

ORIGINAL

VOLUME II OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

RECEIVED

APR 18 2012

S.C. Supreme Court

ROGER SYNDELL LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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VOLUME II OF II
PAGES 501 – 831

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1 Your Honor. We respectfully request that you deny the State's
2 motion.

3 THE COURT: Thank you, sir. Be glad to hear from you
4 Solicitor.

5 SOLICITOR: Thank you, Your Honor.

6 As Your Honor well knows, as the defense counsel has
7 pointed out, we based this on the factors elicited in Kent v.
8 United States. However, the State believes there are eight
9 factors in this and the first being the seriousness of the offense,
10 with, as defense counsel said, is a very serious offense; we
11 would not disagree on that.

12 The second factor the State says is whether committed in
13 an aggressive, violent, premeditated or willful manner. It was
14 aggressive and it was violent. This was done with a gun where
15 he had to have his finger on the trigger, where there is evidence
16 of at least five bullets being fired, three into the victim's head.
17 As far as premeditation goes, there is a statement from the
18 individual who was in the cab drive -- who was in the cab with
19 him at that point in time. And also, as far as willful manner
20 goes, again, he had, he had his hand -- he had the pocket -- his
21 gun in the pocket.

22 Also, the third factor is whether this is against persons or
23 property especially resulting in personal injury, and this is a
24 death, so there is obviously a personal injury.

25 The fourth factor would be prosecution's merit in whether a

1 Grand Jury would return an indictment, and definitely in this
2 case, Your Honor, a Grand Jury would return an indictment
3 based on the evidence presented by Detective Twigg and the
4 Defendant's own admissions in his statement.

5 As far as the Co-defendants go, at this point, there are no
6 Co-defendants, Your Honor, and we are still investigating as to
7 whether there will be.

8 Now, here's the sticky point, sophistication and maturity.
9 Defense counsel believes that the State's witness has testified
10 that this is like a child, he couldn't survive in the streets, but her
11 own testimony was that he is of average sophistication and
12 maturity for a sixteen-year-old low income individual. And also,
13 if he was put out on the streets, he could survive. He might not
14 do very well at first, but he would be able to survive on the
15 street. He is mature enough and sophisticated enough to
16 understand what he has done. He was mature and
17 sophisticated enough to waive his rights and to talk to the
18 Detective about these charges.

19 And Factor Seven, which is previous history as a juvenile.
20 He does not have an extensive history here in Family Court and
21 Your Honor is well aware of that.

22 And again, the last factor is likelihood of rehabilitation in
23 the juvenile system. This juvenile is sixteen years old now, a
24 little over. He will only be spending up to his seventeenth
25 birthday in the juvenile system. At that point in time he is

1 transferred to an adult facility. So, the juvenile facility has
2 possibly maybe nine, maybe eight or nine months to rehabilitate
3 him. And there's also testimony from Ms. Metz to the fact that
4 they would first have to look at whether he has a drug addiction
5 or not with his use of marijuana and that would have to be
6 handled as well. The State does not believe there is a
7 reasonable amount of time in eight to nine months to
8 completely rehabilitate this juvenile before he is transferred to
9 an adult correctional facility and the State would respectfully
10 ask, Your Honor, to waive this juvenile up to General Sessions
11 to be charged with this crime as an adult.

12 THE COURT: Thank you. This hearing is being conducted
13 under the mandates of Section 20-7-430, transfer of jurisdiction
14 by certain Courts over a juvenile. After giving due consideration
15 to the testimony which has been presented as well as the
16 argument of counsel, as well as the applicable statutory as well
17 as case law, particularly I am guided by the criteria that is set
18 forth in the Kent case, Kent versus United States, 383 U.S. 541,
19 the factors that are set forth, to my knowledge are given no
20 preferential treatment. They are enumerated but the list itself
21 carries no weight as far as one factor being weighed more
22 heavily or giving more substance than the others.

23 Giving due consideration to all of the applicable factors as
24 set forth, I find that the State's motion should be granted and
25 the juvenile should be waived up to General Sessions Court.

1 SOLICITOR: Your Honor, at this point in time, the State
2 would, as far as this juvenile is eligible for bond at this point in
3 time, we would ask the Court -- if the Court does not want to
4 hear this bond, that this juvenile be transferred back to the
5 Detention Center and we will set up a bond for him at that point
6 in time.

7 THE COURT: I'll be glad to hear from Mr. Gardner.

8 MR. GARDNER: May I have one moment, Your Honor?

9 THE COURT: Yes, sir.

10 MR. GARDNER: Your Honor, we're not prepared to do a
11 bond hearing at this time. I think it would be best if we tried to
12 set it up tomorrow or Friday or ---

13 THE COURT: That'll be fine.

14 SOLICITOR: Thank you, Your Honor.

15 THE COURT: Thank you. Court stands adjourned.

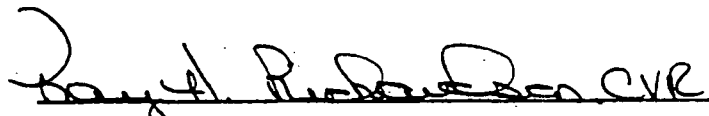
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17 **END OF TRANSCRIPT.**
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CERTIFICATE OF COURT REPORTER

I, the undersigned, Kay H. Richardson, Official Court Reporter for the Fifteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Family Court for Horry County, South Carolina, on the 9th day of October, 1996.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 16th day of April, 1998.



Kay H. Richardson, CVR

Certified Verbatim Reporter

Notary in and for the State of

South Carolina

My Commission Expires: 2/27/06

STATE OF SOUTH CAROLINA)
COUNTY OF Horry)

IN THE FAMILY COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT
FILE NO.: 96-JU-26-623

STATE OF SOUTH CAROLINA,
PLAINTIFF,

VS.

ROGER LEGETTE,
CHILD UNDER THE AGE OF 17 YEARS

ORDER WAIVING JURISDICTION
(ENDING ACTION)

FILED
Horry County
56 OCT 23 PM 4:18
BILLIE G. RICHARDSON
CLERK OF COURT

HEARING DATE:	SEPTEMBER 26, 1996 & OCTOBER 9, 1996
TRIAL JUDGE:	H. T. ABBOTT, III
FAMILY COURT SOLICITOR:	ROGER P. ROY, JR.
ATTORNEY FOR MINOR:	JOHNNY GARDNER AND BARBARA PRATT
COURT REPORTER:	KAY H. RICHARDSON

This matter is before me upon the Solicitor's motion to waive Family Court jurisdiction and to bind Defendant over to the Court of General Sessions. I conclude the motion should be granted.

FINDING OF FACT

1. Defendant, Roger Legette, was born August 30, 1980; he is now sixteen years old.
2. Defendant is charged with the murder in connection with the death of Robert Lockhart. Mr. Lockhart was murdered on May 24, 1996, allegedly by the Defendant.
3. Mr. Lockhart was murdered by three gunshot wounds to the head, fired at close range. The murder occurred in his taxi cab while transporting the Defendant.
4. The murder of Mr. Lockhart was ~~premeditated~~ and was carried out in a wilful and brutal manner.

5. Based upon the overwhelming incriminating evidence against this juvenile, there is substantial prosecutive ^{and not} merit to this charge.

6. Despite the waiver evaluation performed by the Department of Juvenile Justice, the circumstances of this heinous crime, together with the actions of this juvenile convinces this Court that insufficient time is available under the Family Court system to adequately rehabilitate him. By his actions, this juvenile has lost the privilege of having his case tried in this Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this juvenile and the subject matter of this action.

2. The factors articulated by the South Carolina Supreme Court in Kent vs. United States, 383 U.S. 541, 856 S.Ct. 1045 (1966), were applied to the facts of this case. Based upon this analysis, waiver is warranted.

THEREFORE IT IS ORDERED that this Court waives jurisdiction of this case to the Court of General Sessions.

DATED: October 22, 1990
CONWAY, SOUTH CAROLINA

H. T. ABBOTT, III, PRESIDING JUDGE

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

ROGER LEGETTE,

Plaintiff,

v.

STATE OF SOUTH CAROLINA,
Defendant,

IN THE COURT OF COMMON PLEAS
CASE NO. 96-CP-26-3090

HORRY COUNTY
JAN 17 AM 10:59
CLERK OF COURT
JEANIE J. JACOBS

O R D E R

This matter is before this Court by way of an appeal of the Family Court's order dated October 22, 1996 in which the Honorable H.T. Abbott, III, waived the Family Court's jurisdiction of the case to the Court of General Sessions.

FINDINGS OF FACT

Plaintiff, Roger Legette, was born on August 30, 1996. He is now sixteen years of age. Legette is charged with the murder of Robert Lockhart who was shot and killed on May 24, 1996. Legette was fifteen years of age on the date of the alleged murder. After a hearing on September 26, 1996 and another hearing on October 9, 1996, the Honorable H.T. Abbott, III, granted the Solicitor's motion to waive the Family Court's Jurisdiction and to bind the defendant over to the Horry County Court of General Sessions. Legette now appeals the Family Court's decision to the Circuit Court in accordance with § 20-7-430, Code of Laws of South Carolina 1976, as amended.

DISCUSSION

The record before this Court includes a transcript of the first part of the waiver hearing held in Family Court on September 26, 1996, a copy of Judge Abbott's order dated October 22, 1996, and a draft copy of the

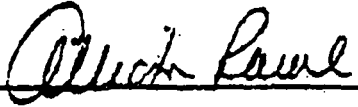
William S. Hall Psychiatric Institute evaluation of Roger Legette performed by Lillian M. Tidler, M.D. The record does not include the transcript of the second part of the waiver hearing held on October 9, 1996 which contains the Family Court's ruling. After a review of the factors to be considered in juvenile waiver cases as articulated in Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045 (1966), and In the Interest of Keith Lamont G., 304 S.C 456, 405 S.E.2d 404 (1991), the record is insufficient for this Court to make a determination as to what evidence the Family Court considered in weighing these factors. In addition, this Court is unable to determine whether the Family Court reviewed the draft evaluation report from the William S. Hall Psychiatric Institute which Counsel for Roger Legette tendered to this Court at the hearing on January 13, 1996.

CONCLUSION

IT IS THEREFORE ORDERED THAT the case is remanded back to Family Court for clarification of its order dated October 22, 1996. The Family Court is specifically instructed to state in its order the evidence it reviewed in its findings of fact and the exact Kent factors it considered in its conclusions of law. If the Family Court did not have a copy of the Hall Institute evaluation at the time of its original decision, the court is instructed to review it and make any necessary amendments to its order consistent with all of the evidence.

IT IS SO ORDERED.

January 16, 1997.


The Hon. A. Victor Rawl
PRESIDING JUDGE

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT OF THE
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	FILE NO. 96-JU-26-623
IN THE INTEREST OF	)	AMENDED ORDER
	)	WAVING JURISDICTION
ROGER LEGETTE	)	

Previously, this matter was before me on a Waiver Hearing resulting in an Order dated October 22, 1996 in which I waived jurisdiction to the Court of General Sessions. Thereafter, the Honorable A. Victor Rawl, pursuant to a Motion on behalf of the Defendant, remanded the case for a clarification of the Order of Waiver and required specific findings as to the psychiatric evaluation and the Kent v. United States, 383 U.S. 541, 856 S.Ct. 1045(1966) factors.

After due consideration of the testimony, a review of applicable statutory authority and applicable case law, personal observations of the witnesses and argument of counsel, I make the following findings.

FINDINGS OF FACT

1. I find this Court has jurisdiction over the juvenile and the subject matter of this action.
2. I find the Defendant, Roger Legette, was born on August 30, 1980 and is sixteen (16) years of age.
3. I find the Defendant was charged with the murder of Robert Lockhart, who was killed on May 24, 1996, allegedly by the Defendant.
4. I further find the murder of Mr. Lockhart was apparently caused by three (3) gunshot wounds to the head, fired at very close range. Furthermore, the murder occurred in the

JAMES G. ROBERTS
 CLERK OF COURT
 HORRY COUNTY
 APR - 1997
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decendent's taxi cab while transporting the Defendant.

5. I further find the murder of Mr. Lockhart was carried out in a willful and brutal manner.

6. I further find based upon the overwhelming incriminating evidence against the juvenile, there is substantial prosecutive merit to the pending charge.

7. I have carefully reviewed the evaluation of Dr. Lillian M. Tidler, Chief of child and Adolescent Out Patient Forensic Psychiatric Services of the William S. Hall Psychiatric Institute dated September 23, 1996.

8. I further find based upon the psychiatric evaluation and the testimony offered at the hearing, very little, if any, rehabilitative services would be offered to the juvenile through the facilities presently available to the Department of Juvenile Justice.

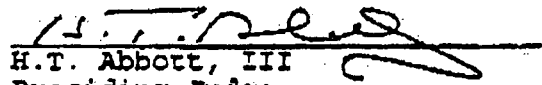
9. I further find a summary of the evidence with respect to the factors articulated in Kent are as follows:

- a. Murder is the most serious of criminal offenses.
- b. The alleged offense was committed in both an aggressive and willful manner.
- c. The alleged offense was committed against a person and not property.
- d. The prosecutive merit is very great.
- e. The juvenile has the necessary sophistication and maturity.

f. Very little, if any, rehabilitative services would be offered to the juvenile through the facilities presently available to the Department of Juvenile Justice.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED this Court waives jurisdiction of the case to the Court of General Sessions.


H.T. Abbott, III
Presiding Judge

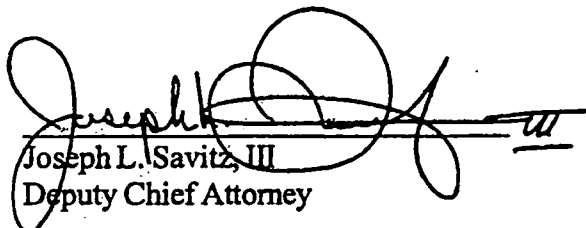
Dated: April 7, 1997
Conway, South Carolina

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3

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

October 23rd, 1998



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Deputy Chief Attorney

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(803) 734-1330

ATTORNEY FOR APPELLANT.

98-224

99-mo-72

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT COURT

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S.C. SUPREME COURT

Appeal from Horry County

David H. Maring, Sr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

ROGER SYNDELL LEGETTE,

APPELLANT.

FINAL ANDERS BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT.

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TABLE OF AUTHORITIES**CASES**

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STATEMENT OF ISSUE ON APPEAL

The judge erred by declining to direct a verdict acquitting appellant of murder and submitting the case to the jury only as involuntary manslaughter.

STATEMENT OF FACTS

Roger Legette was fifteen when he shot to death cabdriver Robert Lockhart. After a waiver hearing, Horry County Family Court Judge H.T. Abbott, III, transferred jurisdiction to the Court of General Sessions in an order dated October 22, 1996. Circuit Court Judge A. Victor Rawl remanded the case back to family court for clarification of the waiver order. Judge Abbott issued an amended order transferring jurisdiction on April 7, 1997.

On December 19, 1996, an Horry County grand jury indicted appellant for murder and possession of a deadly weapon during the commission of a violent crime. Judge David H. Maring, Sr., presided at appellant's jury trial on August 4-5, 1997. In addition to murder, he submitted involuntary manslaughter and accident to the jury. The jury convicted appellant as charged and the judge sentenced him to life imprisonment for murder and five years for possession of a weapon during the commission of a violent crime.

ARGUMENT

The judge erred by declining to direct a verdict acquitting appellant of murder and submitting the case to the jury only as involuntary manslaughter.

Appellant was riding in the front seat of Robert Lockhart's cab and Craig Legette, appellant's brother, and George Gray, their cousin, were in the back. When Lockhart asked for his fare at the end of the ride, appellant pulled out a gun and shot him three times in the head. ROA p. 114, lines 13-22. The state said the shooting was murder and the defense involuntary manslaughter or accident. What did the evidence show?

Immediately after the shooting, appellant tearfully told his uncle, Lonnie Gray, that he accidentally shot someone. ROA p. 133, lines 6-10. His grandmother, Juanita Gray, heard him call 911 to report an accidental shooting. ROA p. 186, lines 9-20.

George Gray testified that "the gun went off" when appellant reached in his pocket to pull out his money and pay Lockhart. ROA p. 217, lines 3-9. Craig Legette testified that the gun discharged accidentally because "the money got stuck to the trigger." ROA p. 241, line 14 - p. 242, line 9. Legette was sure "it was an accident." ROA p. 267, line 24 - p. 268, line 3.

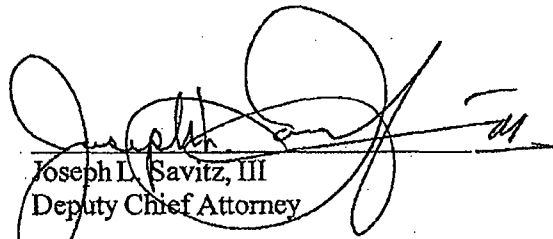
At the conclusion of the state's case, the defense moved for a directed verdict on murder because "[t]here has been no evidence for malice." ROA p. 298, lines 21-24. The judge denied the motion. ROA p. 298, line 25.

When the Supreme Court reviews the denial of a directed verdict motion, it considers the evidence in the light most favorable to the state and, if there is any direct or substantial circumstantial evidence which reasonably tends to prove the guilty of the

accused, that denial is not error. State v. Brazell, 325 S.C. 65, 480 S.E.2d 64 (1997); State v. Edwards, 298 S.C. 272, 379 S.E.2d 888 (1989).

In this case, every state's witness who witnessed the shooting testified that it was accidental. The fact that the three young men did not rob the victim lends further credence to their accounts. ROA p. 276, lines 11-21; ROA p. 233, lines 5-7. For this reason, the judge should have directed a verdict acquitting appellant of murder and submitted the case to the jury as involuntary manslaughter or accident.

Respectfully submitted,



Joseph L. Savitz, III
Deputy Chief Attorney
ATTORNEY FOR APPELLANT.

This 12th day of November, 1998.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

David H. Maring, Sr., Circuit Court Judge

THE STATE,

RESPONDENT,

v.

ROGER SYNDELL LEGETTE,

APPELLANT,

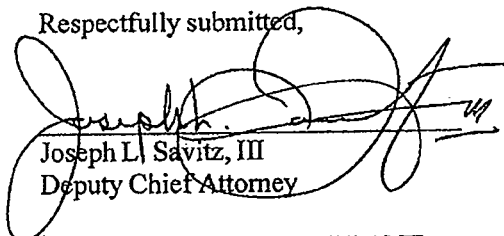
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger Syndell Legette states:

1. He is Deputy Chief Attorney for the South Carolina Office of Appellate Defense and was appointed to represent appellant.
2. He has reviewed the record of appellant's trial before Judge David H. Maring, Sr., which was held on August 4-5, 1997 and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 539 (1967), briefed the one legal arguable issue which arose during the course of the trial.

WHEREFORE, he asks the Court to relieve him as counsel for Roger Syndell Legette.

Respectfully submitted,



Joseph L. Savitz, III
Deputy Chief Attorney

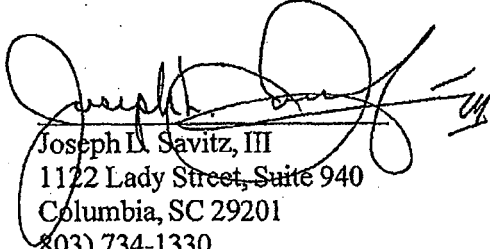
ATTORNEY FOR APPELLANT.

This 12th day of November, 1998.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 210(b), SCACR.

November 12, 1998



Joseph D. Savitz, III
1122 Lady Street, Suite 940
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803) 734-1330
Attorney for Appellant

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

David H. Maring, Sr., Circuit Court Judge

THE STATE,

RESPONDENT,

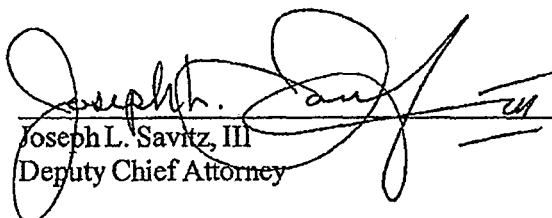
V.

