant has obtained a copy of his trial transcript prior to the entry of his plea, which Applicant submits supports an allegation of ineffective assistance of trial counsel and involuntary guilty plea. As a result, Applicant submits that his Applicant presents material facts that are not ripe for summary dismissal and has raised allegations to which the one year statute of limitations does not apply.

Therefore, based upon the foregoing, the Applicant respectfully submits that specific reasons exist to support the Applicant's position that his Application should not be dismissed with prejudice. Additionally, Applicant would respectfully request that a motion hearing be held during the next term of court prior to the issuance of an Final Order of Dismissal and/or the Application be allowed to proceed to an evidentiary hearing.

September __, 2015
Columbia, SC

Respectfully submitted,

Tricia A. Blanchette
Attorney for the Applicant
Post Office Box 12725
Columbia, South Carolina 29211
(803) 988-0008

STATE OF SOUTH CAROLINA
COUNTY OF WALTERBORO

) IN THE COURT OF COMMON PLEAS
) FOR THE FOURTEENTH JUDICIAL CIRCUIT

Trevor Fishburne, #340902,
Applicant,

) #2012-CP-15-0604

vs.

) AFFIDAVIT OF JERMAINE
) VANDYKE

State of South Carolina,
Respondents.)

PERSONALLY appeared before me, Jermaine Vandyke, Affiant, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Jermaine Vandyke (hereafter, "Affiant"), the individual offering this sworn testimony within this Affidavit.

Affiant is a resident of Walterboro County, located at: 609 Francis Street, Walterboro, South Carolina 29488; Telephone No. (843)-635-6627. Affiant provides this personal information in the event that any party associated herewith, to include the courts, should require to interview and/or subpoena Affiant for testimony.

2). Affiant was alleged to have been a victim in the criminal offenses that, Trevor Fishburne #340902 ("Applicant") now stands convicted.

Although Affiant was a "victim" to the criminal allegations, he reported to the Solicitor's Office and spoke personally with a [male] prosecutor. It was disclosed to this unidentified prosecutor that Affiant had not been any victim relating to any type of Armed robbery and wanted to set the record straight.

3). When Affiant learned of the trial that the Applicant had been called to have a jury determine his fate, he reported to the Walterboro County Courthouse to testify.

When coming to the Courthouse Affiant met a Law Enforcement official and inquired as to where the trial in question was occurring. Affiant would be informed, at that time, that the trial was over and the Applicant had been sentenced.

For the purposes of this record, Affiant would attest that he reported to the Courthouse for the sole purpose of testifying on behalf of the Applicant. It was, and remains till this day, Affiant's position to clear the air and correct any misrepresented facts or evidence that may have been introduced by the prosecution.

4). On the day that the incident occurred, Kelvin F. Mitchell, Jr., (purported "Victim") and Affiant went to Applicant's grandmother's residence to pick-up Applicant to go look at an automobile.

Once at the residence, Elijah Brown, would come by and be in the Victim's automobile at this time the shooting incident occurred.

Applicant, Affiant, Victim and Brown got into Victim's automobile and rode over to Cane Branch Road.

5). Affiant was aware that the Victim had informed Applicant of a "Classic Box Chevy" that was for sale in the Druid Apartments right off Cane Branch Road.

The reason that Applicant had been invited to ride out and look an automobile that Applicant might have been interested in purchasing. Applicant has an avid affection for these 1980's style automobiles, and had one that he had already restored at his residence.

6). Victim was the driver and Applicant sat in the back seat behind him. Affiant sat in the passenger seat, and Brown in the back behind him.

Affiant watched as Victim passed the turn off to the Druid Apartments and continued down Cane Branch Road.

7). Affiant would attest that Cane Branch Road is a long stretch of road that is two lane and pretty much desolate. It is a rural area that is made up of woods and fields. It is not a good place to get isolated or abandoned at. Not a great deal of traffick occupies this stretch of road.

8). Affiant observed the Victim as his hand began to disappear between the driver's side door and seat. It was apparent that the Victim was reaching for a weapon. Furthermore, Victim is known to always be in possession of a hand gun.

9). Victim slammed on the brakes and turned the car cross ways in this deserted stretch of road.

Affiant immediately jumped out of the car and the Victim's opened his door. It was at this time that the Applicant fired the shot that injured the Victim.

10). Affiant is of the belief that the Applicant became aware of the stealth movement of the Victim as he reached between the door and seat; then the car screeching to an abrupt halt; Applicant jumped out and observed the Victim pulling out a hand gun and fired to protect himself.

Affiant being in the front seat had a clear line of view of the movements of the Victim and offers this testimony as a means to clarify the facts that led up to the Applicant's actions in this incident.

