

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUL 01 2018
S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diana Schafer Goodstein, Circuit Court Judge

Case No 2015-CP-18-00147

Jonathan Coburn, Petitioner,

vs.

State of South Carolina Respondent

Explanation of Appealability Under Rule 243 (c)

This Court recently addressed the issue of successive Post Conviction Relief Petitions in *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (S.C. 2016). The case did not involve a claim of actual innocence. The case involved the competency of post conviction relief counsel in a capital case, but some language used in the case is helpful in this case. The *Robertson* court noted that as a general rule a successive application for post conviction relief are not allowed. The Court notes, however, that S. C. Code § 17-27-90 requires that all grounds be raised in one 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.” The Court then noted that *Aice v. State*, 305 S.C. 448, 450, 409 S.E.2d 395 (1991) holds that a successive PCR is

forbidden “unless an applicant can point to a ‘sufficient reason’ why the new grounds for relief he asserts were not raised, or were not raised properly.” The Court further quoted *McCoy v. State*, 401 S.C. 363, 369, 737 S.E.2d 623, 626 (2013) that says “Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing.” In addition, the Post Conviction Relief Statute must be interpreted in keeping with Article I, § 6, of the Constitution of the State of South Carolina which provides “All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained.” In South Carolina the Constitution specifically provides a constitutional remedy for wrongs sustained. Obviously an innocent person being imprisoned is a wrong sustained. In addition the Due Process clause of Article I, § 3 of the Constitution of the State of South Carolina would also prevent the wrongful imprisonment of an innocent person. By the Constitution, a remedy must be provided. To interpret the PCR statute to deny a successive PCR based upon actual innocence would render the statute unconstitutional.

The Applicant in this case is not asking for a ruling from the Court based upon the allegations, which, as noted above, must be accepted as true, that the Applicant is actually innocent. All he is requesting is that a hearing be conducted so that the actual innocence issue can be resolved. Such a hearing would not prejudice the State in its ability to prove Mr. Coburn guilty if they have such evidence. Certainly the issue of his actual innocence is a material fact that has not previously been asserted to the courts. In keeping with the *Robertson* decision a Court need not find that ineffective PCR counsel is per se the basis for relief. When the

ineffectiveness of PCR counsel is coupled with a credible claim of actual innocence, that has not been litigated, then the Applicant should be entitled to a successive PCR hearing.

In the Reply to the Conditional Order of Dismissal Jonathan Coburn raised a very credible question as to his innocence. Represented by counsel, Mr. Coburn entered a plea to the murder of Lisa Thompson and assault and battery with intent to kill involving the shooting and wounding of Melvin "Keith" Bryant. The theory of the state was that then sixteen year old Jonathan Coburn, under the direction and planning of Vincent Payton, attempted to rob Mr. Bryant, who was a known drug dealer, and shot him while attempting the robbery. When Mr. Coburn approached the passenger side of the automobile in which Mr. Bryant was sitting, Mr. Coburn pulled out a pistol and shot Mr. Bryant, grazing his face. Mr. Coburn fired twice into the car from the passenger side and fled the scene. Mr. Bryant gave a statement and an interview stating that he, Mr. Bryant, also fled the scene immediately after the shooting. In Mr. Bryant's interview he indicated that Ms. Thompson was alive when he left the scene where Ms. Thompson was shot. She was obviously killed instantly and Mr. Bryant left after Mr. Coburn left. Interview Melvin Bryant, attached as Exhibit A.¹ His reason for fleeing the scene and not coming back when law enforcement arrived was never explained. Mr. Bryant later gave a statement stating that Mr. Coburn, after shooting him, went to the driver's side of the automobile and shot two more times. Exhibit B. This theory was not used by the State at the plea of Mr. Coburn. Plea of Jonathan Coburn, Exhibit C at 13, ll 18 to 14 l 17. In addition, this theory is not in keeping with the investigation as only three spent shells were found in the revolver. Exhibit

¹ All Exhibit references are to the attachments to the Reply to the Order of Dismissal filed by the Applicant.