ROGER SYNDELL LEGETTE,

APPELLANT.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Anders Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, this 12th day of November, 1998.


Joseph L. Savitz, III
Deputy Chief Attorney

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of November, 1998.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: March 13, 2007.

STATE v. LEGETTE

California, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted.

Ernest A. Fering, Jr. C.J.
Robert O. Anderson A.J.
James E. Moore A.J.
John H. Waller Jr. A.J.
Octaviano H. A.J.

*Original**99/10/28-159*

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Horry County

David H. Maring, Sr., Circuit Court Judge

Memorandum Opinion No. 99-MO-072

Filed November 3, 1999

THE STATE,

RESPONDENT,

V.

ROGER SYNTELL LEGETTE,

PETITIONER.

PETITION FOR REHEARING

RECEIVED

NOV 16 1999

S.C. SUPREME COURT

RAS. ROGER S. LEGETTE
Petitioner, Pro-Se
Kershaw Corr. Inst.
Magnolia East 41
4848 Goldmine Hwy.
Kershaw, S.C. 29067

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<u>S.C. Rules App. Proc.</u> , Rule 220(b)(1)	pg. 4
<u>S.C. Code of Laws (1976)</u> , § 22-5-200	pg. 6
<u>S.C. Code of Laws (1976)</u> , § 22-5-210	pg. 6
<u>S.C. Rules Crim. Proc.</u> , Rule 1	pg. 6
<u>Attorney Generals Opinion (1950)</u> , S.C. Digest, Volume 13, pg. 442	pg. 6
<u>U.S. Constitution</u> , Fifth Amendment	pg. 7
<u>U.S. Constitution</u> , Fourteenth Amendment	pg. 7
<u>U.S. Constitution</u> , Sixth Amendment	pg. 3
<u>U.S. Constitution</u> , Fourth Amendment	pg. 5
<u>S.C. Rules App. Proc.</u> , Rule 407, Prof. Cond.	pg. 12

STATEMENT OF POINTS FOR REHEARING

Point I ✓

The Supreme Court consider petitioner's argument that the trial court erred by allowing prosecution to use inculpatory evidence gained through an illegal custodial interrogation of petitioner after trial court ruled that petitioner's statement was inadmissible; thereby, violating the petitioner's Fifth and Fourteenth Amendment rights guaranteed by the U.S. Constitution.

Point II ✓

The Supreme Court reconsider petitioner's argument that the trial court violated petitioner's right to an impartial trial by denying petitioner's motion to dismiss members of the jury who were personal friends of the respondents witnesses; thereby violating the petitioner's Sixth Amendment rights.

Point III ✓

The Supreme Court consider petitioner's argument that the trial court lacked subject matter jurisdiction; thereby violating the petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights.

Point IV

The Supreme Court consider that petitioner's appellate counsel has been ineffective in the representation of the petitioner; moreover, the ineffectiveness has resulted in a serious miscarriage of justice, violating Sixth and Fourteenth Amendment.

STATEMENT OF THE CASE

Ras. Roger S. Legette was fifteen when he accidentally shot to death cabdriver Robert Lockhart. After five (5) waiver hearings, Horry County Family Court Judge H.T. Abbott, III, transferred jurisdiction to the Court of General Sessions in an order dated October 22, 1996. Circuit Court Judge, A. Victor Rawl remanded the case back to Family Court for clarification of the Waiver Order for a sixth time. Judge Abbott issued an amended order transferring jurisdiction on April 7, 1997 and the case was again remanded back to the Circuit Court. On December 19, 1996, a Horry County Grand Jury indicted petitioner for Murder and Possession of a Deadly Weapon during the Commission of a Violent Crime. Judge David H. Maring, Sr., presided at petitioner's jury trial on August 4-5, 1997. In addition to Murder, he submitted Involuntary Manslaughter and Accident to the jury. The jury convicted petitioner as charged and the judge sentenced him to Life Imprisonment for Murder and five years for Possession of a Weapon during the Commission of a Violent Crime. On August 10, 1997, the petitioner's trial counsel file Notice of Appeal with the Supreme Court of South Carolina. On August 30, 1997, the petitioner turned 17 years of age and was transferred from the Dept. of Juvenile Justice to the Department of Corrections. On November 10, 1997, the petitioner was informed that he would be represented on appeal by appellate counsel Joseph L. Savitz, III, from the Office of Appellate Defense. On July 2, 1998, counsel filed an Initial Anders Brief in the case. On November 12, 1998,

counsel filed a Final Anders Brief. On July 29, 1998, the petitioner filed Motion to Relieve Counsel. Motion was denied in February 1999. On September 22, 1999, the petitioners case was submitted to the S.C. Supreme Court. On November 3, 1999, the petitioners appeal was dismissed without opinion from the court. This Petition for Rehearing follows.

Now comes the petitioner, Ras. Roger Syntell Legette, pursuant to S.C. Rules App. Proc., Rule 221(a) and Rule 224, who herein states with particularity the points supposed to have been overlooked or misapprehended by the court in accordance with the above cited rules. Whereby the petitioner prays that the court grant this Petition for Rehearing in light of the following points:

POINT I

The Supreme Court consider petitioners argument that the trial court erred by allowing prosecution to use inculpatory evidence gained through an illegal custodial interrogation of petitioner after trial court ruled that appellant's statement was inadmissable; thereby, violating the petitioner's Fifth and Fourteenth Amendment rights guaranteed by the U.S. Constitution.

The petitioner would respectfully direct the courts attention to the supplemental brief of the petitioner. (Argument I, pg. 4) The introduction of the weapon into evidence was clearly the result (fruit) of an illegal interrogation. This interrogation was ruled to be illegal by the trial court. In order for petitioner's indictment to be valid the prosecution had to be able to prove each element of the offense charged. This court has the jurisdiction to examine facts that are outside the record and in the interest of justice the petitioner requests that it do so taking into account the petitioners age and ethnic background

at the time of the incident. The U.S. Supreme Court has long held that before the prosecution may introduce a defendant's incriminating statement, or evidence gained therefrom, it generally must prove the accused voluntarily, knowing and intelligently waived his Miranda rights. Colorado v. Connerly, 479 U.S. 157 (1986) As the petitioner stated previously, the trial court had already ruled that the statement violated the above constitutional command. The petitioner should therefore be granted a rehearing on this issue.

POINT II

The Supreme Court reconsider petitioner's argument that the trial court violated petitioner's right to an impartial trial by denying petitioner's motion to dismiss members of the jury who were personal friends of the respondents witnesses; thereby violating the petitioner's Sixth Amendment rights.

Since the court did not issue any opinion as the the arguments of the petitioner concerning the above argument, the petitioner would like to petition the court for reconsideration of this argument which is contained in the petitioner's Supplemental Brief. (Argument II, pg. 8) The petitioner is aware that he is not versed in law; however, he would request the indulgence of the court in these matters. The petitioner could not have possibly received a trial by a fair and impartial jury of his peers when the members were personal friends of the officers giving testimony concerning the events that took place. This is doubly

true when the court view the circumstances surrounding the case. The petitioner, a young African-American male is accused of taking the life of a European-American in a racially divided society. The death of any human being is a tragedy; nevertheless, the court should not blind itself to the facts just because it deems it the least offensive means of punishing the petitioner. The command of the U.S. Constitution is explicit:

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State...

After all, as this court has consistently held in the cases of Euro-Americans "A jury should be composed of persons who will decide a case according to the law and the evidence, free from bias, prejudice, or fixed opinion." Carpenter v. Commonwealth, 44 S.E.2d 419, 425 (1947) Perhaps, if the court is interested in justice instead of upholding constitutional violations of "just us" it will consider this issue as argued in the petitioner's Supplemental Brief and grant the petitioner a rehearing on this issue.

POINT III

The Supreme Court consider petitioner's argument that the trial court lacked subject matter jurisdiction; thereby violating the petitioner's Fourth, Fifth, Sixth and Fourteenth Amendment rights.

The petitioner respectfully requests that the court consider the above argument which is contained in the petitioner's Supplemental Brief. (Argument III, pg. 14) This court has long held "that lack of jurisdiction of the cause or subject matter can be raised at any time, including for the first time on appeal in this Court." State v. Funderburk, 191 S.E.2d 520, 522 (1972); State v. Castleman, 64 S.E.2d 250; State v. Adams, 53 S.E. 538. The petitioner understands that pursuant to S.C. Rules App. Proc., Rule 220(b)(1) that this court has the right not to make a written opinion in any case it so chooses. While this may be unjust in the opinion of the petitioner, it is, nevertheless, the law. The petitioner's claim in Argument III, however, raises a novel claim of constitutional dimensions.

At the time of his arrest the petitioner was a juvenile. The question is really whether or not a juvenile is a citizen of the United States and the State of South Carolina? Why does the court not give an opinion on the numerous waiver hearings that the petitioner was subjected to? Is normal and accepted practice in the State to violate the petitioner's Sixth Amendment right to a "speedy and public trial" something to be conveniently pushed aside without comment from the highest court in the state? If a juvenile is protected by the Constitution then is it not the responsibility of this court to uphold it and protect the rights of all its citizens no matter their age, ethnic affiliation or financial status? The petitioner is acutely aware that this court is burdened with a heavy workload of cases; however, the petitioner has been sentenced to LIFE, which in this society is

an easy means of sentencing a person to DEATH in prison. Sort of like Pontius Pilate. The petitioner, therefore, asks that the court consider his petition as it would for someone sentenced to death. It's a slower death than the injection, but its still death.

The law of this State and the U.S. Constitution specifically requires that before a person can be arrested in their home, an arrest warrant must be issued upon probable cause:

The right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Actually, the Fourth Amendment seems pretty straightforward. So is the case of the petitioner. The police entered his home, without a warrant and arrested him, without a warrant, transported him to a detention facility, without a warrant. The State should know better. After all, Payton v. New York, 100 S.Ct. 1371 (1980), specifically forbade such behavior. As in Payton, there were no "exigent circumstances" which would have precluded the officers to wait at the petitioner's home until a valid arrest warrant could be obtained. There was no hot pursuit. The petitioner was not trying to escape the authorities. Instead, the police chose to arrest the petitioner inside his home. The U.S. Supreme Court has held this to be a violation of constitutional rights. The S.C. Supreme Court has held that this issue

can be heard on appeal at any time. The question still remains: Is a fifteen year old African American entitled to the same constitutional protections as a fifteen year old European American?

The petitioner also requests that the court consider the fact that not only did the police violate South Carolina and United States Constitutional Law; they also proceeded to violate statutory law and the rules of court. See S.C. Code of Laws (1976), § 22-5-200 and § 22-5-210; S.C. Rules Crim. Proc., Rule 1. As the petitioner argued, the only way that the petitioner could be legally indicted by the Grand Jury was through the process of an indictment; nevertheless, since the arrest warrant was never issued, the only legal way left was through the issuing of a presentment by the grand jury. See State v. Hann, 12 S.E.2d 720 (1940); Atty. Gen. Op. (1950), S.C. Digest, Vol. 13, pg. 442. Since a presentment was not obtained, the trial court again lacked subject matter jurisdiction to try the petitioner. The petitioner even communicated with appellate counsel in order to obtain the transcript of the Grand Jury hearing to strengthen the argument. Counsel stated that he did "not have access to grand jury material..." and that "Unfortunately, we do not have the funds to make an investigator available." PFR Appendix, Exhibit 1. It is quite possible that appellate counsel was unaware of the Fifth Amendment of the U.S. Constitution which states in part:

No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury....nor be deprived of life, liberty, or property, without due process of law;

If the petitioner was not indigent, a juvenile with limited knowledge of law and a member of the ethnic majority, it is quite probable that "the funds to make an investigator available" would have been available to help him protect his rights. The Fourteenth Amendment to the U.S. Constitution seems to guarantee these rights to the petitioner:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the district wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, and property without due process of law, nor deny to any person in its jurisdiction the equal protection of the law.

Since the petitioner was "born" in the U.S. he is considered a "citizen" and therefore entitled to these rights. The constitution uses the word "shall" in connection with these rights. It is only this court that has the opportunity to insure that the petitioner's rights are not violated just because he belongs to a African ancestry. In view of these facts and law the petitioner should be granted a rehearing on this issue.

The petitioner now brings before the court the final point that should be considered when ruling on the merits of this petition. The petitioner prays that this court will give it due consideration before ruling upon this petition.

POINT IV

The Supreme Court consider that petitioner's appellate counsel has been ineffective in the representation of the petitioner; moreover, the ineffectiveness has resulted in a serious miscarriage of justice.

The petitioner is aware that an appeal from a criminal conviction is not a constitutional right but one guaranteed by statute. In light of the racism prevalent within the S.C. Court system it is amazing that the petitioner has even been afforded this right. The fact that the petitioner is poor makes a fair hearing almost impossible. Still, the petitioner is determined to at least put forward the truth of his situation so that it can at the very least be recorded that he did not willingly give in to injustice and oppression. The petitioner would respectfully direct the court's attention to the decision rendered by the U.S. Supreme Court in Evitts v. Lucey, 105 S.Ct. 830, 834 (1985) where the court held:

Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. Nonetheless, if a State has created appellate courts as an integral part of the system for finally adjudicating the guilt or innocence of a defendant, the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution.

The petitioner has previously brought to the attention of

the contents of one of the pieces of correspondence from his attorney in response to an inquiry about specific appealable issues. Counsel never stated that the State's neglect to obtain a "presentment" instead of an indictment from the Grand Jury was a non appealable issue that was without merit. Instead, counsel stated that he did not have "access" to those materials. The court is well aware that counsel could have obtained these documents if he wished. The petitioner, counsel and this court, is well aware that there are very few Grand Jury hearings in South Carolina except when those of wealth and status are charged with a crime. Counsel did not have "access" because he knew full well that the solicitor never convened a Grand Jury. In any event, counsel deceived (lied) to his client. That doesn't seem very effective behavior. How convenient for counsel that the petitioner was indigent and dependent the Office of Appellate Defense that didn't have the "funds" to investigate the petitioner's case. It was more expedient, financially, to file an Anders brief and condemn a young African American man to slow death in prison. At least counsel magnanimously gave the petitioner permission to call him collect. Unfortunately, he was never available. Again, in Evitts, the court held:

A first appeal as of right therefore is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. Evitts, at 836.

The previously referenced letter was not the only communication by counsel. On November 10, 1997, counsel submitted an introductory letter to the petitioner. PFR Appendix, Exhibit 2. In

this letter counsel states that due to "state budgetary limitations we are presently unable to accept collect calls." Counsel never mentions any possibility of actually meeting with his client to discuss anything. This is not acceptable practice as described in S.C. Rules App. Proc., Rule 407, Rules of Professional Conduct. Counsel then stated that "In about sixty days, I will be filing an initial brief with the Supreme Court containing what I feel are the best issues." Those sixty days turned into a entire year when counsel filed a Anders brief without consulting with his client. Consultation is also a requirement of the rules cited previously. Even if it were not, counsel made the promise himself in his letter by stating "if I feel, after studying the transcript and the relevant law that you have little chance of success on appeal, I will let you know that too. I will not drop this direct appeal unless you ask me to do so in writing." The petitioner did ask him to drop the appeal when he filed a Motion to Relieve Counsel. In response to the court, counsel rejected this course of action in his response. Maybe he forgot what he had promised to do if his client, whom he had never met, requested he be relieved. PFR Appendix, Exhibit 3.

An unrepresented appellant--like an unrepresented defendant at trial--is unable to protect the vital interests at stake. To be sure, respondent did have nominal representation when he brought this appeal. But nominal representation on an appeal as of right--like nominal representation at trial--does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all. Evitts, supra at 836.

The previous only serve to show that the petitioner received ineffective assistance of appellate counsel on appeal. There is one more item that the petitioner would like for the court to consider. On November 4, 1999, appellate counsel wrote to the petitioner concerning the dismissal of his appeal. PFR Appendix, Exhibit 4. The petitioner was advised by counsel that "If you want to pursue your case, you can elect to go into post conviction relief..." Counsel was well aware that the court had denied the petitioners appeal without opinion. The result of the opinion was to dismiss him as counsel and yet he continued to try and deceive the petitioner. The next step, if the petitioner feels that something has been misapprehended or overlooked by the court is to file a Petition for Rehearing pursuant to Rule 221(a) and if the petition is denied the petitioner can then file for a Petition for a Writ of Certiorari pursuant to Rule 226(a) and (h). This is the only method to preserve the issues the petitioner has presented for further appellate review by the U.S. Supreme Court or Federal Habeas Review. Moreover, issues that could not have been presented because trial counsel failed to object can be addressed by motion after the case has been remitted pursuant to Rule 221(b). Appellate counsel was too ineffective to advise his client concerning the numerous options open to him. Whether this was done purposefully or mistakenly, it is still disgusting behavior on the part of appellate counsel. The standards set by this court are very clear. S.C. Rules App. Proc., Rule 407, Professional Conduct (Rule 1.4 Communication)

states in part:

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

It is obvious from appellate counsel's instructions that he is unaware of this courts' rules of conduct or procedural rules. Due to the blessing of JAH, the petitioner can read and was not taken in by counsel's intentional deception. This court has also required pursuant to S.C. Rules App. Proc., Rule 407, Professional conduct (Rule 1.3 Diligence) that:

Comment

A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

Does this apply in view of "budgetary limitations"? The behavior of the petitioner's former counsel has clearly been shown to have been unethical and has cause significant damage to the petitioner in that many significant issues that should have been raised by counsel were not investigated because of the petitioner's financial situation and stereotype of a young African American male. Accordingly, the petitioner should be granted a rehearing by the court and new counsel appointed from a firm other than that of the Office of Appellate Defense.

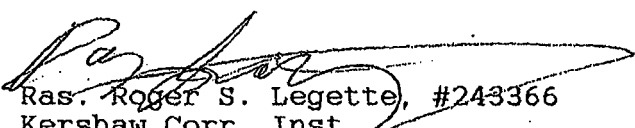
CONCLUSION

The petitioner in this action, Ras. Roger Syntell Legette, hereby requests that the S.C. Supreme Court consider his Petition for Rehearing based upon the facts and law herein in conjunction with his Supplemental Brief.

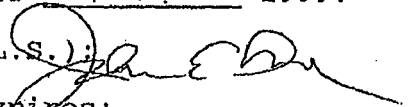
The petitioner is proceeding in this action as a Pro Se Litigant and prays the court's indulgence as to any mistakes of form or substance.

The petitioner requests that the court grant this petition.
Kweli Ndugu amani na upendo kijana simba.

Respectfully Submitted,


Ras. Roger S. Legette, #243366
Kershaw Corr. Inst.
Magnolia East 41
4848 Goldmine Hwy.
Kershaw, S.C. 29067

Affirmed and Subscribed to before me
this 12 day of NOV 1999.

Notary Public (L.S.): 

My Commission Expires:

Notary Public, South Carolina, State at Large
My Commission Expires Feb. 6, 2008



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT
BRENDA F. SHEALY
DEPUTY CLERK

P.O. Box 11330
COLUMBIA, S.C. 29211
(803) 734-1080

December 15, 1999

Mr. Roger S. Legette
Kershaw Correctional Inst.
Magnolia East 41
4848 Goldmine Highway
Kershaw, SC 29067

Re: The State v. Legette, Roger
96-GS-26-2809

Dear Mr. Legette:

The Court has refused your Petition for Rehearing in the above case in the following Order:

"Petition for Rehearing is denied.

s/ Ernest A. Finney, Jr. C.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

s/ John H. Waller, Jr. A.J.

s/ E.C. Burnett, III A.J.

