

3
The State of South Carolina
In the Supreme Court

APPEAL from York County
Court of Common Pleas P.C.R

Honorable John C Hayes III Circuit Court

CASE NO: 2008-CP-46-1900

Jimmie Smith Jr.

Applicant,

vs

State of South Carolina

Respondent,

NOTICE OF APPEAL

I Prose Jimmie Smith Jr. Appeals the Order issued
On August 14, 2017 in York County, South Carolina

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The State of South Carolina
In the Supreme Court

Appeal from York County
Court of common Pleas PCR

Honorable John C Hayes III Circuit Court

CASE NO: 2008-CP-46-1900

Johnnie Smith Jr
Applicant

vs

State of South Carolina

Respondent

CERTIFICATE OF SERVICE

I, Prose Johnnie Smith Jr. hereby certify that I U.S.
mailed out this document on 18th day of September copy the
NOTICE of Intent to Appeal and attachment of office of the
Attorney General's office at: Post Office Box 11549 Columbia,
S.C. 29211-1549

SS Johnnie Smith Jr
Prose Johnnie Smith Jr # 310505
LEE C.I. #4-A # 115B
990 Wsacky Hwy
Bishopville S.C. 29010

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Johnnie Smith Jr # 310505
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The South Carolina
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STATE OF SOUTH CAROLINA)
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COUNTY OF YORK)
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Johnnie Smith, Jr.,)
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Applicant,)
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vs.)
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State of South Carolina,)
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Respondent.)

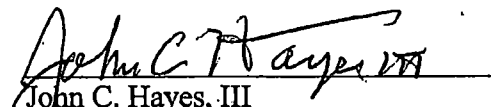
IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT
C.A. No.: 2008-CP-46-1900

ORDER

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2017 AUG 18 PM 2:21
DAVID HANNEFON
C.C.J.P. & GS
YORK COUNTY, SC

Applicant has filed a third motion seeking relief from a judgement in his Post-Conviction proceeding. The Court disposed of this issue with finality by Order dated April 20, 1015. Therefore, further consideration of Applicant's motion is unwarranted and the instant motion (dated July 10, 2016) is dismissed with prejudice.

IT IS SO ORDERED.


John C. Hayes, III
Presiding Judge

August 14, 2017
York, South Carolina

CC: Johnnie Smith, Jr.

STATE OF SOUTH CAROLINA

COUNTY OF York

Johnnie Smith Jr.

Plaintiff(s)

vs.

State Of South Carolina

Defendant(s)

Submitted By: Johnnie Smith # 310505

Address: Lee Correction Institution

990 Wilsocky Highway / F4A-1158

Bishopville, S.C. 29010

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

08 -CP- 46 - 1900

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
- NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
- Instructions (100)
 - Debt Collection (110)
 - General (130)
 - Breach of Contract (140)
 - Fraud/Bad Faith (150)
 - Failure to Deliver/Warranty (160)
 - Employment Discrim (170)
 - Employment (180)
 - Other (199)

- Torts - Professional Malpractice**
- Dental Malpractice (200)
 - Legal Malpractice (210)
 - Medical Malpractice (220)
 - Previous Notice of Intent Case # 20 -NI-
 - Notice/ File Med Mal (230)
 - Other (299)

- Torts - Personal Injury**
- Conversion (310)
 - Motor Vehicle Accident (320)
 - Premises Liability (330)
 - Products Liability (340)
 - Personal Injury (350)
 - Wrongful Death (360)
 - Assault/Battery (370)
 - Slander/Libel (380)
 - Other (399)

- Real Property**
- Claim & Delivery (400)
 - Condemnation (410)
 - Foreclosure (420)
 - Mechanic's Lien (430)
 - Partition (440)
 - Possession (450)
 - Building Code Violation (460)
 - Other (499)

- Special Petitions**
- PCR (300)
 - Mandamus (520)
 - Habeas Corpus (530)
 - Other (599) Rule 60(b)

- Administrative Law/Relief**
- Reinstate Drv. License (800)
 - Judicial Review (810)
 - Relief (820)
 - Permanent Injunction (830)
 - Forfeiture-Petition (840)
 - Forfeiture-Consent Order (850)
 - Other (899)