D, North Charleston Police investigation.

During the plea colloquy in state court, the State never offered a theory as to how Ms. Thompson, who was in the driver's seat, was shot in the left side of her head when Mr. Coburn, according to the plea, was on the passenger side of the automobile and fired his weapon only twice. The sole reference to the actual shooting of Ms. Thompson at the plea was the following:

Q. And as part of the plea, obviously you're aware that Lisa Thompson was shot one side - - one time in the head?

A. Yes, sir.

Q. And was killed as a result of that?

A. Yes, sir.

Exhibit C, Plea of Jonathan Coburn hearing at 14, ll 3-7.

A proper plea colloquy can cure a claim of ineffective assistance of counsel. "Moreover, any deficiency on the part of plea counsel was cured by the plea colloquy." *Holden v. State*, 393 S.C. 565, 574, 713 S.E.2d 611, 616(2011); *Dalton v. State*, 376 S.C. 130, 138-139, 654 S.E.2d 870, 874 (Ct. App. 2007) ('In considering an allegation on PCR that a guilty plea was based on inaccurate advice of counsel, the transcript of the guilty plea hearing will be considered to determine whether any possible error by counsel was cured by the information conveyed at the plea hearing.') As to the charge of murder, the plea colloquy in this case cures nothing. Had the State simply conducted a proper plea colloquy, then the defects in the State's case would have been exposed. There is no admission by Mr. Coburn that he shot the deceased. There is no admission by Mr. Coburn that he aided or abetted in the shooting of the deceased. There is no admission by Mr. Coburn that the shooting of the deceased was the part of any plan so that the

hand of one is the hand of all would be applicable.

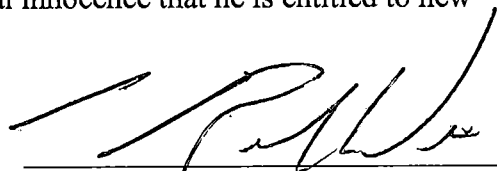
In the Court below, Mr. Coburn submitted the affidavit of Mr. Brent Turvey, who holds a PhD in Criminology and a Master of Science in Forensics. Exhibit E, Vita of Brent Turvey and affidavit. Mr. Turvey's affidavit establishes that Ms. Thompson could not have been shot from the passenger side of the automobile. Exhibit E, Affidavit of Brent Turvey. He further was of the opinion that Mr. Bryant had handled a firearm some time in the recent past. This opinion was based upon the SLED GSR report. Exhibit E, Affidavit of Brent Turvey. The conclusion of Mr. Turvey is that Mr. Coburn could not have shot and killed Ms. Thompson from the passenger side of the vehicle, the position he testified he was in when he fire the two shots. At the plea, the State took no exception to the statement of Mr. Coburn. Apparently no investigation of the underlying facts of the incident was conducted by either trial counsel or post conviction relief counsel. Mr. Coburn has further filed his affidavit attesting to the fact that he did not realize he could not have shot the driver until his case was further investigated. Affidavit of Jonathon Coburn, Exhibit F. At no time did Mr. Coburn ever admit to shooting the driver or knowing he accidentally shot her.

Post Conviction Relief Counsel never argued trial counsel was ineffective for his failure to investigate the case to determine if Mr. Coburn did in fact shoot Ms. Thompson. The actual innocence has never been ruled upon by our courts. The only two issues at the initial PCR hearing were whether Mr. Coburn properly understood the consequences of his plea and whether trial counsel properly advised Mr. Coburn about the felony murder rule. The post conviction relief judge denied relief and her decision was affirmed on appeal.

This Court should hear this matter, remand to the lower Court to determine if Mr.

Coburn can present enough evidence exists as to his actual innocence that he is entitled to new trial.

September 25, 2018

A handwritten signature in black ink, appearing to read 'C. Rauch Wise', written over a horizontal line.