December 15, 1999."

The remittitur in this matter is today being forwarded to the Clerk of Court for Horry County.

Very truly yours,

Daniel E. Shearouse
CLERK DS

DES/djp

Mr. Roger S. Legette
December 15, 1999
Page 2

cc: Deputy Chief Attorney Joseph L. Savitz, III
Assistant Deputy Attorney General Donald J. Zelenka

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

J. Michael Baxley, Circuit Court Judge

ROGER S. LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M. PACHAK
Assistant Appellate DefenderSouth Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER

CHARLES M. CONDON
Attorney GeneralJOHN W. MCINTOSH
Chief Deputy Attorney GeneralALLEN BULLARD
Assistant Deputy Attorney GeneralP. O. Box 11549
Columbia, S. C. 29211

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

County of HORRYRas. Roger S. Legette, #243366*Full name and prison number (if any) of Applicant.*

vs.

Charles Condon, Atty. General;*Name of Respondent.*State of South Carolina.

In the Court of Common Pleas

00-05-0818APPLICATION FOR
POST-CONVICTION RELIEFFILED
CLERK OF COURT
00 APR 27 AM 10:11INSTRUCTIONS — 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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Kershaw Correctional Institution; Magnolia East 41;
4848 Goldmine Hwy.; Kershaw, S.C. 29067
2. Name and location of Court which imposed sentence Horry Co. Family Court; Conway,
S.C.; H.T. Abbott, III, Presiding Judge
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 96-JU-26-623; Murder & Weapon Possession (Waiver Hearing)
 - (b) 96-06-1167; Competency and Waiver Hearing
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) April 7, 1997 - Waiver of Jurisdiction
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

(a) after a plea of guilty N/A

(b) after a plea of not guilty YES

(c) after a plea of nolo contendere N/A

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

NO

7. If you answered "yes" to (6), list

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

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

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

i. _____

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) See Attachment 8

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) See Attachment 9

(b) _____

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) See Attachment 10

(b) _____

(c) _____

ATTACHMENT 8

8(a). Due to the failure of appointed counsel to inform the applicant of his right of first appeal, which had to be filed within 10 days of Order Waiving Jurisdiction and counsel's failure to protect the rights of the applicant who was a minor at the time.

8(b). Failure of counsel to pursue ruling on Rule 59(e) and Rule 60(b) motions made on behalf of the applicant on April 23, 1997.

8(c). Failure of the Family Court Judge, Hon. A. Victor Rawl, to provide the applicant with rulings on the above motions.

ATTACHMENT 9GROUND I

The Order Waiving Jurisdiction of the applicant was a violation of the applicant's Fifth and Fourteenth Amendment right to Due Process and Equal Protection and a violation of S.C. Code Ann., § 20-7-7605(5) & (6); therefore, the Family Court was without jurisdiction to transfer the applicant's case to the Court of general Sessions.

GROUND II

Applicant's Sixth Amendment right was violated due to counsel's conflict of interest; failure to advise applicant of his right to appeal waiver hearing order; failure to provide independent, unbiased, psychological evaluation of applicant; and failure to pursue rulings on Rule 59(e) and Rule 60(b) motions that were timely filed on applicant's behalf. This caused a denial of applicant's Fourteenth Amendment rights to Equal Protection and Due Process.

ATTACHMENT 10GROUND I

South Carolina Law requires that the applicant should not be waived into the jurisdiction of the Court of General Sessions as an adult; therefore, the court was without jurisdiction to impose such an order for the crime of Weapon Possession.

GROUND II

The applicant's counsel from the Office of the Public Defender, Barbara Krug-Pratt, acknowledged a conflict of interest but was not removed nor recused herself from the applicant's case. Counsel failed procure an unbiased evaluation of the applicant's mental capacity and failed to file an appeal of the applicant's competency hearings.

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? NO
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) Which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) 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) See Attachment 15
- (b) _____
- (c) _____

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

- (a) your arraignment and plea? YES
- (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? N/A
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. Barbara Krug-Pratt; 114 Laurel St.; P.O. Box 1666;
Conway, S.C. 29526; (803) 248-1570
- ii. Johnny Gardner; 216 Elm Street; Conway, S.C. 29526
(803) 248-7135
- iii. _____

(b) the proceedings at which each such attorney represented you:

- i. Detention, Waiver and Competency Hearings
- ii. Detention, Waiver and Competency Hearings
- iii. _____

18. State clearly the relief you seek in filing this application.

That the Order Waiving Jurisdiction be Vacated.

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

NO

ATTACHMENT 15

15(a). The applicant brings this action pursuant to S.C. Code Laws (1976), § 17-27-20(1) & (2) and was unable to present this application before now due to the refusal of the court or counsel to relinquish the Family Court records necessary for applicant to pursue litigation on these issues.

15(b). The applicant was unable to present this application due to State action and now presents this application pursuant to S.C. Code Ann., § 17-27-45(B), pursuant to the S.C. Supreme Court's recent decisions in State v. Corey D., Opinion No. 25077 (March 6, 2000); Slocumb v. State, Opinion No. 25013 (November 8, 1999), as relating to S.C. Code Ann., § 20-7-7605(5) & (6).

15(c). The applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the Order of Waiver of Jurisdiction and that these facts were just recently discovered by the applicant pursuant to legitimate discovery requests; therefore, the applicant should be granted a hearing on these issues pursuant to S.C. Code Ann., § 17-27-45(C).

STATE OF SOUTH CAROLINA

County of HORRY

VERIFICATION

I, Ras. Roger Syntell Legette, #243366, 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.

Ras. Roger Syntell Legette
 Notary Public, South Carolina, State at Large
 My Commission Expires Feb. 6, 2008

SWORN to and subscribed before me this 20day of APRIL, 192000

(L.S.)

Notary Public

Notary Public, South Carolina, State at Large
 My Commission Expires Feb. 6, 2008

My Commission Expires: _____

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

I, Ras. Roger Syntell Legette, #243366, 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 therefor.

Ras. Roger Syntell Legette
 Applicant

SWORN or affirmed to and subscribed before me this

20 day of APRIL, 192000

Notary Public

Notary Public, South Carolina, State at Large
 My Commission Expires Feb. 6, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2000-CP-26-1962

Roger S. Legette, 243366,)

Applicant,)

v.)

RETURN AND MOTION TO DISMISS

State of South Carolina,)

Respondent.)

Respondent (the State), making its Return and Motion to Dismiss to the Application for Post-Conviction Relief (PCR) filed April 27, 2000, would respectfully show this Court:

I.

The Applicant is presently confined in the Kershaw Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Horry County. The Applicant was indicted at the January 1997, term of the grand jury for Horry County for murder, possession of a weapon during the commission of a violent crime and possession of a pistol by a person under the age of twenty-one (96-GS-26-2809). Johnny Gardner, Esquire and Barbara Krug-Pratt, Esquire represented the Applicant. On August 5, 1997, the Applicant underwent a trial pursuant to which the jury found him guilty of murder and possession of a weapon during the commission of a violent crime. The Honorable David H. Maring sentenced the Applicant to life imprisonment for murder and five (5) years, concurrent, for possession of a weapon during the commission of a violent crime. The Applicant did not appeal his conviction or sentence.

Attached herewith and incorporated herein by reference are the records of the Horry County Clerk of Court regarding the subject convictions and the Applicant's records from the South Carolina Department of Corrections.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "The Order Waiving Jurisdiction of the applicant was a violation of the applicant's Fifth and Fourteenth Amendment right to Due Process and Equal Protection and a violation of S.C. Code Ann., §20-7-7605(5) & (6); therefore, the Family Court was without jurisdiction to transfer the applicant's case to the court of General Sessions."
2. "Applicant's Sixth Amendment right was violated due to counsel's conflict of interest; failure to advise applicant of his right to appeal waiver hearing order; failure to provide independent, unbiased, psychological evaluation of applicant; and failure to pursue rulings on Rule 59(e) and Rule 60(b) motions that were timely filed on applicant's behalf. This caused a denial of applicant's Fourteenth Amendment rights to Equal Protection and Due Process."

III.

The State submits that the current application for PCR should be summarily dismissed for failure to comply with the filing procedures of the Act. S.C. Code Ann. § 17-27-10 to -160 (1976 & Supp. 1997). The Act 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.

S.C. Code Ann. § 17-27-45(a) (Supp. 1998).

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 August 5, 1997. The Applicant filed this Application on April 27, 2000, well after the one year statutory filing period had expired.

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, the State requests that this Court summarily dismiss the Application for PCR for failure to file within the time mandated by statute.

IV.

Each and every allegation contained within the application not hereinbefore either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return and Motion to Dismiss, the State requests that the Applicant's current application for PCR be summarily denied and dismissed.

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

G. ROBERT DELOACH, III
Assistant Deputy Attorney General

PATRICIA D. DOOLEY
Assistant Attorney General

By:


ATTORNEYS FOR RESPONDENT

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Columbia, South Carolina
Oct. 16, 2000.

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF HORRY) 00 CP 26 1962

3
4 Roger S. Legette,)
5 Plaintiff,)

6 -VS-)

7 State of South Carolina,)
8 Defendant.)

TRANSCRIPT OF RECORD

9 March 14, 2002
10 Conway, South Carolina

11 B E F O R E:

12 HONORABLE J. MICHAEL BAXLEY, Presiding Judge.

13
14 A P P E A R A N C E S:

15 J. MATTHEW DOVE, Esquire
16 Garden City, South Carolina
17 Attorney for the Plaintiff

18 ALLEN BULLARD, Esquire
19 Office of the Attorney General
20 Columbia, South Carolina
21 Attorney for the State

22
23 BETTYE S. GUM
24 OFFICIAL REPORTER
25

I N D E X

(PW) PLAINTIFF'S WITNESS
(DW) DEFENSE WITNESS

MOTIONS 3

WITNESSES:

(PW) ROGER S. LEGETTE
DIRECT EXAMINATION BY MR. DOVE.....11
CROSS EXAMINATION BY MR. BULLARD.....27

(DW) JOHNNY GARDNER
DIRECT EXAMINATION BY MR. BULLARD.....29
CROSS EXAMINATION BY MR. DOVE.....33
EXAMINATION BY THE COURT 35
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E X H I B I T S

(PLAINTIFF=P)
(DEFENSE=D)
(COURT=C)

NO.	DESCRIPTION	I.D	EV.
D-1	NOTICE OF MOTION AND MOTION DATED APRIL 23, 1997		28

1 THE COURT: All right, please call your next
2 case.

3 MR. BULLARD: We can go ahead with Roger
4 Legette.

5 THE COURT: All right, Mr. Legette, I want you
6 to come forward, please, sir, and be seated here at
7 counsel table.

8 All right, let me say to -- I believe Mr. and
9 Mrs. Lockhart are here. Are the other members of your
10 family here?

11 MR. LOCKHART: My sister is here, and my
12 daughter is here.

13 THE COURT: All right, very good.

14 Mr. and Mrs. Lockhart, if you are -- if you
15 can hear the proceedings from where you are, I'll just
16 let you remain in your seat. We really don't have a
17 lot of seating room up front beyond the Bar.

18 At some point in this proceeding, probably at
19 the conclusion of the proceeding, if you have
20 something you wish to say, I'll be glad to hear from
21 you.

22 As a victim of crime in South Carolina, you
23 have significant rights, one of which is to be heard
24 in proceedings such as these, and I will be glad to
25 hear from whichever of you chooses to be the

1 spokesperson in this matter.

2 All right, let me first ask Mr. Dove, have you
3 had an opportunity to talk with your client, Mr.
4 Legette, and you're ready to go forward?

5 MR. DOVE: Yes, we're prepared to go forward,
6 Your Honor.

7 THE COURT: All right.

8 Mr. Legette, have you had an opportunity to
9 discuss this matter with your lawyer fully?

10 MR. LEGETTE: Well, Your Honor, I just met with
11 Mr. Dove this morning, but Mr. Dove, he told me that
12 -- he gave me his word that he's going to do his best.
13 I am ready to proceed.

14 THE COURT: Do you feel that he's -- after
15 talking with Mr. Dove, do you feel that he's ready to
16 go forward?

17 MR. LEGETTE: Yes, I do.

18 THE COURT: Are you comfortable with
19 proceeding today?

20 MR. LEGETTE: Am I comfortable with
21 proceeding, Your Honor? No, I'm not comfortable with
22 proceeding, but I'll proceed, Your Honor.

23 THE COURT: All right. In other words, you
24 want to go ahead? You want to go forward?

25 MR. LEGETTE: I'll go ahead.

1 THE COURT: All right. Then we're ready to
2 go.

3 The applicant has the burden of proof, Mr.
4 Legette. It's your responsibility to prove your case
5 because you are the one bringing the case.

6 Of course, in that regard, therefore, you go
7 first. The applicant starts off with testimony.

8 Mr. Dove, do you want to make an opening
9 statement before we begin?

10 MR. DOVE: I think it might assist the Court
11 in narrowing the issues. There are a lot of
12 issues ---

13 THE COURT: All right.

14 MR. DOVE: --- and then I think we can narrow
15 it down.

16 THE COURT: All right, Mr. Legette, you may be
17 seated.

18 Go ahead, Counsel.

19 MR. DOVE: Thank you, Your Honor.

20 Your Honor, this PCR application is brought
21 mainly regarding a waiver hearing from Family Court to
22 the Circuit Court for Mr. Legette to be tried as an
23 adult.

24 I believe he was fifteen years old at the time
25 this offense allegedly occurred or, I guess, now

1 occurred, and at the waiver hearing had, I believe
2 what you'll see, and it's in the record on appeal that
3 Your Honor probably has before him.

4 There was significant -- there were two
5 experts brought in to discuss the mental state of Mr.
6 Legette at the time in conjunction with the waiver
7 hearing.

8 One of the experts said that he could be tried
9 as an adult. One said that he couldn't, essentially,
10 and the essential part of this appeal is that that
11 waiver hearing Order was never appealed.

12 He was waived up to Circuit Court and that's
13 the essential portion of this, is that the Waiver
14 Order was never appealed.

15 Now, I just wanted to give the Court that
16 brief statement so that the Court didn't think we had
17 to go through this entire transcript today.

18 THE COURT: All right.

19 MR. DOVE: That is essentially what we are
20 looking to showing today, Your Honor.

21 THE COURT: All right. That does narrow the
22 issues, and what say the State? Do you wish to
23 respond in opening fashion, Mr. Bullard?

24 MR. BULLARD: No, sir, Your Honor, but I did
25 want to put on the record just for housekeeping's

1 sake, it's my understanding that Mr. Legette actually
2 filed two applications with regard to this conviction.

3 I don't think they've been merged properly,
4 but they are -- they concern the same conviction and
5 the same issues.

6 They are 2000-CP-26-1962 and 2001-CP-26-1911.
7 I just wanted to have those merged and any Order that
8 is issued reflect both of those docket numbers so that
9 it will clear up the docket one way or the other.
10 Granted or denied, we take care of both of these open
11 cases.

12 **THE COURT:** And into which case do you wish
13 the two to be merged?

14 **MR. BULLARD:** Well, they don't have to
15 necessarily be merged, but if they need to be merged,
16 into the -- into the 2000 case.

17 Usually we issue an Order of Merger, merging
18 the newer filing into the older one and considering
19 the newer filing an amendment to the older one.

20 **THE COURT:** All right. I note that your
21 return to the 2000 case contains a motion to dismiss.
22 Do you have an outstanding motion?

23 **MR. BULLARD:** No, sir. I have reviewed the
24 file and there was an appeal that ended -- it looked
25 like it was -- that this wasn't timely, but it was

1 petitioned -- there was a petition for rehearing or a
2 petition for cert to the Supreme Court which extended
3 the time, and he was -- he was filing in time.

4 THE COURT: All right, very good.

5 Any objection to the consolidation of these
6 cases?

7 MR. DOVE: Absolutely, Your Honor. I was
8 appointed on one of the cases and I'm -- for whatever
9 reason, I was never even -- I was never provided with
10 this application, the 2001.

11 I'm seeing it for the first time now. That
12 was the first time I'd ever heard of it. And I don't
13 think that it involves solely the same matters.

14 I see here that there is ineffective
15 assistance of appellate counsel on this and from what
16 Roger is telling me now, I believe that -- that may be
17 an issue he may have asked that Counsel to appeal, the
18 issue of the Waiver Order as well, and if that be the
19 case, Your Honor, as I said, I was only appointed on
20 the 2000 case that I knew of.

21 I understand these probably ought to be tried
22 together, but Your Honor, I -- I apologize to this
23 Court. I am not prepared to go forward on that
24 application today and I do not believe from looking at
25 them that they are -- that they are even -- that they

1 are the same.

2 There is the ineffective assistance of trial
3 counsel in one of them, but, Your Honor, I will
4 apologize to my client.

5 I understand that's going to carry out him
6 another four or five months if this Court grants a
7 continuance over this, but I certainly think that that
8 would be better than me trying this case, never having
9 seen this before.

10 I was not aware there were two separate
11 numbered applications, Your Honor, and two separate
12 claims.

13 THE COURT: All right.

14 Let me -- let me hear from the State on this
15 issue. I note that there are two separate PCR
16 applications here.

17 First of all, what is your position as to
18 whether there are two cases outstanding and whether
19 that is allowed under law?

20 MR. BULLARD: Well, to further complicate
21 these things, Mr. Gardner said they've already had a
22 hearing on the adult sentences.

23 MR. DOVE: I've been informed that the 2001
24 has already been heard, Your Honor, and ---

25 MR. BULLARD: So I guess we don't have to do

1 that.

2 MR. DOVE: --- I don't know how Your Honor
3 wishes to handle that, but it's my understanding that
4 that one has already been heard as well.

5 THE COURT: All right. Who was the Judge that
6 heard that, Counsel?

7 MR. GARDNER: Judge Breeden, Your Honor, and
8 mention was made of perhaps joining both of them for
9 that day, and I believe the Defendant -- or the
10 Petitioner said he didn't want to do that, and I
11 believe everybody decided to go forward on the General
12 Sessions PCR and at some point in time do this PCR.

13 THE COURT: All right. Did Judge Breeden
14 issue a ruling with respect to the 2001 case?

15 MR. GARDNER: He ruled from the Bench, Your
16 Honor, and I don't believe I've received the written
17 Order.

18 THE COURT: And what was his ruling from the
19 Bench?

20 MR. GARDNER: He did not grant relief.

21 THE COURT: All right, so then we have only
22 remaining the 2000 case, which is what you are
23 prepared on, Mr. Dove, am I correct?

24 MR. DOVE: I can go forward on that one, Your
25 Honor, yes, sir.

1 THE COURT: All right.

2 Mr. Bullard, I am not going to grant your
3 request for a merger. I'm going to leave the two
4 cases separate as we heard ---

5 MR. BULLARD: Well, I withdraw it. I didn't
6 realize we had this situation.

7 THE COURT: All right.

8 Go ahead, Mr. Dove. You may call your first
9 witness.

10 MR. DOVE: Now that you've -- now that we've
11 scared me to death, Your Honor, I'm prepared to go.
12 We will call Roger Legette to the stand, Your Honor.

13 THE COURT: All right.

14 Mr. Legette, please come around and take the
15 oath of a witness.

16 ROGER LEGETTE, being first
17 duly sworn, testifies as follows:

18 THE COURT: Mr. Dove, is your client chewing
19 gum?

20 MR. LEGETTE: No, sir.

21 THE COURT: All right.

22 Go ahead.

23 MR. DOVE: Thank you, Your Honor.

24 DIRECT EXAMINATION:

25 BY MR. DOVE:

1 Q. Roger, tell the Court what -- what kind of
2 sentence you're presently doing for what
3 charge.

4 A. On a murder charge, I'm doing a life sentence,
5 and five years for a gun charge.

6 Q. Is that life without parole?

7 A. Yes, sir.

8 Q. How old are you now?

9 A. Twenty-one.

10 MR. DOVE: Okay, you're not chewing gum, are
11 you?

12 (Mr. Legette removes something from his mouth.)