- Judgments/Settlements**
- Death Settlement (700)
 - Foreign Judgment (710)
 - Magistrate's Judgment (720)
 - Minor Settlement (730)
 - Transcript Judgment (740)
 - Lis Pendens (750)
 - Transfer of Structured Settlement Payment Rights Application (760)
 - Confession of Judgment (770)
 - Petition for Workers Compensation Settlement Approval (780)
 - Other (799)

- Appeals**
- Arbitration (900)
 - Magistrate-Civil (910)
 - Magistrate-Criminal (920)
 - Municipal (930)
 - Probate Court (940)
 - SCDOT (950)
 - Worker's Comp (960)
 - Zoning Board (970)
 - Public Service Comm. (990)
 - Employment Security Comm (991)
 - Other (999)

- Special/Complex /Other**
- Environmental (600)
 - Automobile Arb. (610)
 - Medical (620)
 - Other (699)
 - Sexual Predator (510)
 - Permanent Restraining Order (680)
 - Pharmaceuticals (630)
 - Unfair Trade Practices (640)
 - Out-of State Depositions (650)
 - Motion to Quash Subpoena in an Out-of-County Action (660)
 - Pre-Suit Discovery (670)

Submitting Party Signature:

Johnnie Smith Jr.

Date: July 10 2016

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

DAVID HAMILTON
C.C.C.P. CLERK
YORK COUNTY, SC
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State Of South Carolina

York County Courthouse

Count Of Common Pleas

Sixteenth Judicial Circuit

Hon. John C. Hayes, III

Johnnie Smith, Jr.

Applicant.

vs

State Of South Carolina.

Respondent

08-CF-46-1900

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YORK COUNTY, SC

Motion For Relief From

Judgment

S.C. Civil P. Rule 60(B)

Please Take Notice, that applicant moves this court for a hearing based on South Carolina Code Ann. Sec. 17-27-45(B)(c) 2Cum. Supp. 16) whereas, this information and law which come to be known to applicant, would change outcome of Proceedings when

Jury not Judge should have imposed sentencing. For reasons set forth herein this motion should be Granted based on following:

Applicant files this motion Pursuant to McCoy v. State, 401 S.C. 363(2013), where under sec. 17-27-45(a) an application must be filed one year after conviction, or if a direct appeal is taken. However, sec. 17-27-45(c) provides that if applicant discovers "Material Facts Not Previously Presented and heard that require vacation of his conviction or sentence" he/she may file a Per application within one year of actual discovery.

When as herein applicant alleges facts that would establish an exception to either the statute of limitations or the Prohibition against successive Per applications and those facts are not conclusively refuted by record before court, a question of fact is raised requiring a hearing. See, Delaney v. State, 269 S.C. 555, 556(1977). Although claim may ultimately Prove to be untimely, successive, or perhaps unsuccessful on the merits the court is asked to Grant a hearing. Because genuine issues of material fact exist as to whether claim is untimely or successive. See, Lecommon v. State, 363 S.C. 432(2005)

Accordingly, applicant contends under Apprendi v. New Jersey, 530 U.S. 476(2000) the Jury in case at bar never made threshold determination concerning weight of drugs. Moreover, this was addressed at trial, but trial counsel argued this issue under McCluney and not Apprendi, which was relevant to this question.

Similarly, the Per court already ruled that counsel misadvised applicant concerning this case and as such satisfied first Prong of Strickland. But also ruling applicant has not shown Prejudice as a result of advice

Thus, the Sixth amendment by its terms is not a limitation on Judicial Power, but a reservation of Jury Power. It limits Judicial Power only to the extent that the claimed Judicial Power infringes on the Province of the Jury. Indeterminate sentencing does not do so. It increases Judicial discretion, to be sure, but not at the expense of the Jury's traditional function of finding the facts essential to lawful imposition of the Penalty.

The facts herein pertain to whether applicant has a legal right to a lesser sentence based on trial testimony weight was under 10 ^{Pounds} (App. PG 363 lines 13-19) and there is no evidence Jury made such finding.

Further, one of the most contested issues at trial was weight and that makes all the difference insofar as judicial infringement upon the traditional role of Jury is concerned. Whether the Sixth amendment incorporates this manipulable standard rather than Apprendi's bright-line rule depends on the plausibility of the claim that the Framers would have left that definition of the Jury Power to Judges' intuitive sense of how far is too far. This case is not about whether sentence imposed is constitutional or unconstitutional, only about whether Jury found applicant to be in possession of 10 ^{Pounds} or more and whether it satisfies statute's threshold weight.