11). Furthermore, for this record, Affiant is of the belief that Brown did not have any involvement as far as a robbery, but simply was along for the ride and to examine the car that was suppose to be at the Druid Apartments.

12). It was the Victim who had the intent of robbing the Applicant and it did not work out as he had seemed to have planned it.

Under the circumstances that Affiant watched as they unfolded, it became evident that Applicant was attempting to circumvent the purported Victim's intent to rob or kill him.

Affiant was aware that Applicant had brought with him a large sum of cash, so if he liked the car he could purchase it and bring the automobile home with him.

13). This sworn testimony is offered consistent with Rule 43(d) and (e), of the South Carolina Rules of Civil Procedure, SCRCP; and Rule 603, of the South Carolina Rules of Evidence, SCRE.

AFFIANT SAYETH NO FURTHER

June __, 2015

Respectfully Submitted,

Jermaine Vandyke
609 Francis Street
Walterboro, South Carolina
29488

(843)-635-6627

Jermaine Vandyke

Sworn and subscribed before me this
__ day of __, 2015

Notary Public for South Carolina
My commission expires: _____

STATE OF SOUTH CAROLINA)
COUNTY OF WALTERBORO) IN THE COURT OF COMMON PLEAS
FOR THE FOURTEENTH JUDICIAL CIRCUIT

Trevor Fishburne, #340902,)
Applicant,) #2012-CP-15-0604

vs.) AFFIDAVIT OF WANDA GLOVER

State of South Carolina,)
Respondents.)

PERSONALLY appeared before me, Wanda Glover, Affiant, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Wanda Glover (hereafter, "Affiant"), the individual offering this sworn testimony within this Affidavit.

Affiant is the maternal parent of Trevor Fishburne #340902 ("Applicant"), and is fully aware of all facts and occurrences that are relevant to this subject matter.

Affiant would further provide all parties associated hereto with her address: 8279 Ritter Road, Walterboro,

South Carolina 29488; and Telephone No. (843)-893-4471, in the event that any such party, to include the courts, should wish to contact Affiant to interview and/or subpoena her for a court appearance, this contact information is available to them for contacting purposes.

2). On or about March 25, 2010, the Applicant was tried and convicted in the Court of General Sessions, Walterboro County, by a jury of his peers.

Affiant contacted E.W. Bennett, Esquire, (trial counsel), immediately after this trial and inquired if counsel would file for a direct appeal. Affiant was informed by Applicant that he desired to appeal the adverse decision and that he further believed that there was merit to such an appeal.

3). Trial counsel informed Affiant that he had already begun to prepare the Notice of Intent to Appeal.

Several times over the course of a two week period, Affiant would contact trial counsel concerning whether he had filed the requested appeal. Each time Affiant personally spoke with trial counsel concerning this topic, i.e., filing for appeal, and trial counsel informed her that he had already taken care of it.

After the two week period had passed, trial counsel simply began to avoid or evade Affiant's attempts to communicate and/or respond to her inquiries.

It had become apparent that trial counsel did not wish to communicate with Affiant nor Applicant, and had not filed the necessary notice of appeal, thereby depriving Applicant of the rights associated with the appellate process.

4). This Affidavit is submitted as sworn testimony consistent with Rule 43(d) and (e), of the South Carolina Rules of Civil Procedure, SCRPC; and Rule 603, of the South Carolina Rules of Evidence, SCRE.

AFFIANT SAYETH NO FURTHER

June ____, 2015

Respectfully Submitted,

Wanda Glover
8279 Ritter Road
Walterboro, South Carolina
29488

(843)-893-4471

Sworn and subscribed before me this
__ day of _____, 2015

Notary Public for South Carolina
My commission expires:

Wanda Glover



LAW OFFICE OF TRICIA A. BLANCHETTE

March 3, 2015

Colleton County Clerk of Court
ATT: Common Pleas
PO Box 620
Walterboro, SC 29488

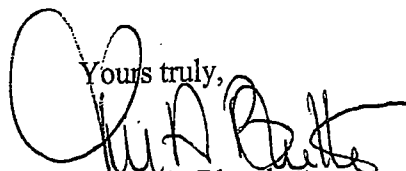
RE: Trevor Fishburne v. State; Docket No.: 2012-CP-15-0604

Dear Clerk:

I am writing to enter my appearance on behalf of Trevor Fishburne in the above referenced PCR case. Please note your file accordingly to ensure that I am copied on all filings.

Thank you for your assistance with this matter. Please contact me with any questions.

Yours truly,



Tricia A. Blanchette
Attorney at Law

cc: Ashleigh Wilson, Assistant Attorney General
Trevor Fishburne