13 Q. Okay. You're twenty-one now?

14 A. Yes, sir.

15 Q. How old were you at the time of the -- of the
16 incident that -- that caused this situation?

17 A. Fifteen years old

18 Q. Fifteen?

19 A. Yes, sir.

20 Q. Do you recall having a waiver hearing in
21 Family Court? Do you know what I'm talking
22 about when I say a waiver hearing?

23 A. Yes, sir.

24 Q. And do you recall having one of those?

25 A. Yes, sir.

1 Q. At that waiver hearing, do you recall any --
2 do you recall the testimony of a Dr. Tidler
3 and a Dr. Metz?

4 A. Yes, I do.

5 Q. Okay. Did you meet with both of those persons
6 -- and I may be incorrect in calling them
7 doctors, but some counselors of some sort, is
8 that correct?

9 A. Yes, sir.

10 Q. Did you meet with both of those people prior
11 to that hearing?

12 A. No -- yes, sir, I did. Yes, sir, I did. Yes,
13 sir.

14 Q. And did you meet with them on several
15 occasions or just one?

16 A. I believe I met with both of them around a
17 couple of times.

18 Q. Do you recall the testimony of Dr. Metz in
19 that hearing?

20 A. Yes, sir, I do.

21 Q. I think the record speaks for itself, but as a
22 general rule, was it her opinion that you
23 should probably not be tried as an adult?

24 A. Yes, sir, it was.

25 Q. Was it her opinion that your matter should

1 remain in Family Court and be tried as a
2 juvenile?

3 A. Yes, sir.

4 Q. And dealt with as a juvenile?

5 A. Yes, sir.

6 Q. And you were fifteen at the time of the
7 occurrence?

8 A. Yes, sir.

9 Q. Who represented you in these actions -- in
10 both the Family Court matter and the General
11 Sessions matter?

12 A. Johnny Gardner represented me in both of them.
13 Mrs. Pratt represented me, I think, only on
14 -- if I'm not mistaken, only on -- during the
15 juvenile proceeding.

16 She -- she assisted, but I'm not sure if
17 she assisted with the -- for the proceedings.

18 Q. Do you think probably Mr. Gardner was lead
19 counsel ---

20 A. He was.

21 Q. --- and Mrs. Pratt was -- was a second chair
22 assisting counsel, that type thing?

23 A. Yes, sir.

24 Q. Okay. Now, as a result of the hearing, did
25 Judge Abbott sign an Order waiving

1 jurisdiction to General Sessions Court?

2 A. Yes, sir, he did.

3 Q. Do you feel like that was a proper hear- -- a
4 proper thing for him to do? Do you feel he
5 was correct in that ruling?

6 A. No, sir, I don't.

7 Q. Did you appeal that ruling?

8 A. Yes, sir, I did.

9 Q. You appealed the ruling of the Family Court?

10 A. Yes, sir, and on notice -- after Mr. Gardner
11 filed Notice of Appeal from the initial aiver
12 hearing, Judge Victor Rawl remanded the case
13 back to Family Court for clarification. And
14 upon that, Judge Abbott did another Order,
15 sent it back to ---

16 Q. Okay. All right, so the first Order waiving
17 jurisdiction was appealed, is that correct?

18 A. Yes, sir, that's correct.

19 Q. And there was another Order issued, is that
20 correct?

21 A. That's correct.

22 Q. The Order in General Sessions or Circuit Court
23 required Judge Abbott to expound on his first
24 Order, is that what happened?

25 A. Yes, sir, that's correct.

1 Q. Now, the second Order that Judge Abbott
2 issued, did it, too, waive jurisdiction up?

3 A. Yes, sir, it did.

4 Q. Okay, and did you appeal from that Order?

5 A. That -- that's my understanding, that a Rule
6 59(e) and 60(b) is to be -- carry the weight
7 of an appeal. That's my understanding, but
8 I'm not sure.

9 Q. Okay. No question a Rule 59(e) and 60(b)
10 motion were filed by Mr. Gardner, correct?

11 A. Yes, sir, that's correct.

12 Q. Did you ever have hearings on those?

13 A. No, sir. We didn't get no other proceedings
14 from it after it was filed.

15 Q. Okay. Have you ever -- you never received any
16 Order on that?

17 A. No, sir.

18 Q. Has Mr. Gardner or Mrs. Pratt ever consulted
19 with you regarding their pursuit of that 59(e)
20 or -- 59(b) or (e), or 60(b) motion? Have
21 they ever consulted with you on that?

22 A. No, sir.

23 Q. How long between the waiver hearing and the
24 General Sessions trial elapsed, roughly?

25 A. Four months.

1 Q. Four months?

2 A. Three months, really.

3 Q. Three months. Okay. Now, is that between the
4 hearing and the trial?

5 A. Between the hearing and the trial.

6 Q. Okay.

7 A. Between the final Waiver Order and the trial.

8 Q. Okay, between the final Waiver Order and the
9 trial, there was a four month lapse?

10 A. Yes, sir.

11 Q. And in that time, Mr. Gardner filed a
12 motion, ---

13 A. Yes, sir, he did.

14 Q. --- a post-trial motion?

15 A. Yes, sir.

16 Q. But it's your position he did not pursue that?

17 A. It wasn't -- it wasn't pursued and no Order
18 was ever issued.

19 Q. And were you ever advised by Mr. Gardner or
20 Mrs. Pratt that you had the right and the
21 opportunity to appeal from that waiver to the
22 Supreme Court or any other appellate court?

23 A. No, sir.

24 Q. Would you have done so had you been aware of
25 your possibility of doing that?

- 1 A. Yes, sir.
- 2 Q. Do you feel that there's a possibility that
3 based on Ms. Metz's testimony an appellate
4 court might have overturned that waiver?
- 5 A. That's -- that's my opinion, sir.
- 6 Q. Okay, and had that happened, as I -- had that
7 happened, you would have been tried as a
8 juvenile, correct?
- 9 A. That's correct.
- 10 Q. You're sure that Mr. Gardner did not pursue
11 the 59(e) or 60(b) motion?
- 12 A. I'm not -- I'm not sure that he did not pursue
13 it. I just -- no Order was ever issued
14 because I wrote several letters to the courts
15 and everything requesting the outcome of that
16 motion.
- 17 Q. So you're sure you never received anything
18 since the original motion?
- 19 A. Since the original motion, no.
- 20 Q. You never received a response from the State?
- 21 A. Nothing.
- 22 Q. Never received any memoranda, ---
- 23 A. No.
- 24 Q. --- never received any briefs, never went to a
25 hearing on that motion, never received an

- 1 A. Yes, sir.
- 2 Q. I just wanted to clear that up.
- 3 Did Mr. Gardner or Mrs. Pratt ever get an
- 4 independent evaluation of you as to whether
- 5 you were fit to stand trial as an adult or a
- 6 juvenile?
- 7 A. Not that I'm aware of, sir.
- 8 Q. Okay. Did you ever speak with anyone
- 9 regarding your mental state other than Ms.
- 10 Metz and Ms. Tidler?
- 11 A. No, sir.
- 12 Q. Okay. While you were in detention and prior
- 13 to your trial, you didn't speak with any
- 14 psychologists?
- 15 A. No, sir.
- 16 Q. No psychiatrists?
- 17 A. No, sir.
- 18 Q. No counselors?
- 19 A. No, sir.
- 20 Q. You didn't go for any kind of psychological
- 21 evaluations with anyone other than those two?
- 22 A. No, sir.
- 23 Q. Now, is there anything else -- I've asked you
- 24 a lot of questions about this waiver hearing
- 25 and about the appeals.

1 Is there anything else you feel this
2 Court needs to know regarding this waiver
3 hearing that I've not addressed this morning?

4 A. Only -- only the fact that I also alleged in
5 my PCR application that the gun charges was
6 waived up to the Court of General Sessions,
7 and according to the statute, they couldn't
8 waive -- they couldn't even waive jurisdiction
9 of the gun charges.

10 Q. Okay. Now, by gun charges, what you're
11 referring to is possession of a weapon during
12 a felony? Is that during the commission of a
13 felony?

14 A. And possession of a weapon during the
15 commission of a violent crime, and possession
16 of a pistol by a minor.

17 Q. Okay, and your position is that those could
18 not be waived up?

19 A. Yes, sir.

20 Q. Now, do you feel that those adver- -- that --
21 do you feel that waiving those up along with
22 the murder charge adversely affected the
23 outcome of the murder trial?

24 A. Yes, sir. It played -- it played -- it played
25 a -- it played a crucial role within the trial

1 after the instructions given by the Trial
2 Judge and the argument of the Solicitor. It
3 was, in fact, very crucial to the trial.

4 Q. Okay. Now, in the trial, how do you feel that
5 you were adversely affected by the gun charges
6 being there as well as the murder charges?
7 Now, I'm not talking about the murder charges.

8 Assuming that the murder charges were
9 correctly waived, how did it adversely affect
10 you that the gun charges were also waived up?

11 A. See, ---

12 MR. BULLARD: Your Honor, now I'm going to
13 object at this point because I think we're now talking
14 about prejudice in a trial that they say they've
15 already had a PCR on and this is not concerning the
16 trial, just the waiver hearing.

17 So I think that's another matter that was
18 taken care of at another time. Counsel didn't want to
19 go forward on the trial issues and they found out
20 they've already been determined, so I would object to
21 this.

22 THE COURT: What say you in response, Counsel?

23 MR. DOVE: Your Honor, we're still dealing
24 with the waiver issues. It's my understanding that we
25 -- even if we show that the matter was incorrectly

1 waived up, we still have to show that there was
2 prejudice as a result of that waiver, and I'm just
3 asking this applicant if he can tell us how he was
4 prejudiced.

5 THE COURT: It's overruled on the issue of
6 prejudice. Go forward.

7 MR. DOVE: Thank you, Your Honor.

8 MR. DOVE:

9 Q. Now, I'll repeat my question so that you can
10 -- so that you can recall it cor- --
11 accurately.

12 Assuming that the murder trial was
13 correctly waived, how do you think that the
14 gun charges adversely affected you in that
15 trial?

16 A. Okay, first of all, we go back to the
17 Solicitor. He was cal- -- he called
18 witnesses, right? And whenever he -- he had
19 -- he had a gun on display, you know what I'm
20 saying.

21 He had a gun on display, and there's a
22 jury in the box, so he takes the gun and he
23 tells the jury -- he's asking the witness, the
24 individual witness who he called and explained
25 to him how the gun was going off and

1 everything else.

2 So when the witnesses get to testifying,
3 he -- he made a big show about the way the
4 guns were. "Nah, it ain't went like that. It
5 went like this," you know, and he got the gun
6 in front of the jury and he -- he's referring
7 to the gun, how I'm a -- how I'm a hunter, and
8 a menace, and some other things of that
9 nature, right.

10 And then the mere fact of the way the
11 Judge instructed the jury at the end of the
12 trial to the elements of the gun, because I
13 had a involuntary manslaughter charge and a
14 murder charge, what he said with respect to
15 the gun charge at hand. "If you find a
16 individual -- if you find a minor defendant"
17 -- he didn't say minor defendant.

18 "If you find a defendant guilty of
19 possession of a firearm during the commission
20 of a violent crime, you cannot find a
21 defendant guilty of involuntary manslaughter
22 because involuntary manslaughter is a non-
23 violent crime and possession of a firearm is a
24 violent crime."

25 So with that -- with respect to that

1 instruction alone, I feel that it was some
2 kind of burden shifting, because if the gun
3 wasn't there, then he couldn't have gave that
4 instruction, and the jury -- the jury may have
5 had reason to believe that they had to find me
6 guilty because the gun was actually displayed.
7 And there was witnesses there who testified
8 that the gun was in my possession when it went
9 off.

10 Q. That being said, is there anything else that
11 you feel like this Court needs to address
12 today, or does that pretty much cover what
13 we -- what we're dealing with on the waiver
14 hearings?

15 A. Could I have a second just to look on this?

16 Q. Sure.

17 A. That -- that -- that will basically clear up
18 everything -- everything that -- that's on my
19 application, but I have -- I have, you know,
20 evidence that -- that was not submitted or
21 nothing because we was just proceeding off of
22 questions, but I don't know if you want to
23 present them or not.

24 Q. All -- all we can deal with today is the
25 waiver hearing and -- and as far as I know,

1 I've asked you everything we need to about the
2 waiver hearing.

3 Is there anything else about the waiver
4 hearing that -- that this Court needs to
5 address today?

6 A. No, sir, there's nothing else dealing with the
7 waiver hearing.

8 MR. DOVE: Okay. Thank you.

9 The Attorney General is now going to ask you
10 some questions.

11 That's all I have.

12 THE COURT: Cross examination.

13 MR. BULLARD: Beg the Court's indulgence for
14 just a moment.

15 CROSS EXAMINATION:

16 BY MR. BULLARD:

17 Q. Mr. Legette, do you have the Rule 59 and Rule
18 60 motions?

19 A. Sir?

20 Q. Do you have the Rule 59 and Rule 60 motions?

21 A. I -- I have -- you mean the rule to that
22 particular thing?

23 Q. No, not the rule itself, but the motions?

24 A. Yes, sir, I do. I have it right -- right
25 here. It's right here, sir -- right there,

1 sir.

2 MR. BULLARD: Your Honor, could I have just a
3 second to review those?

4 THE COURT: Yes, sir, you may.

5 (PAUSE)

6 THE COURT: Go ahead.

7 MR. BULLARD: That's all. I just wanted to
8 have this just to see it. Actually, I think we need
9 to put it into evidence.

10 I'd move to put it in evidence. I assume you
11 don't have an objection to it?

12 MR. DOVE: I would object, Your Honor. I
13 don't have a copy of it and that's probably my
14 client's only copy. If we could just ensure that we
15 get ---

16 THE COURT: Well, we can cure that objection.
17 Over your objection, we will admit it into evidence.

18 Let's take a moment and mark it and then we'll
19 provide copies to you and to your client.

20 MR. DOVE: I mean, there's certainly no
21 objection to it coming in, Your Honor.

22 (DEFENDANT'S EXHIBIT 1 [NOTICE OF MOTION AND
23 MOTION DATED APRIL 12, 1997] IS INTRODUCED INTO
24 EVIDENCE AND APPROPRIATELY MARKED.)

25 MR. BULLARD: I don't have any other

1 questions.

2 THE COURT: Any -- any redirect?

3 MR. DOVE: Certainly not, Your Honor.

4 THE COURT: All right, sir, you may step down
5 then.

6 Any further witnesses?

7 MR. DOVE: Nothing further from the applicant,
8 Your Honor.

9 THE COURT: All right. The applicant rests?

10 MR. DOVE: Yes -- yes, sir.

11 THE COURT: Any reply witnesses?

12 MR. BULLARD: Yes. The State would call
13 Johnny Gardner.

14 THE COURT: Please come around and take the
15 oath of a witness.

16 JOHNNY GARDNER, being
17 first duly sworn, testifies as follows:

18 DIRECT EXAMINATION:

19 BY MR. BULLARD:

20 Q. Mr. Gardner, you just had a chance to look at
21 the Rule 59 motions?

22 A. I sure did.

23 Q. Okay. Do you know why -- well, first of all,
24 did you -- did you -- I can't think of the
25 word I'm trying to think of.

1 Was there ever any disposition of the
2 Rule 59 motion?

3 A. No, not to my knowledge.

4 Q. Okay, and why did you not pursue a disposition
5 of it?

6 A. Well, I guess I should probably address why I
7 filed it first to answer the question.

8 After the waiver hearing, Judge -- the
9 Family Court Judge did an Order just basically
10 waiving him up. I don't have a copy of it
11 with me.

12 I felt that it didn't address the issues
13 that are necessary under Kent to waive a child
14 up to big court, so we appealed that to the
15 Circuit Court.

16 The Circuit Court Judge basically said --
17 and I have a copy of -- well, I have it
18 somewhere. All that information on that desk
19 deals with this case. It's a very extensive,
20 very complex case.

21 The Circuit Court Judge basically said he
22 didn't have enough in this Order to see if it
23 met the criteria under the United States
24 Supreme Court case, remanded it back for
25 further hearing or what I thought was a

1 further hearing on the issues of Kent.

2 The Family Court Judge at some point in
3 time just re-did a new Order and filed an
4 amen- -- what is captioned "Amended Order
5 Waiving Jurisdiction" which sets forth the
6 Kent vs. United States factors.

7 And I got that, like I said, without
8 benefit of a subsequent hearing, and again, I
9 don't -- I was under the impression and
10 thought we were entitled to another hearing,
11 so that's when I filed the Rule to have him
12 alter this or at least give us a hearing on
13 it.

14 I wanted to address those. Obviously the
15 Judge didn't think he needed to hear anything
16 else on it because he had heard the waiver
17 hearing, which I believe was at least two
18 days long, and the only other thing that I
19 could -- there was absolutely nothing else
20 done on it.

21 And I guess it's because I thought maybe
22 that the Judge had decided that he didn't need
23 any more information and he wasn't going to
24 change his mind, because we had given him --
25 and he had at least two opportunities to try

1 and change his mind.

2 The only other thing I can think is that
3 the copy of the indictment that I have is
4 stamped "True Billed December 19th, 1996,"
5 which I believe would have given General
6 Sessions jurisdiction at that time, and a copy
7 of the Amended Order which would have preceded
8 the motion that Mr. Legette was talking
9 about -- the copy of the Order I have is dated
10 April 7th, 1997, which is after it would have
11 been -- jurisdiction was in General Sessions
12 Court.

13 That may have had something to do with
14 it, although I can't testify that's the
15 reason. I think the reason was that the Judge
16 -- we were trying to get another bite at the
17 apple and the Judge didn't want to give that
18 to us.

19 Does that answer your question?

20 Q. Yes. Did you have any -- I'm sorry. I
21 withdraw that question.

22 MR. BULLARD: That's all the questions I have,
23 Your Honor.

24 THE COURT: Any cross examination?

25 MR. DOVE: Yes, if it please the Court, Your

1 Honor.

2 CROSS EXAMINATION:

3 BY MR. DOVE:

4 Q. Mr. Gardner, regarding this notice of motion,
5 it was filed on April 23rd, is that correct,
6 of 1997?

7 A. It -- it's not a -- the stamp is not good, but
8 relying on the stamp, it looks like it. I
9 signed it on the 23rd. It probably would have
10 been filed that same day.

11 Q. It's dated -- that was -- that was the issue.
12 That was filed on April 23rd, 1997, correct,
13 or signed on the 23rd?

14 A. I believe the 24th, but ---

15 Q. The Order ---

16 A. Yeah, April 23rd, you're right, 1997.

17 Q. The Order, the Final Order, of Judge Abbott
18 was April 7, 1997, is that correct?

19 A. That's correct.

20 Q. Now, in the motion, you request a specific
21 hearing on the Kent factor, is that correct?

22 A. That's correct.

23 Q. Now, I guess I didn't catch all of your
24 explanation, but you said there was never a
25 disposition of this motion, is that correct?

1 A. That's correct.

2 Q. And why did you not pursue that to a
3 disposition?

4 A. The best answer I have for that is that the
5 purpose of filing that was to have another
6 hearing so that the -- so they could be -- so
7 the issues in Kent could be addressed. The
8 trial -- or the Family Court Judge did the
9 Amended Order without a hearing, and I -- I
10 just was trying to get a hearing and at the
11 hearing, try to get him to change his mind.

12 So that's what was filed. I -- I don't
13 -- other than that, I don't have a good answer
14 for you why I didn't have a -- actually
15 schedule a hearing.

16 Q. Would you have -- do you recall at any time
17 informing Roger of his right to appeal from
18 the Family Court Order waiving jurisdiction?