As counsel told Jury that:

"And the evidence is clear in this case there was only 8.2 Pounds of marijuana"

App. PG 242 lines 9-11

Conversely, if statute requires 10 Pounds or more, then anything less would be possession with intent to distribute (App. PG 199 lines 9-14) which evidence proves and counsel argued extensively about.

Therefore, counsel failure to argue and request bifurcated proceedings at trial under Apprendi denied applicant right to counsel at critical stage of adversarial proceedings. Not only does record support the fact state failed to prove drug amount was under 10 Pounds, but record also shows trial Judge and not Jury made determination concerning weight. Similarly, Apprendi was available to counsel at time of trial and issue was ripe for appellate review when trial court stated:

And Mr. Cortez testified he didn't know it was not 10 lbs until he was told when it was weighed that it was not ten Pounds"

App. PG 214 lines 11-13; PG 213 lines 4-9

Conclusion

Like the Appellate court, and other things being equal that General Assembly would have wanted to create this type of unfairness under Derwin v. State, and ask court to vacate sentence.

Date: 10 day of July _____, 2016

Respectfully Submitted:
Johanne Smith
Johanne Smith / Pro Se

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF YORK
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2008CP4601900**

Johnnie Smith Jr 310505

South Carolina State Of

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

ORDER

This order ends does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
n/a	n/a	n/a

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

8/John C Hayes 999
Circuit Court Judge

2049
Judge Code

4/20/2015
Date

For Clerk of Court Office Use Only

This judgment was entered on April 22, 2015, and a copy mailed first class or placed in the appropriate attorney's box on April 22, 2015, to attorneys of record or to parties (when appearing pro se) as follows:

Tricia A Blanchette P O Box 12725 Columbia, SC 29211
Johnnie Smith Jr, Lee Correctional Institute, 990 Wisacky
Highway, Bishopville, SC 29210

ATTORNEY(S) FOR THE PLAINTIFF(S)

J. Rutledge Johnson PO Box 11549 Columbia, SC 29211-
1549

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

Court Reporter

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
 State of South Carolina,)
)
 Plaintiff,)
)
 v.)
)
 Johnnie Smith,)
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 SIXTEENTH JUDICIAL CIRCUIT
 CASE NO: 2008-CP-46-1900

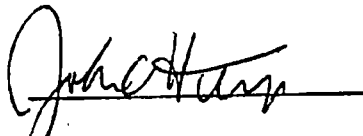
ORDER

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 DAVID HAMILTON
 C.C.P. & G.S.
 YORK COUNTY, SC

The record reflects, Mr. Johnnie Smith filed a "Motion for Relief from Judgement #2008-CP-46-1900 S.C. Civil Procedure Rule 60B(5)(6)." This case was fully adjudicated by evidentiary hearing and Order of Dismissal filed June 2, 2009 and an appeal. First, as this case has been fully adjudicated, the State of South Carolina did not respond to Mr. Smith's 2015 motion. Second, Mr. Smith is attempting to have his case reviewed under Lafler v. Cooper, 132 S.Ct. 1376 (2012). This exact issue was raised during the evidentiary hearing, albeit under different case law. Third, S.C.R.Civ.P. 60(b) mandates, the motion be made "within a reasonable time."

Therefore, Mr. Smith's "Motion for Relief" is DENIED.

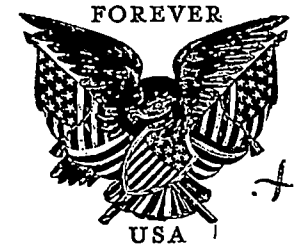
AND IT IS SO ORDERED.


 John C. Hayes, III

April 20¹⁵, 2015

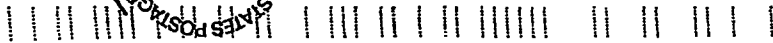
York, South Carolina

Johnnie Smith Sr. #310505
Lee C. I. F4A #1158
990 Wisacky Hwy
Bishopville S.C. 29010



York County S.C.
Clerk of Court's Office
P.O. Box 649, York, S.C. 29745-0649

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PATNEY BOWEN



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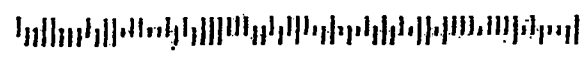
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