C. Rauch Wise
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THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

S.C. SUPREME COURT

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
Diane Schafer Goodstein, Circuit Court Judge

Appellate Case No. 2018-001645
Case No 2015-CP-18-00147

Jonathan Coburn, SCDC #329567, Petitioner,

vs.

State of South Carolina Respondent.

AFFIDAVIT OF SERVICE

PERSONALLY appeared before me Sandy Traynham who, after being duly sworn, deposes and says that she is the Secretary for C. Rauch Wise, Attorney for the Petitioner in the above entitled case. That on September 25, 2018, she did deposit in the United States Mail with proper postage affixed thereto, a copy of the Explanation of Appealability Under Rule 243 (c) in the above case addressed to Christian Saville, Office of the Attorney General, P.O. Box 11549, Columbia, SC, 29211.

SWORN to and Subscribed

Sandy Traynham

before me this 25 day

of September, 2018.

[Signature] (L.S.)

Notary Public for South Carolina

My Commission expires: 12/7/2019

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S.C. SUPREME COURT

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September 25, 2018

Daniel E. Shearouse, Clerk
Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

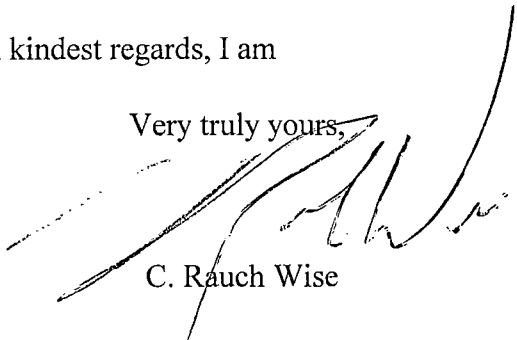
Re: State vs. Jonathan Coburn, Case No. 2018-001645

Dear Mr. Shearouse:

I am enclosing herewith for filing the original and six copies of the Explanation of Appealability Under Rule 243 (c) regarding the above matter together with the original Affidavit of Service.

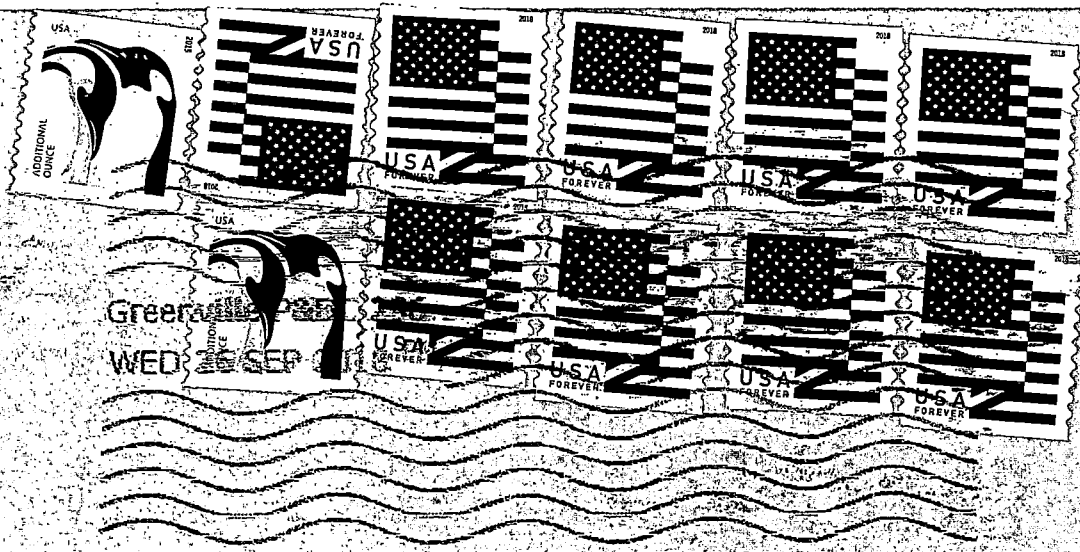
With kindest regards, I am

Very truly yours,


C. Rauch Wise

CRW/slt
Enclosure

cc Christian Saville



Greenville
WED 10 SEP 2010

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