19 A. No, I didn't.

20 Q. Did you ever file a notice of appeal from that
21 Order or anything?

22 A. Not from the Family Court.

23 Q. Okay.

24 MR. DOVE: Beg the Court's indulgence, Your
25 Honor.

1 MR. DOVE:

2 Q. To your knowledge, Mr. Gardner, there still is
3 no Order on this Rule 59 or Rule 60 motion
4 that you filed, correct?

5 A. To my knowledge, there's no ruling on it and
6 no hearing was scheduled for it.

7 Q. To your knowledge, was there ever an Order
8 dismissing that Rule?

9 A. To my knowledge, there was never an Order
10 addressing the motion.

11 Q. And did you ever withdraw that Rule or
12 anything of that -- to that effect?

13 A. No. We never -- I don't believe we ever
14 addressed it once it was filed.

15 MR. DOVE: Your Honor, that's all that I have
16 of this witness.

17 THE COURT: All right. I have some questions
18 for you.

19 EXAMINATION BY THE COURT:

20 Q. First of all, Mr. Gardner, can you just
21 briefly synopsize why the Family Court found
22 it appropriate to waive this case up? What
23 was the reasoning in waiving the case up to
24 the General Sessions Court?

25 A. Judge, I can give you my best guess on it. If

1 I recall correctly, and if you would prefer, I
2 can step down, and in one of those files is
3 the Waiver Evaluation Report.

4 It addresses a few of the Kent factors,
5 and I believe this was -- if memory serves me,
6 this was a close case. It wasn't a slam-dunk.

7 Mrs. Pratt handled the actual expert part
8 of the hearing and probably could better
9 address that than me, but my understanding is
10 that the evaluation was close and it could
11 have gone either way.

12 What the Judge -- playing Monday morning
13 quarterback, I believe the Judge hung his hat
14 on the fact that this is a very serious crime,
15 but -- and I argued below that we don't waive
16 all the murder cases up automatically, we look
17 at all the factors in it, and that's the only
18 thing that I -- that I could see.

19 He had no prior criminal record. He was
20 only fifteen years old. The report was good,
21 and I definitely will have to defer to Mrs.
22 Pratt on the other expert witness, but I
23 believe -- I think it's safe to assume that
24 that was a good report, too.

25 Q. All right, and in your opinion, you were asked

1 about whether or not you had appealed the
2 waiver. Was there, in your opinion, some
3 error of law or some appealable issue which
4 would have been meritorious?

5 A. Judge, I -- I don't -- I don't think we made
6 any errors of law, and I believe the whole
7 thing boils down to the discretion of the
8 Judge.

9 I believe that whole issue is if there's
10 any facts to support any of those Kent
11 factors, and specifically the three that
12 South Carolina uses in their waiver
13 evaluation, I believe it's totally
14 discretionary, and I believe that the
15 appellate court in Columbia would say this is
16 in the Judge's discretion.

17 Q. So the review would be, then, on an abuse of
18 discretion basis?

19 A. I believe, but I have never done the research
20 on that, because -- we did everything we could
21 do.

22 Basically the waiver hearing is it's a
23 two part -- two phase hearing. The first is
24 what I would like to call probable cause
25 related.

1 It's similar to a probable cause hearing
2 or a preliminary hearing that we would do in
3 Magistrate's Court, for example, whether or
4 not there's a reasonable suspicion that a
5 crime was committed, whether or not there was
6 a reasonable suspicion that the Defendant
7 committed the crime. Well, obviously that was
8 there.

9 So then you move from there to whether or
10 not this child should stay in Family Court and
11 be rehabilitated or go up to adult court, and
12 then you look at those factors set forth in
13 Kent, and the strongest ones are -- well,
14 here's his Order right here where he says he,
15 the Judge that did this, -- I assume I can
16 read from this.

17 I believe it would probably be part of
18 the record, or you can take judicial notice of
19 it, but ---

20 MR. DOVE: Is it -- just -- Judge, briefly, is
21 this the Amended Order he's reading from?

22 A. This is the Amended Order waiving
23 jurisdiction, signed by the Family Court Judge
24 on April 7th, 1997.

25 I believe another thing that he put

1 emphasis on -- okay, he starts it off when
2 he's going into -- talks about the facts of
3 the case, and then it says, "This action was
4 carried out in a wilful and brutal manner."

5 Well, I submit that all murders are, by
6 characterization -- if it's a murder, that
7 would be part of it.

8 Then it goes back into what I addressed
9 earlier, the probable cause portion of it.
10 "There is substantial prosecutive merit to the
11 pending charge." Well, we put -- we basically
12 conceded that for that part of the hearing.
13 I mean, he would have pled guilty in my
14 position in Family Court that day.

15 Then he read -- this is the Judge's Order
16 again -- read the evaluation of Dr. Tidler and
17 he found -- finds that very little, if any,
18 rehabilitative services would be offered as a
19 juvenile through the facilities presently
20 available to D.J.J., the Department of
21 Juvenile Justice.

22 I think what he was saying there that
23 Juvenile Justice can only keep a person up
24 until they're 21, and I guess he thought that
25 this person couldn't be rehabilitated in six

1 years.

2 THE COURT: All right, sir. Well, you've
3 answered my question, and thank you for that, sir.

4 Any -- any follow-up questions based on the
5 Court's inquiry, from the State?

6 MR. BULLARD: No, sir.

7 THE COURT: From the applicant?

8 MR. DOVE: Briefly, Your Honor.

9 THE COURT: All right.

10 RECROSS EXAMINATION:

11 BY MR. DOVE:

12 Q. Mr. Gardner, you said it's your understanding
13 that the -- now I can't think of the word I
14 need -- it's your understanding that the --
15 that what the appellate court looks at is an
16 abuse of discretion? The standard of appeal
17 is abuse of discretion, is that correct?

18 A. That's my -- I mean, that's the only thing I
19 can think of. I mean, it's not like -- I just
20 can't think of a standard that you could hold
21 a Judge to on that.

22 Q. Okay, and if it were more -- if it were
23 something more like any equity case in Family
24 Court where the appellate court could take its
25 own view of the evidence, would you then feel

1 that this was an appealable Order where an
2 appellate court might take a different view of
3 the evidence?

4 A. Oh, absolutely, and I don't mean to say by
5 saying that it's discretion, that it
6 automatically would lose. I don't do
7 appellate work, but, you know, my -- what my
8 line of thinking would be, that they would
9 look at it, either the three-court panel, or
10 however it was addressed, would look at it and
11 decide if there was any evidence supporting
12 the Judge's decision and whether or not it was
13 enough under the factors that he has to go by
14 under Kent.

15 Q. But you said that this was not a slam-dunk?

16 A. No, this was nowhere near a slam-dunk.

17 Q. This is a questionable case for waiver at
18 best?

19 A. This was -- was the closest waiver hearing
20 I've ever participated in.

21 Q. And how many of those have you participated
22 in, Mr. Gardner, roughly?

23 A. Probably five or six murders.

24 Q. Five or six murders?

25 A. Probably so.

1 Q. And this was the closest one you've ever ---

2 A. I'm guessing, because I used to prosecute all
3 the juveniles, and then I did the bulk of the
4 defense work after I left.

5 MR. DOVE: I don't have anything further at
6 this time, Your Honor.

7 THE COURT: All right.

8 You may step down.

9 MR. GARDNER: Thank you, Your Honor.

10 THE COURT: You have a follow-up question?

11 MR. BULLARD: Your Honor, I do have a couple
12 based on that.

13 THE COURT: I'm sorry. We have further
14 questions.

15 REDIRECT EXAMINATION:

16 BY MR. BULLARD:

17 Q. You say you've done five or six waiver
18 hearings on juveniles for murder?

19 A. I'm -- I'm guessing. I may be off by a
20 couple.

21 Q. All right. How many other waiver hearings
22 have you done, an estimate?

23 A. I have to think for a minute. We did one that
24 wasn't technically a murder. It was some
25 bizarre charge. Most of them involve -- I

1 mean, obviously they involve serious charges.

2 I can't off the top of my head think of
3 any other technically non-murder charges.
4 They're all -- there was a lot of homicide by
5 some type of deal.

6 There was an incendiary device case.
7 There was a big drug case, but there was also
8 a murder attached to that, too. There was one
9 that I didn't participate in that involved
10 drugs, based on the amount of the drugs.

11 Q. Were those done in front of Judge Abbott?

12 A. I don't believe any of those were -- I believe
13 Judge Abbott was right off -- and I don't want
14 to speak for him. I think he had just taken
15 the Bench. I don't think he had done one
16 before.

17 Q. All right.

18 A. To my knowledge. He may have.

19 Q. Okay.

20 MR. BULLARD: I don't have any further
21 questions.

22 THE COURT: All right. You may ---

23 MR. DOVE: Nothing -- nothing from the
24 applicant.

25 THE COURT: You may step down.

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1 MR. GARDNER: Thank you, Your Honor.

2 THE COURT: Mr. Bullard, further witnesses?

3 MR. BULLARD: No, sir.

4 THE COURT: No further witnesses?

5 MR. BULLARD: No, sir.

6 THE COURT: All right.

7 Any evidence in reply?

8 MR. DOVE: No evidence, Your Honor. I do have
9 one request of the Court. If the Court is considering
10 ruling from the Bench on this, I would have one
11 request prior to that ruling, ---

12 THE COURT: All right.

13 MR. DOVE: --- if the Court would indulge.

14 THE COURT: You don't intend to call Mrs.
15 Pratt?

16 MR. BULLARD: No, sir.

17 THE COURT: All right. It would be my
18 intention to rule from the Bench, Counsel. Do you
19 have a question or a motion at this time?

20 MR. DOVE: I -- I would, Your Honor. I would
21 ask that if this Court is inclined to deny the PCR
22 application here, it was my understanding coming in,
23 -- and I'm not saying that this is correct, but it was
24 my understanding that there was a lighter standard of
25 review than that which Mr. Gardner said he thought of,

1 that the abuse of discretion.

2 I would ask this Court, and I think it's
3 significant, I would ask this Court for time to submit
4 to this Court a brief or at least a statement on what
5 the actual standard of review is on a waiver hearing
6 from Family Court.

7 I think certainly that this is an abuse of
8 discretion case that -- that is a different case than
9 if it would be a -- their own view of the evidence
10 type case.

11 If it were their own view of the evidence, I
12 think almost unquestionably he is entitled to an
13 appeal at this point, however Your Honor was going to
14 rule, but if that -- I would make that request of this
15 Court, that we be allowed to address the standard for
16 that.

17 THE COURT: All right.

18 MR. BULLARD: Your Honor, ---

19 THE COURT: Does the State wish to reply?

20 MR. BULLARD: Yes, I would, please.

21 Your Honor, the State wanted to make a few
22 comments on the issues raised.

23 First of all, on his allegation regarding the
24 possession of a weapon charge being waived up and
25 prejudice, again all the prejudice seemed to flow to

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1 his eventual conviction of the murder charge, that
2 someone handled the gun and showed how the gun was
3 made automatic, and there was a lot of reference to
4 people handling the gun, and if it hadn't been waived
5 up, they couldn't have gotten the gun.

6 Well, the gun would have been there regardless
7 of whether the possession of a weapon charge, and the
8 gun was evidence of the crime, and whether or not he
9 was charged with possession of a weapon, the gun was
10 still going to be at the trial, so I don't think
11 there's any prejudice even if that were prejudice
12 flowing from -- somehow flowing from the waiver
13 hearing.

14 The State does not concede that. The State
15 submits that the prejudice argued is of his eventual
16 conviction in the adult trial of murder so that it
17 doesn't have anything to do with the waiver hearing.

18 Second, regarding the Rule 59, it appears
19 given the date, that the Rule 59 was not timely
20 anyway. It was filed on the 23rd, and the Order was
21 dated the 7th, which is sixteen days, and you have to
22 file those within ten days.

23 Third, the State would submit that because his
24 appeal -- and you should have the appellate record up
25 there, which is part of this PCR as an attachment to

1 our return.

2 The appeal included the waiver hearing
3 transcript, both days, and the Orders of Waiver, and
4 there was an Anders brief done, and pursuant to
5 Anders, the appellate court reviews all issues, all
6 potential issues, in the record.

7 In fact, they don't like Anders' briefs
8 because they -- that causes their staff to do more
9 work. He's got to read everything instead of the
10 narrow issues involved in the case, so they reviewed
11 the entire record for error and they will buck or send
12 an Anders back if they find an issue of merit.

13 This was not the issue raised in the Anders,
14 but if they had found it, they would have sent it
15 back. That is the Anders procedure, and I'm not just
16 saying that it's some unwritten procedure. That is
17 what Anders holds and that's what the cases following
18 Anders in South Carolina indicate.

19 They review the entire record for any error
20 and then send it back and have counsel brief it if
21 they find meritorious issues. Otherwise, they dismiss
22 it on Anders and say, "There are no meritorious issues
23 here."

24 Third, or next, the State would cite the case
25 of State vs. Cory Dee, which is -- all I've got is a

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1 West Law cite unfortunately, but it is a published
2 Opinion of the Supreme Court from March of 2000 when I
3 printed this up. It still did not have a South
4 Carolina cite. I'm sure it does now -- where they do
5 indicate that -- and I'll just read one sentence from
6 the Supreme Court.

7 "Regardless of the procedural aspects of the
8 transfer proceedings," and they are talking about a
9 juvenile transfer, "this Court reviews the merits of a
10 transfer order for an abuse of the Family Court's
11 discretion," so that is the proper -- the proper
12 standard for review by an appellate court, an abuse of
13 discretion.

14 And given that, the State would contend and
15 would submit that given a review of this record and
16 the Orders issued by Judge Abbott, and a review of the
17 transcript of the waiver hearing, I don't think that
18 the applicant can show that Judge Abbott abused his
19 discretion in waiving this matter up to Family (sic)
20 Court.

21 THE COURT: All right, thank you, Counsel.

22 Let me say to the Lockhart family, Mr.
23 Lockhart, you have been here. You have waited
24 patiently this morning.

25 One of the rights of victims in South Carolina

1 is to be present at hearings which involve the
2 disposition of the Defendant in matters of which you
3 are the victim, or you are a family member or the
4 victim.

5 Of course, Mr. Legette is here asking this
6 Court to set aside his conviction below or at least to
7 vacate it so that he may have another trial on the
8 basis of ineffective assistance of counsel, and just
9 by way of explanation without going far beyond the
10 scope of what we are doing here, from the early days
11 of our country, our Constitution has guaranteed
12 individuals to have the right to counsel when they
13 face charges, severe charges, of this nature, and the
14 U.S. Supreme Court has determined that to be -- to
15 mean effective and appropriate counsel.

16 The Defendant here, or the applicant here, Mr.
17 Legette, says he did not have effective assistance of
18 counsel, and you've heard the evidence as to why he
19 believes that to be the case.

20 I'll be glad, if you wish to say something on
21 this record, if you wish to say -- make any remarks to
22 the Court, I'll be glad to hear from you at this time,
23 sir.

24 MR. LOCKHART: Okay. Yes, I'm here to
25 represent my brother that was killed's family. He

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1 left behind five kids and two brothers and a sister,
2 and a mother.

3 We are here to oppose any type of re-trial or
4 anything, going through this thing again. We'd like
5 to put it to rest.

6 And if I could say something toward the gun
7 matter, we've been on all the hearings, and the last
8 time we were here for a hearing, the Judge ruled that
9 even if they didn't have a gun, it wouldn't matter on
10 the verdict because there was two witnesses who put
11 the gun in his hand and said he fired a shot.

12 So as far as the gun issue, that was ruled by
13 the Judge a couple of months ago, and we'd like to get
14 it put to rest, and nothing against the family or
15 anybody else, but the boy did the crime. I feel like
16 he should do the time.

17 **THE COURT:** All right, sir. Mr. Lockhart, I'm
18 sorry that you find yourself here as a victim of
19 crime. I wish you well, sir. I'm sorry that you've
20 been through this experience, you and your family.

21 All right, just a moment. I am going to rule
22 from the Bench, Mr. Dove. To my satisfaction, the
23 issue of whether or not it is an appellate review on a
24 discretion basis or whether it is a complete review of
25 the facts has been answered.

1 MR. DOVE: Mine, too, Your Honor, and if I
2 might address the Court on that very briefly.

3 THE COURT: You may.

4 MR. DOVE: I certainly in that discussion was
5 not conceding that there was no abuse of discretion.
6 I think in Mr. Gardner's testimony he specifically
7 said both reports appeared favorable, it was the
8 closest that he's ever been involved in, and he's been
9 involved, I'm sure, more than anybody else in this
10 room in five or six, and I would -- it would be our
11 position that even if it's an abuse of discretion,
12 which I'm willing to accept it. I'm certainly not
13 going to question the attorney.

14 I haven't done the research myself, but if
15 that satisfies you, even with an abuse of discretion
16 standard, Your Honor, what we're looking at is a
17 possible abuse of discretion with Mr. Gardner saying
18 how close it was and admitting or stating on the stand
19 that he thought it was a very close call.

20 I would submit to this Court that this
21 applicant is still entitled to have the appellate
22 court decide that that was not an abuse of discretion.
23 I think that there is a possibility of that and
24 considering the reports, the evaluations, and things
25 of that nature, I would -- I would still submit to

RULING OF THE COURT

52

1 this Court that even on that, there is -- this
2 applicant is entitled to a review of the -- a review
3 of the Order waiving jurisdiction, Your Honor.

4 Thank you for your indulgence.

5 THE COURT: Yes, sir.

6 All right, I'm going to go ahead and rule at
7 this time.

8 Mr. Legette, as you've heard me say earlier
9 today, that there's a two-pronged analysis here and
10 the applicant must prove both of those prongs. You
11 must meet your burden of proof and prevail on both
12 prongs, number one, that there was ineffective
13 assistance of counsel, which means that your counsel -
14 - and, of course, you had two lawyers, fell below the
15 standard required of lawyers practicing criminal law
16 in South Carolina. That's prong number one.

17 And then once you overcome that, then you've
18 got to go to number two and show that whatever error
19 was committed, whatever mistake occurred actually
20 prejudiced you. You can't just say, "Well, it
21 shouldn't have happened." You've got to show actual
22 prejudice. That's the second prong.

23 And I find that you have failed to meet the
24 burden of proof on both of those prongs. With respect
25 to the first prong, I do not find that there has been

1 ineffective assistance of counsel.

2 I'm going to ask the State, Mr. Bullard, to
3 prepare the Order in this matter, so if you would
4 please follow carefully the ruling of the Court.

5 Specifically you allege that the failure to
6 appeal a decision made by the Family Court was
7 ineffective assistance of counsel, but in this record
8 before me, I have no evidence that there was, number
9 one, an appealable issue, and it would be
10 inappropriate to just file a frivolous or a non-
11 meritorious appeal when there is no appealable issue
12 before the Court, regardless of the fact of whether it
13 was a close question.

14 That's totally separate from whether there was
15 an error of law committed by the Court, and I simply
16 don't see an error of law for which there would have
17 been an appeal that could have been filed.

18 I further do not find any ineffective
19 assistance of counsel as to the fact that the Court,
20 for whatever reason, the Family Court, did not follow
21 up on and issue a Final Order with respect to the Rule
22 59 or Rule 60 motions which were made by counsel.

23 Counsel clearly was effective in making those
24 motions, but the lawyer cannot compel or force the
25 Court to issue some type of order. It seems to me as

RULING OF THE COURT

54

1 I hear the evidence that the Court had made a decision
2 to waive up the case and did not intend to retreat
3 from it and, therefore, there was no ultimate piece of
4 paper that came out and said, "We deny the motion for
5 re-hearing," but that, to me, does not reflect as
6 being ineffective assistance of your attorney. That's
7 just a decision that the Court had made, which they
8 cannot control.

9 And finally, I -- you have shown no prejudice
10 here. I do not find that you have shown that if there
11 had been a follow-up hearing on the Rule 59 or Rule
12 60, or if there had been an appeal, that it would have
13 been successful, that somehow the outcome would have
14 been different, and I don't see that it would have
15 been.

16 I don't see any evidence before me that shows
17 that you have been prejudiced, but I don't -- further,
18 as I stated, I don't find the first prong occurred,
19 which is that I believe you have failed to prove
20 ineffective assistance of counsel and, therefore, for
21 those reasons, I deny your -- your request for post
22 conviction relief, and that is the ruling of the
23 Court.

24 Is there anything further from the State?

25 MR. BULLARD: No, sir.

RULING OF THE COURT

55

1 THE COURT: Anything from the applicant?

2 MR. DOVE: Nothing at this time, Your Honor.

3 THE COURT: All right.

4 To the Lockhart family, you -- you are free to
5 go at this time if you wish. That concludes this
6 matter. I wish you the best in the future.

7 CONCLUSION OF TRANSCRIPT OF RECORD.

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CERTIFICATE OF REPORTER

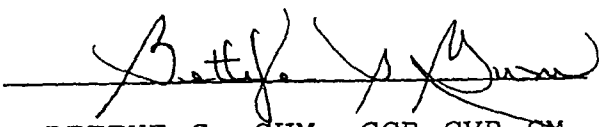
56

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF HORRY)
3

4 I, the undersigned Bettye S. Gum, Official
5 Court Reporter for South Carolina Court
6 Administration, do hereby certify that the foregoing
7 is a true, accurate and complete Transcript of Record
8 of all the proceedings had and evidence introduced in
9 the hearing of the captioned case, relative to appeal,
10 in the Court of Common Pleas for Horry County, South
11 Carolina.

12 I do further certify that I am neither of kin,
13 counsel, nor interest to any party hereto.
14
15

16 August 19, 2002

17 
18
19 BETTYE S. GUM, CCR-CVR-CM

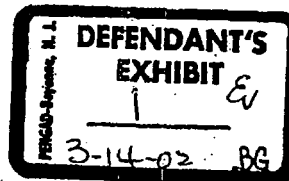
20 Official Reporter
21
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25

COPY

STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)
 STATE OF SOUTH CAROLINA)
 IN THE INTEREST OF:)
 ROGER LEGETTE)
 A MINOR UNDER THE AGE OF)
 SEVENTEEN)

IN THE FAMILY COURT OF THE
 FIFTEENTH JUDICIAL CIRCUIT
 CASE NO: 97-JU-26-623

NOTICE OF MOTION AND MOTION



PLEASE TAKE NOTICE that the undersigned, on behalf of the juvenile defendant, ROGER LEGETTE, will move upon ten (10) days notice or as soon thereafter as may be heard, before The Honorable H. T. Abbott, Family Court Judge of the Fifteenth Judicial Circuit for an order amending the amended order waiving jurisdiction. Such relief is requested under South Carolina Rules of Civil Procedure Rule (59(e)). This motion is further based upon the grounds that the Order issued by The Honorable A. Victor Rawl remanding this case to Family Court for clarification could not be complied with without a hearing on the Kent factors and especially with regard to the Hall Institute evaluation on the juvenile defendant.

PLEASE TAKE FURTHER NOTICE, that in the alternative, the minor defendant moves for a new trial under South Carolina Rules of Civil Procedure, Rule (60(b)). This motion is further based upon the Solicitor introducing at the appeal a draft copy of the Hall Institute evaluation. It is the defendant's contention that this issue could not be resolved without a new hearing and furthermore the defendant, based upon the State's untimely disclosure, has been prejudiced in that he could not provide evidence to contradict the State's report. Therefore, the juvenile defendant is entitled to

2

a hearing on the matter.

RESPECTFULLY SUBMITTED.

Dated: 4/23, 1997
Conway, South Carolina



JOHNNY GARDNER
Attorney for Defendant
216 Elm Street
Conway, SC 29526-5118
(803) 248-7135

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

)
) IN THE COURT OF COMMON PLEAS
)

2000-CP-26-1962

Roger S. Legette, 243366,,)

)
) Applicant,)

)
) v.)

ORDER OF DISMISSAL

)
) State of South Carolina,)

)
) Respondent.)
)

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 27, 2000. The Respondent made its Return on October 16, 2000. An evidentiary hearing into the matter was convened on March 14, 2002, at the Horry County Courthouse. The Applicant was present at the hearing and was represented by Matthew Dove, Esquire. The Respondent was represented by Allen Bullard of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Testifying on behalf of the State was Johnny Gardner, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Horry County Clerk of Court, the materials from the Applicant's appeal and the Applicant's records from the South Carolina Department of Corrections.

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 Horry County. The Applicant was indicted at the January 1997 term of the grand jury for Horry

County for murder, possession of a weapon during the commission of a violent crime and possession of a pistol by a person under the age of twenty-one (96-GS-26-2809). Johnny Gardner, Esquire and Barbara Krug-Pratt, Esquire represented the Applicant. On August 5, 1997, the Applicant underwent a trial pursuant to which the jury found him guilty of murder and possession of a weapon during the commission of a violent crime. The Honorable David H. Maring sentenced the Applicant to life imprisonment for murder and five (5) years, concurrent, for possession of a weapon during the commission of a violent crime.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "The Order Waiving Jurisdiction of the applicant was a violation of the applicant's Fifth and Fourteenth Amendment right to Due Process and Equal Protection and a violation of S.C. Code Ann., §20-7-7605(5) & (6); therefore, the Family Court was without jurisdiction to transfer the applicant's case to the court of General Sessions."
2. "Applicant's Sixth Amendment right was violated due to counsel's conflict of interest; failure to advise applicant of his right to appeal waiver hearing order; failure to provide independent, unbiased, psychological evaluation of applicant; and failure to pursue rulings on Rule 59(e) and Rule 60(b) motions that were timely filed on applicant's behalf. This caused a denial of applicant's Fourteenth Amendment rights to Equal Protection and Due Process."

the outset of the PCR hearing the Applicant informed the Court that he intended to proceed only with allegations of ineffective assistance of counsel with respect to his Family Court waiver hearing. has another PCR pending (2001-CP-26-1911) which addresses issues regarding his trial in neral Sessions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

On September 26, 1996, and October 9, 1996, a waiver hearing was held before the Honorable H.T. Abbot. Judge Abbot issued an order dated October 22, 1996, waiving jurisdiction over the Applicant's Murder charge to the Court of General Sessions. On January 16, 1997, the Honorable A. Victor Rawl issued an order remanding the Murder charge back to the Family Court for clarification of the waiver order. On April 7, 1997, Judge Abbot issued an amended order waiving jurisdiction. On April 23, 1997, counsel for the Applicant filed a motion to alter or amend, pursuant to Rule 59(e), and a motion for a new trial pursuant to Rule 60(b), in reference to Judge Abbot's amended order. In the Rule 59(e) motion counsel claimed a hearing was necessary before the Family Court could enter an amended order following the remand order. The Rule 60(b) motion claimed a new trial was necessary because the State introduced an evaluation of the Applicant from William S. Hall at the appeal proceeding which it had not disclosed to the Applicant. The Applicant claimed that counsel was ineffective for failing to schedule a hearing and obtain a ruling on his Rule 59 and Rule 60 motions prior to the commencement of his trial in General Sessions.

Initially, this Court finds that the Rule 59 motion was not timely filed. Therefore, the Family Court would not have reached the merits of the claims raised. When no timely Rule 59 motion is

made, the trial judge loses jurisdiction over the matter. Leviner v. Sonoco Products Company, 339 S.C. 492, 530 S.E.2d 127 (2000). Since the Court no longer had jurisdiction over the matter, it could not and would not have convened a hearing on the motion. Even had the motion been timely, this Court finds, based on the evidence before it, the motion would have been denied. The Applicant failed to present this Court with any evidence that would require the Family Court to alter or amend its judgement. Moreover, when the Applicant ultimately appealed his guilty verdict, appellate counsel filed an Anders brief. The record on appeal contained both the trial transcript and the waiver hearing transcript. In Anders v. California, the United States Supreme Court announced the procedure an appointed attorney should follow if that attorney believes the client's appeal is frivolous and without merit. 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). The Supreme Court held the attorney could petition for permission to withdraw from the case, but that the petition for withdrawal must be accompanied by a brief "referring to anything in the record that might arguably support the appeal." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498. Under Anders, the defendant must be given time to respond and to raise any additional points after his attorney submits the Anders brief. Id. The court then is obligated to conduct a "full examination" of the record to determine whether the appeal is "wholly frivolous." Id. According to Anders, if the reviewing court finds the appeal is frivolous, "it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires." Id. at 744, 87 S.Ct. at 1400, 18 L.Ed.2d at 498. Thus, the Supreme Court reviewed both the trial and the waiver hearing in its Anders review and found no meritorious issues. Thus, for all of the reasons noted above, this Court finds that the Applicant suffered no prejudice.

The Rule 60 motion was filed pursuant to section (b). That section of Rule 60 allows the court to relieve a party from a final judgement for one of five enumerated reasons. This Court finds that the Applicant has presented no evidence to support the granting of a motion under any of the five enumerated reasons. Furthermore, the filing of a Rule 60(b) motion "does not affect the finality of the judgement or suspend its operation." Therefore, the Court of General Sessions was free to proceed with the Applicant's trial, as the validity of the waiver order was unaffected by the pending motion. For the foregoing reasons this Court finds that the Applicant suffered no prejudice.

The Applicant also claimed counsel was ineffective for failing to object to testimony from witnesses at trial regarding observing the Applicant with a gun. The Applicant claimed any testimony concerning the gun was improper because it was error for the Family Court to transfer jurisdiction of the possession of a weapon during the commission of a violent crime to General Sessions. The question of whether the Family Court erred in transferring jurisdiction of the possession of a weapon during the commission of a violent crime charge is immaterial to the analysis of this allegation. Even were the Family Court in error, testimony regarding the Applicant's handling and possession of the gun was relevant to the Murder charge and was not objectionable under the theory he advances. This Court is unaware of any objection counsel could have made to this testimony. Therefore, the Applicant cannot prove deficiency nor prejudice.

The Applicant claimed counsel was ineffective for failing to request an evaluation be performed on him (the Applicant). However, the Applicant failed to present any evidence concerning what an evaluation would have shown which would have changed the outcome of his waiver hearing. This Court concludes that there was no evidence which would have done so. The

Applicant failed to show deficiency or prejudice.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

CONCLUSION

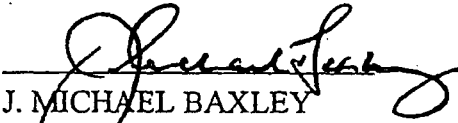
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 27 day of June, 2002.


J. MICHAEL BAXLEY
Presiding Judge
Fifteenth Judicial Circuit

HARTSVILLE, South Carolina.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

2000-CP-26-1962

Roger S. Legette, 243366

Applicant,

vs

AFFIDAVIT OF SERVICE BY MAIL

State of South Carolina,

Respondent.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Personally appeared before me, Amy Colquitt, who being first duly sworn, states:

1. That I am an employee of the Office of the Attorney General.
2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.
3. That I have this day served a copy of the Order of Dismissal in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Matthew Dove, Esquire
Post Office Box 625
Murrells Inlet, South Carolina 29576

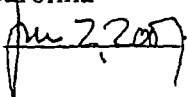
Roger S. Legette, 243366
KERSHAW CORRECTIONAL INSTITUTION
4848 Gold Mine Highway
Kershaw, SC 29067-8069

DATED this 17th day of July, 2002.


Amy Colquitt

VORN to before me this
th day of July, 2002.



tary Public for South Carolina (L.S.)
Commission Expires: 

County of HORRY
51570 RR

COURT OF GENERAL SESSIONS

JANUARY TERM 1997

THE STATE

vs.

ARREST WARRANT NO.

CAW199612007 (0116 16-03-0010, 0020)

CAW199612009 (0549 16-23-0490)

CAW199612208 (0321 16-23-30(e))

DOA: 5/24/96

ROGER SYNDELL LEGETTE B/M

208 Barkwood Road

Conway, South Carolina 29526

DOB: 8/30/80

SSN:

ACTION OF GRAND JURY

TRUE BILL

DEC 19 1996

Foreman of Grand Jury

Jackie Williams

VERDICT

Foreman of Petit Jury

Date:

ATTY: JOHNNY GARDNER

Indictment for

COUNT 1: MURDER

COUNT 2: POSSESSION OF WEAPON
 DURING COMMISSION OF
 VIOLENT CRIME

COUNT 3: POSSESSION OF PISTOL BY
 PERSON UNDER THE AGE
 OF TWENTY-ONE

RALPH J. WILSON, SOLICITOR

CERTIFIED A TRUE
 AND CORRECT COPY

PE 1 *Jeane J. Roberts*
 HORRY COUNTY CLERK OF COURT

BY *A. Daniels*

96-26-2809

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) INDICTMENT FOR:

 COUNT 1: MURDER

 COUNT 2: POSSESSION OF WEAPON
 DURING COMMISSION OF
 VIOLENT CRIME

 COUNT 3: POSSESSION OF PISTOL BY
 PERSON UNDER THE AGE OF
 TWENTY-ONE

At a Court of General Sessions, convened on December 19, 1996, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: MURDER (CDR: 0116 16-03-0010, 0020)

That ROGER SYNTELL LEGETTE did in Horry County, on or about the 24th day of May, 1996, wilfully, knowingly, intentionally, wickedly and with malice aforethought, kill one Robert Lockhart by means of shooting the victim in the head; that as a result of said acts and from said wounds inflicted upon Robert Lockhart, he did die in Horry County on or about the 24th day of May, 1996.

AND THE GRAND JURORS FURTHER PRESENT UPON THEIR OATH:

COUNT TWO: POSSESSION OF A WEAPON DURING THE COMMISSION OF
A VIOLENT CRIME (0549 16-23-0490)

That ROGER SYNTELL LEGETTE did in Horry County, on or about the 24th day of May, 1996, possess or visibly display a weapon during the commission or attempted commission of a violent crime, to wit: an Excam Model GT27 semi-automatic .25 caliber pistol, in violation of code section 16-23-490, Code of Laws of South Carolina, (1976) as amended.

AND THE GRAND JURORS FURTHER PRESENT UPON THEIR OATH:

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

OFFENSE CODE 5057 50116

DATE OF OFFENSE 5-24-96

DATE OF ARREST 5-24-96

ARRESTING AGENCY HCPD

TICKET/WARRANT(S) CAW199612009

ORIGINAL WARRANT CHARGE

CI Murder

PLED CONVICTED

CI Murder

CASE NO. 96 GS-26-2809

SENTENCE

The defendant Roger Syrdell Leggett is committed to State Department of Corrections for a term of life days/months/years and/or pay a fine of \$ suspended to days/months/years and/or pay a fine of \$ plus pay court costs and assessments as applicable, with probation for months/years. Restitution to be paid to

AHCCOC. Victim's information: NAME

STREET ADDRESS CITY STATE

SPECIAL CONDITIONS: Probation Terminated upon full payment Attend Voc. Rehab

 Random Drug/Alcohol Testing Public Service Employment days/hours Obtain GED

 Substance Abuse Counseling OTHER CONDITIONS NONE

SENTENCE: CONCURRENT/CONSECUTIVE

Credit for jail time served on this offense days/months.

DATED 8-5- 1997

 PRESIDING JUDGE

COSTS AND ASSESSMENTS

(1) FINE \$

(4) ASSESSMENT(100%) \$

(6) SERVICE CHARGE(3%) \$

(13) DUJ ASSESSMENT(12.00)\$

(14) SURCHARGE \$ 100.00

TOTALS \$ 100.00

CERTIFIED A-1
AND CORRECT CO.
RESTITUTION
SERVICE CHARGE(3%)
HORRY COUNTY CLERK OF COURT
TOTAL BY A. Daniels \$

INFORMATION ON DEFENDANT

DATE OF BIRTH 8-30-80 M / F

SS# RACE Black

ATTORNEY John Anderson

SOLICITOR Roger Ray

COURT REPORTER John Johnson

ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER'S CHECK WE CANNOT ACCEPT PERSONAL CHECKS.

CLERK OF COURT
P O BOX 677
CONWAY, SC 29528

COUNTY OF HORRY

DATE OF ARREST 5-24-96ARRESTING AGENCY HCPDTICKET/WARRANT(S) CAW199612009ORIGINAL WARRANT CHARGE II Poss firearm
during comm. of a violent crimePLED CONVICTED II Poss of a
weapon during the commission
of a violent crimeCASE NO. 96 GS-26-2809

SENTENCE

The defendant Roger Syndell Leggett is committed to State Department of Corrections for a term of 5 days/months/years and/or pay a fine of \$ suspended to days/months/years and/or pay a fine of \$ plus pay court costs and assessments as applicable, with probation for months/years. Restitution to be paid to

HCCOC. Victim's information: NAME STREET ADDRESS CITY STATE SPECIAL CONDITIONS: Probation Terminated upon full payment Attend Voc. Rehab Random Drug/Alcohol Testing Public Service Employment days/hours Obtain GED Substance Abuse Counseling OTHER CONDITIONS SENTENCE: CONCURRENT CONSECUTIVECredit for jail time served on this offense days/months.DATED 8-5, 1997PRESIDING JUDGE

COSTS AND ASSESSMENTS

(1) FINE \$ (4) ASSESSMENT(100%) \$ (6) SERVICE CHARGE(3%) \$ (13) DU ASSESSMENT(12.00)\$ (14) SURCHARGE \$ 100.00TOTALS \$ 100.00CERTIFIED A TRUE
AND CORRECT COPYSERVICE CHARGE(3%) \$
Jeanne J. Roberts
Horry County Clerk of Court
BY A. Daniels

INFORMATION ON DEFENDANT

DATE OF BIRTH 8-30-80 M/ F SS# RACE BlackATTORNEY John BaydumSOLICITOR Roger RayCOURT REPORTER Jean JohnsonCLERK OF COURT
P O BOX 677ALL PAYMENTS MUST BE MADE BY CASH, MONEY
ORDER OR CASHIER'S CHECK WE CANNOT ACCEPT.
PERSONAL CHECKS

COPY

RECEIVED

2002 OCT 17 PM 4:13

SC SUPREME COURT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry CountyJ. Michael Baxley, Circuit Court Judge

ROGER S. LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Assistant Appellate DefenderSouth Carolina Office
of Appellate Defense
1122 Lady Street, Suite 940
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

Whether the court of general sessions had jurisdiction over the charge of possession of a weapon during a violent crime?

STATEMENT OF THE CASE

Petitioner was indicted for murder, possession of a weapon during a violent crime, and possession of a pistol by a person under 21 at the January 1997 term of the Horry County Grand Jury. He was represented by Johnny Gardner, Esquire and Barbara King-Pratt, Esquire. Trial proceeded on August 5, 1997, before the Honorable David H. Maring and a jury. Petitioner was found guilty of murder and possession of a weapon during a violent crime. He was sentenced to life imprisonment for murder and to five (5) years for the weapon offense. He did not appeal his conviction.

Petitioner filed an application for post-conviction relief dated April 20, 2000. Respondent filed a return and motion to dismiss dated October 16, 2000.

An evidentiary hearing was held in the Horry County Court of Common Pleas on March 14, 2002. The Honorable J. Michael Baxley presided. Petitioner was present and was represented by J. Matthew Dove, Esquire. Respondent was represented by Allen Bullard, Assistant Attorney General. Petitioner testified in his own behalf and Johnny Gardner testified in respondent's behalf.

On June 27, 2002, Judge Baxley issued an order denying and dismissing petitioner's application for post-conviction relief.

This petition follows.

ARGUMENT

The court of general sessions did not have jurisdiction to try petitioner on the charge of possession of a weapon during a violent crime because the family court could not transfer that charge.

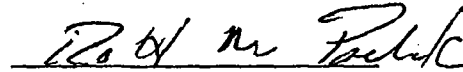
Petitioner was born on August 30, 1980, and the crimes were committed on May 24, 1996. (App. p. 84). He was only fifteen (15) years old at that time. S.C. Code §20-7-430(5)¹ provides for the transfer of juvenile cases to general sessions court for minors who are 14 or 15 years of age. But only certain enumerated offenses are allowed to be transferred. Possession of a weapon during a violent crime is not one of those offenses. Johnson v. State, 312 S.C. 556, 437 S.E.2d 20 (1993).

¹ S.C. Code §20-7-430 has been replaced by S.C. Code §20-7-7605,

CONCLUSION

Because general sessions lacked jurisdiction to try petitioner for the weapon charge, the conviction should be vacated.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Robert M. Pachak", written over a horizontal line.

Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

October 17, 2002

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry CountyJ. Michael Baxley, Circuit Court Judge

ROGER S. LEGETTE,

PETITIONER,

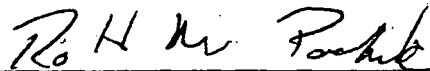
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

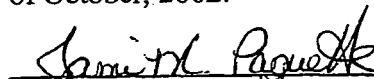
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Allen Bullard, Esquire, this 17th day of October, 2002.



Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 17th day
of October, 2002.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: January 8, 2011.

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

ROGER LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

RETURN TO PETITION FOR
WRIT OF CERTIORARI

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Chief, Capital and Collateral Litigation

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the court of general sessions have jurisdiction over the petitioner's possession of a weapon during the commission of a violent crime charge?

STATEMENT OF THE CASE

For purposes of this return, the Respondent accepts the Statement of the Case contained in the petition for writ of certiorari.

ARGUMENT

The court of general sessions had jurisdiction over the petitioner's possession of a weapon during the commission of a violent crime charge.

Section 16-23-490(E) requires that the possession of a firearm during the commission of a violent crime charge be alleged as a separate count in an indictment charging a defendant with a violent crime. The language which states "[t]he penalties prescribed in this section may not be imposed unless the person convicted was *at the same time indicted and convicted of a violent crime* as defined in Section 16-1-60" indicates the legislature's intent that a charge brought under Section 16-23-490 remain with the predicate violent offense. If the court of general sessions were deemed not to have jurisdiction over this offense, Section 16-23-490(E) would preclude sentencing in family court because the petitioner could not be "at the same time indicted and convicted" of the weapons charge in family court when his murder charge is passed upon in the court of general sessions.

In interpreting a statute, the language of the statute must be read in a sense which harmonizes with its subject matter and accords with its general purpose. Hitachi Data Systems Corp. v. Leatherman, 309 S.C. 174, 420 S.E.2d 843 (1992). Statutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction. Higgins v. State, 307 S.C. 446, 415 S.E.2d 799 (1992). A statute must receive a practical, reasonable and fair interpretation consonant with the purpose, design, and policy of the lawmakers. D.W. Flowe & Sons, Inc. v. Christopher Constr. Co., 326 S.C. 17, 482 S.E.2d 558 (1997). The respondent submits that separation of the violent offense and the weapons charge would be contrary to legislative intent and frustrate the purpose of Section 16-23-490.

CONCLUSION

For the foregoing reasons, the Respondent submits the Court should deny the Petition. However, if this Court grants certiorari, the Respondent requests permission under the rules to fully brief the issues discussed above.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

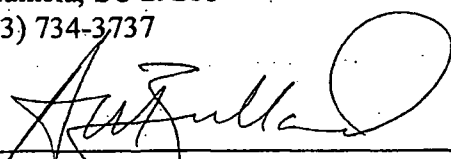
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By:



ATTORNEYS FOR RESPONDENT

December 2, 2002.

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable J. Michael Baxley, Circuit Court Judge

ROGER LEGETTE,

PETITIONER,

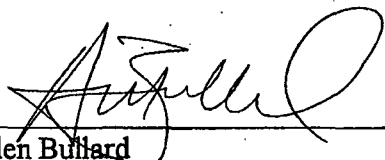
V.

STATE OF SOUTH CAROLINA,

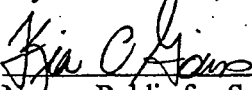
RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Return to Petition for Certiorari has been served upon the petitioner by mailing two (2) copies in an envelope properly addressed with postage prepaid this 2nd day of December, 2002.


Allen Bullard
ATTORNEY FOR RESPONDENT

SWORN to before me this 2nd
day of December, 2002.


Notary Public for South Carolina. (L.S.)
My Commission Expires: June 2, 2007

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Roger S. Legette,

Petitioner,

V.

State of South Carolina,

Respondent.

ON WRIT OF CERTIORARI

Appeal From Horry County
David H. Maring, Trial Judge
J. Michael Baxley, Post-Conviction Judge

Memorandum Opinion No. 2003-MO-014
Submitted February 11, 2003 – Filed February 24, 2004

VACATED

Assistant Appellate Defender Robert M. Pachak, of the South Carolina Office of Appellate Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, and Assistant Deputy Attorney General Allen Bullard, of Columbia, for Respondent.

PER CURIAM: At the age of fifteen, petitioner was indicted for murder, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of twenty-one. He was waived up to general sessions court where he was convicted of murder and possession of a weapon during the commission of a violent crime. He was sentenced to life and five years, respectively, to be served concurrently. This Court dismissed petitioner's appeal after review pursuant to Anders v. California. State v. Legette, Op. No. 1999-MO-00072 (S.C. Sup. Ct. filed November 3, 1999).

Petitioner now seeks a writ of certiorari from the denial, after a hearing, of his application for post-conviction relief (PCR). Petitioner maintains the court of general sessions did not have jurisdiction to try him on the charge of possession of a weapon during the commission of a violent crime because it is not one of the offenses, specifically enumerated in S.C. Code Ann. § 20-7-430(5) (1985), which may be waived up to the court of general sessions.

This Court recently held that the offense of possession of a weapon during the commission of a violent crime may not be waived up for fourteen or fifteen year olds because it is not specifically enumerated in section 20-7-430(5). Austin v. State, Op. No. 25577 (S.C. Sup. Ct. filed January 13, 2003). Accordingly, we hereby grant certiorari, dispense with further briefing, vacate petitioner's conviction and sentence for possession of a weapon during the commission of a violent crime, and remand the matter to the family court.

VACATED AND REMANDED.

**TOAL, C.J., MOORE, WALLER, BURNETT and
PLEICONES, JJ., concur.**

- 2001 - CP - 26 - 1911 -

STATE OF SOUTH CAROLINA

County of HORRY

In the Court of Common Pleas

Roger Syntell Legette #243366

Full name and prison number (if any) of Applicant,

vs.

Charles Condon, Atty. General:

Name of Respondent.

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

APR 19 AM 9:55

FILED

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention Kershaw Correctional Institution; Sycamore East 63;
4848 Goldmine Hwy.; Kershaw, S.C. 29067
2. Name and location of Court which imposed sentence Horry Co. General Sessions Court;
Conway, S.C.; David H. Maring Sr., Presiding Judge
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
(a) 96-GS-26-2809; Murder & Weapon possession
(b) _____
(c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
(a) August 5, 1997; Life & Five years
(b) _____
(c) _____

certified copy
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5. Check whether a finding of guilty was made

- (a) after a plea of guilty N/A
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere N/A

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

7. If you answered "yes" to (6), list

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

- i. S.C. Supreme Court; Direct Appeal & Rehearing
- ii. U.S. Supreme Court; Writ of Certiorari
- iii. _____

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

- i. S.C. Supreme Court Dismissed & Denied
- ii. U.S. Supreme Court Denied
- iii. _____

(c) the date of each such result:

- i. November 3, 1999, Direct Appeal Dismissed.
- ii. Rehearing denied date N/A.
- iii. Writ of Certiorari denied April 24, 2000.

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

- i. 99-MO-072 (Direct Appeal)
- ii. No. 99-8642 (Writ of Certiorari)
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
- (b) _____
- (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) SEE ATTACHMENT 9
- (b) _____
- (c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) SEE ATTACHMENT 10
- (b) _____
- (c) _____

ATTACHMENT 9GROUND I

Ineffective Assistance of Trial Counsel.

GROUND II

Ineffective Assistance of Appellate Counsel.

GROUND III

Subject Matter Jurisdiction.

GROUND IV

Ineffective Assistance of P.C.R. Counsel.

ATTACHMENT 10GROUND I

Trial Counsel was ineffective because he failed to object to illegal evidence; failure to investigate the facts surrounding the crime; and failure to abide by the rules of professional conduct, S.C. Rule 407; which violated applicants Fourth and Sixth Amendment Rights.

GROUND II

Appellate Counsel was ineffective because of his failure to investigate the facts surrounding the crime; and because of his failure to meet with client; and failure to abide by S.C. Rule 407, which violated applicants Sixth and Fourteenth Amendment Rights.

GROUND III

Subject Matter Jurisdiction, illegal arrest of applicant was a Fourth Amendment Violation; illegal indictment of applicant was a Fourteenth Amendment violation.

GROUND IV

P.C.R. Counsel was ineffective because of violations of applicants Sixth and Fourteenth Amendment Rights.

11. 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 petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? YES
- (d) any other petitions, motions or applications in this or any other Court?
YES

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

- (a) the specific nature thereof:
- i. 11(a) Petition for Rehearing; Petition for Writ of Certiorari
 - ii. 11(c) Petition for Writ of Certiorari;
 - iii. 11(d) Motion for New Trial;
 - iv. _____
- (b) the name and location of the Court in which each was filed:
- i. S.C. Supreme Court, Columbia, S.C.
 - ii. U.S. Supreme Court, Washington D.C.
 - iii. Horry Co. Court of Common Pleas, Conway, S.C.
 - iv. _____
- (c) the disposition thereof:
- i. 11(a) Denied & Dismissed
 - ii. 11(c) Denied
 - iii. 11(d) Pending
 - iv. _____
- (d) the date of each such disposition:
- i. 11(a) Dates N/A
 - ii. 11(c) April 24, 2000;
 - iii. 11(d) Still Pending
 - iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. 11(a) N/A
 - ii. 11(c) 99-8642
 - iii. 11(d) Pending
 - iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) 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) SEE ATTACHMENT 15

(b) _____

(c) _____

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

(a) your arraignment and plea? YES

(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? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. Johnny Gardner; 216 Elm. St.; Conway, SC 29526 (843) 248-7135

J. Matthew Dove; P.O. Drawer 14607; Surfside Beach, SC 29587

ii. Joseph Savitz, III; 1122 Lady St., Suite 940; Columbia, SC 29201

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Johnny Gardner, (Trial)

J. Matthew Dove, (P.C.R)

ii. Joseph Savitz, III, (Direct Appeal)

iii. _____

18. State clearly the relief you seek in filing this application.

That Sentence and conviction be vacated.

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

NO

ATTACHMENT 15

15(A). Ineffective Assistance of Trial Counsel, could not be raised on Direct Appeal.

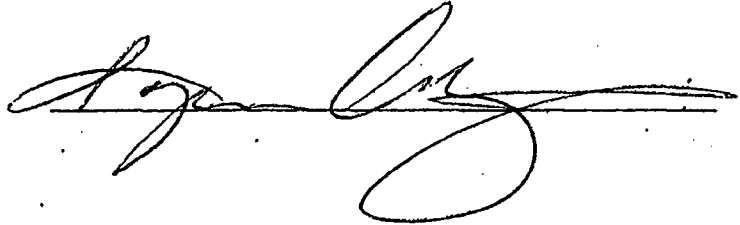
15(B). Ineffective Assistance of P.C.R Counsel, could not be raised at anytime before because it's still pending.

STATE OF SOUTH CAROLINA

County of HORRY

VERIFICATION

I, Ras. Roger Syntell Legette, #243366, 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.



SWORN to and subscribed before me this 11th

day of April, 19 2001

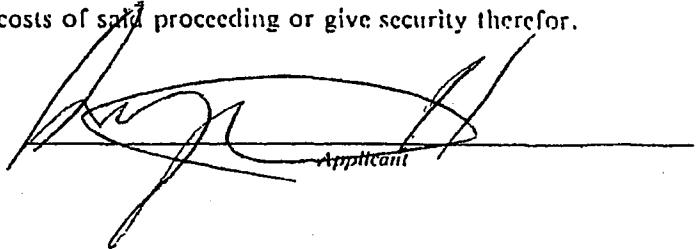
Denny F. West (L.S.)
Notary Public

My Commission Expires: 12-27-10

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

I, Ras. Roger Syntell Legette, #243366, 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 therefor.



Applicant

SWORN or affirmed to and subscribed before me this

11th day of April, 19 2001

Denny F. West
Notary Public

My Commission Expires 12-27-10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	C.A. No. 2001-CP-26-1911
Roger Syndell Legette, S.C.D.C.	)	
No. 243366	)	
Applicant,	)	
v.	)	RETURN
State of South Carolina,	)	
Respondent.	)	

In response to the post-conviction relief application filed April 19, 2001, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Horry County Clerk of Court's orders of commitment. The Horry County Grand Jury indicted the Applicant at the January 1997 term of General Sessions for Murder, Possession of a Weapon During the Commission of a Violent Crime, and Possession of Pistol by Person Under the Age of Twenty-one (96-GS-26-2809). John E. Gardner, Esq. represented the Applicant.

On August 4-5, 1997, the Applicant was tried by the Honorable David H. Maring, Sr., and jury. The jury found the Applicant guilty of Murder and Possession of a Weapon During the Commission of a Violent Crime. Judge Maring sentenced the Applicant to life imprisonment. The Applicant appealed his conviction and sentence to the South Carolina Supreme Court. The Supreme Court dismissed the appeal on December 15, 1999.

On April 27, 2000, the Applicant filed his first PCR (2000-CP-26-1962). It appears that the first PCR was filed during the pending direct appeal. The Respondent filed a Return and Motion to Dismiss. However, the court did not rule on the motion. The Respondent is treating the Applicant's second PCR Application (2001-GS-26-1911) as an amendment to the first PCR Application.

In his second application for post conviction relief the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial, appellate, and PCR counsel
2. Subject matter jurisdiction

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

II.

Respondent asserts the Applicant's allegation that his attorneys were ineffective is without merit. Respondent asserts that the Applicant's attorneys rendered effective assistance well within the standard of "reasonableness within professional norms" for a criminal defense attorney.

Where ineffective assistance of counsel is alleged as a ground for relief, the Petitioner must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland v. Washington. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland v. Washington. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625.

A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland v. Washington test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

The Applicant also alleges subject matter jurisdiction in his application. This allegation raises a direct appeal issue that is procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for an appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised this issue on appeal. The failure to do so has waived this allegation as a ground for relief. Therefore, Respondent moves for a summary dismissal of the judicial error allegation.

The Applicant's contention that he received ineffective assistance of counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546 (1991). Accordingly Respondent moves for a summary dismissal of this allegation.

III.

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

IV.

The State places the Applicant on notice that, should the Applicant make any false claims, commit perjury, or abuse the legal process during the course of these proceedings, the

State reserves the right to seek punitive and remedial sanctions. These include but are not limited to: the forfeiture of all earned work, education, and good time credits earned by the Applicant through the date of the hearing or final disposition of this matter. See S.C. Code 24-27-200 (Supp. 1999); Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (2000).

WHEREFORE, Respondent moves for a summary dismissal of the subject matter allegation and the allegation of ineffective PCR counsel. Respondent further requests an evidentiary hearing solely for the purpose of determining whether the Applicant's trial counsel was ineffective.

Respectfully submitted,

CHARLES M. CONDON
Attorney General

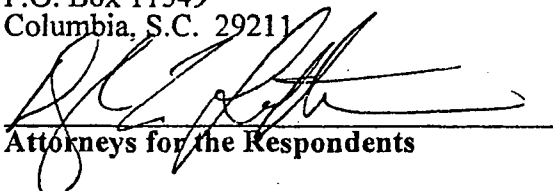
JOHN W. McINTOSH
Chief Deputy Attorney General

ALLEN BULLARD
Assistant Deputy Attorney General

DOUGLAS E. LEADBITTER
Assistant Attorney General

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

By:


Attorneys for the Respondents

Columbia, South Carolina

July 6, 2001 AK

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	2000-CP-26-1962
	)	2001-CP-26-1911
Roger Syndell Legette, SCDC	)	
No. 243366	)	
	)	
Applicant,	)	
	)	
v.	)	MOTION FOR MERGER
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

The applicant in the above-captioned matter has filed two applications for post conviction relief, one which was filed April 27, 2000 (2000-CP-26-1962) and another filed April 19, 2001 (2001-CP-26-1911). An applicant is not generally allowed to have two post-conviction relief proceedings in regard to the same conviction. 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); S.C. Code Ann. §17-27-90.

The State hereby moves to have the two proceedings merged and that the application for post-conviction relief filed April 19, 2001 (2001-CP-26-1911) be considered an amendment to the initial application for post conviction relief filed April 27, 2000 (2000-CP-26-1962).

The State therefore moves to merge the two cases, with docket number 2000-CP-26-1962
being the surviving case.

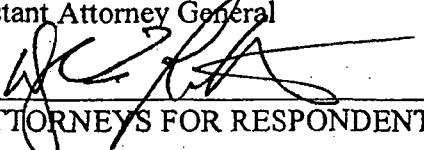
Respectfully submitted,

CHARLES M. CONDON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

ALLEN BULLARD
Assistant Deputy Attorney General

DOUGLAS E. LEADBITTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
(803) 734-3737

Columbia, South Carolina.

July 6, 2001. *KB*

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

)
) IN THE COURT OF COMMON PLEAS
)

2001-CP-26-1911

Roger S. Legette, 243366,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed April 19, 2001. An evidentiary hearing into the matter was convened on November 7, 2001, at the Horry County Courthouse. The Applicant was present at the hearing and was represented by Gabriel Joseph, Jr., Esquire. The Respondent was represented by Edgar R. Donald, Jr. of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. Testifying on behalf of the State was John E. Gardner, Esquire. This Court also had before it a copy of the transcript of the proceedings against the Applicant, the records of the Anderson County Clerk of Court and the Applicant's records from the South Carolina Department of Corrections.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony

accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

The Applicant alleges that he received ineffective assistance of counsel prior to and during his trial. This Court finds these allegations to be without merit. In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCF; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, Id.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The application raised the following grounds as a basis for relief:

1. Trial Counsel was ineffective because he failed to object to illegal evidence; failure to investigate the facts surrounding the crime; and failure to abide by the rules of Professional Conduct, S.C. Rule 407; which violated Applicant's Fourth and Sixth Amendment rights.
2. Appellate Counsel was ineffective because of failure to investigate the facts surrounding the crime; and because of his failure to meet with client; and failure to abide by S.C. Rule 407, which violated Applicant's Fourth and Sixth Amendment rights.
3. Subject Matter Jurisdiction, Illegal arrest of Applicant was a Fourth Amendment violation; Illegal indictment of Applicant was a Fourth Amendment violation.
4. P.C.R. Counsel was ineffective because of violations of Applicant's Sixth and Fourteenth Amendment rights.

As to the above grounds, testimony was taken at the hearing from the Applicant and from the State's witness. The transcript from the Applicant's trial has also been reviewed. At the hearing, the Applicant presented the following instances in relation to the above listed grounds for relief:

5. Trial Counsel failed to object to an erroneous Murder charge.
6. Trial Counsel failed to obtain a jury charge of accident.
7. Trial Counsel allowed the discussions regarding proposed jury charges to be made in front of the jury.
8. Trial Counsel failed to object to a gun being put into evidence against the applicant.

With regard to these issues, the Court finds that:

Grounds One and Eight: The Applicant has failed to show that any prejudicial error regarding the admission of evidence. Counsel testified credibly that he investigated the facts surrounding the Applicant's case and the Court finds Counsel credible. The Applicant has failed to show that Counsel failed to abide by the rules of Professional Conduct, or that there was any

prejudicial violation of Applicant's Fourth and Sixth Amendment rights.

Ground Two: Applicant has failed so prove that his Appellate Counsel was ineffective because of a failure to investigate the facts surrounding the crime. Applicant has failed to prove that he was prejudiced by not meeting with Appellate Counsel. Applicant has failed to show that Appellate Counsel failed to abide by S.C. Rule 407 or that Applicant's Fourth and Sixth Amendment Rights were violated.

Ground Three: Applicant has failed to show that the State lacked Subject Matter Jurisdiction to proceed against Applicant. Applicant has failed to prove that there was an illegal arrest of Applicant. Applicant has failed to prove that the Indictment was illegal.

Ground Four: Applicant's allegation regarding PCR Counsel are not relevant at this hearing.

Ground Five and Six: The Court has reviewed the transcript of the trial and finds that the Murder charge was based on applicant law and that therefore the Applicant was not prejudiced by the charge. The Court also finds that the trial Judge did, in fact, charge Accident to the Jury.

Ground Seven: The Court has reviewed the transcript of the trial and finds that the Jury was not present for charging discussions.

This Court finds the Applicant's testimony regarding the deficiencies of his trial counsel's representation is not credible. Trial counsel's testimony concerning his investigation was credible and this Court affords it great weight. Strickland v. Washington. Therefore, this Court finds that trial counsel was not deficient and Applicant was not prejudiced. Accordingly, this allegation of ineffective assistance of counsel is denied.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not

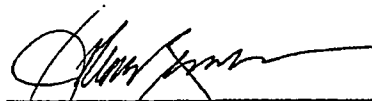
established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 18 day of Sept, 2002.



John L. Breeden, Jr.
Presiding Judge
Fifteenth Judicial Circuit

Crowley, South Carolina.

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

Roger S. Legette, 243366)

Applicant,)

vs)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

2001-CP-26-1911

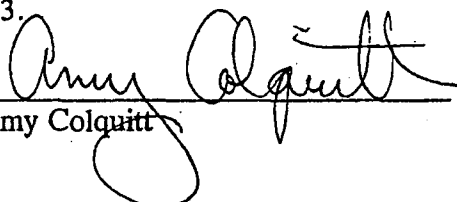
AFFIDAVIT OF SERVICE BY MAIL

Personally appeared before me, Amy Colquitt, who being first duly sworn, states:

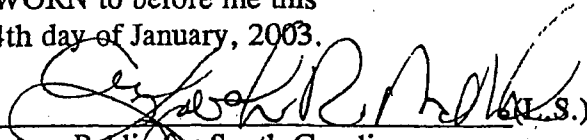
1. That I am an employee of the Office of the Attorney General.
2. That regular communication by mail exists throughout the State of South Carolina, and that this is a proper circumstance of service by mail.
3. That I have this day served a copy of the Order of Dismissal in the above-captioned matter on the following persons by depositing same in the United States mail, postage prepaid:

Gabriel P. Joseph, Jr., Esquire
413 79th Avenue
Myrtle Beach, South Carolina 29577

DATED this 14th day of January, 2003.


Amy Colquitt

SWORN to before me this
14th day of January, 2003.


Notary Public for South Carolina

My Commission Expires: 6-26-11.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Horry County

Paula H. Thomas, Circuit Court Judge

ROGER LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

ROBERT M. PACHAK
Assistant Appellate Defender

South Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201

ATTORNEY FOR PETITIONER

HENRY DARGAN MCMASTER
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTOPHER L. NEWTON
Assistant Attorney General

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

ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA

County of HARRY

In the Court of Common Pleas

ROGER S. LEGETTE

243366

Full name and prison number (if any) of Applicant

vs.

State of S.C.

ATTY. GEN. HENRY McMASTER

Name of Respondent

2003 - CP - 26 - 3207

APPLICATION FOR
POST-CONVICTION RELIEFCLERK OF COURT
03 MAY 29 AM 10:08
HARRY COUNTYINSTRUCTIONS - 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 McCormick C.I., McCormick, S.C.
29899
2. Name and location of Court which imposed sentence Court of General
Sessions, Conway, SC 29526
3. Name(s) of co-defendant(s) (if any) N/A

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

- (a) 96-GS-26-2809 Murder
 (b) 96-GS-26-2809 Weapon Possession
 (c) _____

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

- (a) August 4th, 1997 Life
 (b) August 4th, 1997 5 yrs.
 (c) _____

6. Check whether a finding of guilty was made:

- (a) after a plea of guilty NO
 (b) after a plea of not guilty YES
 (c) after a plea of nolo contendere NO

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

YES.

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

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

- i. S.C. Supreme Court
 ii. U.S. Supreme Court
 iii. S.C. Supreme Court

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

- i. Nov. 3, 1999 Direct appeal denied. Rehearing denied
 ii. April 24, 2000 Writ of Cert. denied
 iii. Feb. 24, 2003, Weapon Possession Vacated

(c) the date of each such result:

- i. SEE Above
 ii. SEE Above
 iii. SEE Above

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

- i. 99-mo-072 (Direct Appeal)
 ii. No. 99-8647 (Writ of Cert.)
 iii. Memorandum Opinion No. 2003-mo-014 (PCR)

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

- (a) _____
 (b) _____
 (c) _____

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

- (a) Whether Trial Courts instructions were
~~(b)~~ conflicting and confusing
 (c) Whether Prosecutor's comments were improper.

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

- (a) PLEASE SEE Amendments!
 (b) 11 11
 (c) 11 11

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-conviction relief?
YES
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? YES
 (d) any other petitions, motions or applications in this or any other Court? YES

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. 12(a) Petition for rehearing, Petition for writ of Cert
 ii. 12(b) Post conviction
 iii. 12(c) Petition for writ of Cert.
 iv. 12(d) Motion for New Trial

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

- i. S.C. Supreme Court

- ii. Harry Co. Court of Common Pleas
- iii. U.S. Supreme Court
- iv. Harry Co. Court of Common Pleas

(c) the disposition thereof:

- i. Not denied and dismissed
- ii. 12(b) denied and vacated by ^{SC} Supreme Court
- iii. 12(b) denied
- iv. 12(b) Pending

(d) the date of each such disposition:

- i. 12(a) Dates Nov. 3, 1999
- ii. 12(b) March 13, 02, Feb. 24, 03
- iii. 12(c) April 24, 2006
- iv. 12(d) still pending

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

- i. 12(a) N/A
- ii. 2003-mo-014
- iii. 99-8247
- iv. pending

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? NO

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

(a) which grounds have been presented:

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

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

- i. N/A
- ii. _____

iii.

N/A

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) BECAUSE I recently got supporting
 (b) facts to present.
 (c) _____

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 judgement of conviction or the imposition of sentence?
yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes

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. Johnny Gardner, Conway
 ii. Johnny Gardner, Conway
 iii. Malher Dave

(b) the proceedings at which each such attorney represented you:

- i. Trial
 ii. SENTENCE
 iii. PCR.

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

SENTENCE be vacated also conviction

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

NO

STATE OF SOUTH CAROLINA)

County of Harry)

VERIFICATION

I, Bogers Legett # 243346, 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 know 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.

Bogers Legett

SWORN to and subscribed before me this 22
day of May, 2003.

Boye L. Young (L.S.)
Notary Public

My Commission Expires: 8 28 2011

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

I, Roque Leggett #243316, 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.

Roque Leggett
Applicant

SWORN or affirmed to and subscribed before me this
22 day of May, 2003.

Dyane L. Young
Notary Public

My Commission Expires: 8-28-2011

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

OFFENSE MURDER
DATE OF NSE 5-24-96
DATE OF ARREST 5-24-96
ARRESTING AGENCY HCPD
TICKET/WARRANT(S) CAW199612009
ORIGINAL WARRANT CHARGE
1st Murder
PLED CONVICTED
1st Murder

CASE NO. 96 GS-26-2809

SENTENCE

The defendant Roger Syrdell Legette is committed to State Department of Corrections for a term of life days/months/years and/or pay a fine of \$ suspended to days/months/years and/or pay a fine of \$ plus pay court costs and assessments as applicable, with probation for months/years. Restitution to be paid to

HCCOC. Victim's information: NAME

STREET ADDRESS CITY STATE

SPECIAL CONDITIONS: Probation Terminated upon full payment Attend Voc. Rehab
 Random Drug/Alcohol Testing Public Service Employment days/hours Obtain GED
 Substance Abuse Counseling OTHER CONDITIONS NONE

SENTENCE: CONCURRENT/CONSECUTIVE

Credit for jail time served on this offense days/months.

DATED 8-5-, 1997

PRESIDING JUDGE

COSTS AND ASSESSMENTS

(1) FINE	\$ <u> </u>	RESTITUTION	\$ <u> </u>
(4) ASSESSMENT(100%)	\$ <u> </u>	SERVICE CHARGE(3%)	\$ <u> </u>
(6) SERVICE CHARGE(3%)	\$ <u> </u>		
(13) DUI ASSESSMENT(12.00)	\$ <u> </u>	TOTALS	\$ <u> </u>
(14) SURCHARGE	\$ <u>100.00</u>		

TOTALS \$ 100.00

INFORMATION ON DEFENDANT

DATE OF BIRTH 8-30-80 M / F
SS# RACE Black
ATTORNEY Jean Anderson
SOLICITOR Roger Ray
COURT REPORTER Jean Johnson

ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER'S CHECK WE CANNOT ACCEPT PERSONAL CHECKS.

CLERK OF COURT
P O BOX 677
CONWAY, SC 29528

96-35-26- 2809

STATE OF SOUTH CAROLINA)

INDICTMENT FOR:

COUNTY OF HORRY)

COUNT 1: MURDER

COUNT 2: POSSESSION OF WEAPON
DURING COMMISSION OF
VIOLENT CRIMECOUNT 3: POSSESSION OF PISTOL BY
PERSON UNDER THE AGE OF
TWENTY-ONE

At a Court of General Sessions, convened on December 19, 1996, the Grand Jurors of Horry County present upon their oath:

COUNT ONE: MURDER (CDR: 0116 16-03-0010, 0020)

That ROGER SYNTELL LEGETTE did in Horry County, on or about the 24th day of May, 1996, wilfully, knowingly, intentionally, wickedly and with malice aforethought, kill one Robert Lockhart by means of shooting the victim in the head; that as a result of said acts and from said wounds inflicted upon Robert Lockhart, he did die in Horry County on or about the 24th day of May, 1996.

AND THE GRAND JURORS FURTHER PRESENT UPON THEIR OATH:

COUNT TWO: POSSESSION OF A WEAPON DURING THE COMMISSION OF
A VIOLENT CRIME (0549 16-23-0490)

That ROGER SYNTELL LEGETTE did in Horry County, on or about the 24th day of May, 1996, possess or visibly display a weapon during the commission or attempted commission of a violent crime, to wit: an Excam Model GT27 semi-automatic .25 caliber pistol, in violation of code section 16-23-490, Code of Laws of South Carolina, (1976) as amended.

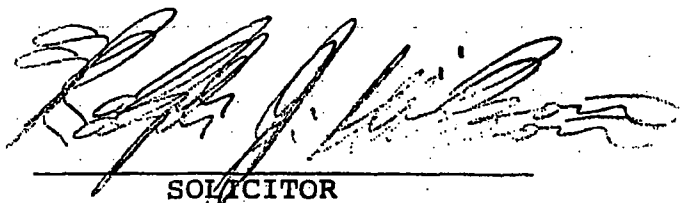
AND THE GRAND JURORS FURTHER PRESENT UPON THEIR OATH:

ORIGINAL

COUNT THREE: POSSESSION OF A PISTOL BY A PERSON UNDER THE
AGE OF TWENTY ONE (CDR: 0321 16-23-30(e))

That ROGER SYNTELL LEGETTE did in Horry County, on or about the 24th day of May, 1996, unlawfully store, keep, possess, or permit another to store, keep, possess a firearm (pistol), described as follows: one Excam Model GT27 semi-automatic .25 caliber pistol, and that the Defendant is under the age of twenty one.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.



SOLICITOR

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

HORRY COUNTY)

C.A. No. 03-CP-26-3207

Roger S. Legette, S.C.D.C.
No. 243366)

Applicant,)

RETURN AND MOTION TO DISMISS

v.)

State of South Carolina,)

Respondent.)
_____)

In response to the post-conviction relief application filed May 29, 2003 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 Horry County. The Applicant was indicted at the January 1997 term of the Grand Jury for Horry County for murder, possession of a weapon during the commission of a violent crime and possession of a pistol by a person under the age of twenty-one (96-GS-26-2809). Johnny Gardner, Esquire, and Barbara Krug-Pratt, Esquire, represented the Applicant. On August 5, 1997, the Applicant underwent a trial pursuant to which the jury found him guilty of murder and possession of a weapon during the commission of a violent crime. The Honorable David H. Maring sentenced the Applicant to life imprisonment for murder and five (5) years, concurrent, for possession of a weapon during the commission of a violent crime.

A timely Notice of Appeal was filed on Applicant's behalf and an appeal was perfected.

The South Carolina Supreme Court affirmed Applicant's conviction. State v. Legette, Op. No.1999-MO-00072 (S.C. Sup. Ct. filed November 3, 1999).

The Applicant subsequently filed an application for post conviction relief on April 27, 2000. An evidentiary hearing was convened on March 14, 2002, at the Horry County Courthouse. The Applicant raised the following issues in his first PCR:

1. "The Order Waiving Jurisdiction of the applicant was a violation of the applicant's Fifth and Fourteenth Amendment right to Due Process and Equal Protection and a violation of S.C. Code Ann., §20-7-7605(5) & (6); therefore, the Family Court was without jurisdiction to transfer the applicant's case to the court of General Sessions."
2. "Applicant's Sixth Amendment right was violated due to counsel's conflict of interest; failure to advise applicant of his right to appeal waiver hearing order; failure to provide independent, unbiased, psychological evaluation of applicant; and failure to pursue rulings on Rule 59(e) and Rule 60(b) motions that were timely filed on applicant's behalf. This caused a denial of applicant's Fourteenth Amendment rights to Equal Protection and Due Process."

The Honorable J. Michael Baxley denied and dismissed the Applicant's PCR application by written Order on June 27, 2002. The Applicant then filed a timely notice of appeal. The South Carolina Supreme Court vacated the Applicant's conviction for possession of a weapon during the commission of a violent crime. Legette v. State, Op. No. 2003-MO-014 (S.C. Sup. Ct. filed February 24, 2004).

The Applicant also filed an application for post conviction relief on April 19, 2001. An evidentiary hearing was convened on November 7, 2001 at the Horry County Courthouse. The Applicant raised the following issues in his second PCR:

1. Trial counsel was ineffective because he failed to object to illegal evidence; failure to investigate the facts surrounding the crime; and failure to abide by the rules of Professional Conduct, S.C. Rule 407; which violated the Applicant's Fourth and Sixth Amendment rights.
2. Appellate counsel was ineffective because of failure to investigate the facts surrounding the crime; and because of his failure to meet with client; and failure to abide by S.C. Rule 407, which violated the Applicant's Fourth and Sixth Amendment rights.
3. Subject matter jurisdiction, illegal arrest of the Applicant was a Fourth Amendment violation; illegal indictment of the Applicant was a Fourth Amendment violation.
4. P.C.R. counsel was ineffective because of violations of the Applicant's Sixth and Fourteenth Amendment rights.
5. Trial counsel failed to object to an erroneous murder charge.
6. Trial counsel failed to obtain a jury charge of an accident.
7. Trial counsel allowed the discussions regarding proposed jury charges to be made in front of the jury.
8. Trial Counsel failed to object to a gun being put into evidence against the Applicant.

The Honorable John L. Breeden, Jr. denied and dismissed the Applicant's PCR application by written Order on August 14, 2002. Upon information and belief, the Applicant did not appeal.

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. The Trial Court's instructions were conflicting and confusing.
2. Prosecutor's comments were improper.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records and the South Carolina Department of Corrections' records and the prior PCR records by reference. 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 application for post-conviction relief. 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.

Under this statute, 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., 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, 274 S.C.

243, 262 S.E.2d 735.

The Applicant could have raised the new grounds for relief in his prior post-conviction relief application. 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 judgement 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's appeal of his conviction was remitted to the trial court on December 15, 1999. The Applicant was therefore required to file his application before December 15, 2000. This Application was filed on May 29, 2003, which was well beyond the time that the statutory filing period had expired.

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 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.

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

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

Respectfully submitted,

HENRY D. MCMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY ELLIOTT
Assistant Deputy Attorney General

CHRISTOPHER L. NEWTON
Assistant Attorney General

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

By:


Attorneys for the Respondents

Columbia, South Carolina
4-8, 2004

STATE OF SOUTH CAROLINA
IN THE CIRCUIT COURT

Case No.2003-CP-26-3207

ROGER S. LEGETTE

Applicant,

v.

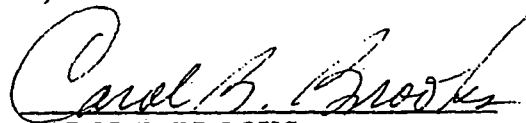
STATE OF SOUTH CAROLINA,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Return of the Respondent been served upon opposing counsel, Patrick Reilly, by mailing one (1) copy in an envelope properly addressed with postage prepaid this 15th day of April, 2004, to the below address:

Patrick J. Reilly, Esquire
Post Office Box 4360
N. Myrtle Beach, South Carolina 29597


CAROL B. BROOKS
LEGAL ASSISTANT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
03-CP-26-3207

Roger S. Legette,)
Plaintiff,) TRANSCRIPT OF RECORD
-versus-) January 20, 2005
The State,)
Defendant.)

B E F O R E:

Honorable Paula H. Thomas
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Wesley Locklair, Esquire
Attorney for Plaintiff

Christopher L. Newton, Esquire
Attorney for the State

Grace L. Hurley, CVR-CM
Official Reporter

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(There were no exhibits marked during the PCR hearing.)

1 (On the record, Thursday, January 20, 2005.)

2 MR. NEWTON: Judge, this is the case of Roger S.
3 Legette versus State of South Carolina. Mr. Legette is
4 represented by Mr. Wesley Locklair, and the State has a
5 preliminary motion on this case relating to the statute of
6 limitations ---

7 THE COURT: Be glad to hear from you.

8 MR. NEWTON: --- and as a successive application.

9 THE COURT: All right.

10 MR. NEWTON: Now, Your Honor, I can give you the time
11 line of this case.

12 THE COURT: Yes, sir.

13 MR. NEWTON: Okay, Your Honor, this Applicant
14 originally underwent a trial in August, August 5th of 1997,
15 and he was found guilty of murder and possession of a
16 weapon during a violent crime. He was sentenced to life
17 for murder and five years for the possession of a weapon,
18 those sentences running concurrently.

19 He filed a timely notice of appeal. The South
20 Carolina Supreme Court affirmed his convictions. On
21 November 3rd of 1999 he subsequently filed an application
22 for post conviction relief. On April 27th of the year 2000
23 the application was denied and dismissed by order on June
24 27th, 2002.

25 There was an appeal filed of that dismissal. The

1 Supreme Court vacated the Applicant's conviction for
2 possession of a weapon during the commission of a violent
3 crime during that appeal but left his murder sentence
4 untouched. That was on February 24th of 2004.

5 There was another application filed on April 19th of
6 2001 while the appeal was still in process and another
7 hearing was held. That application was denied by a written
8 order on August 14th of 2000 [sic].

9 THE COURT: I'm surprised it was heard if there was

10 ---

11 MR. NEWTON: I believe it was, I believe it was
12 denied based on a motion by the State.

13 THE COURT: All right.

14 MR. NEWTON: But that was on August 14th of 2002 and
15 the Applicant did not appeal that second PCR denial.

16 Your Honor, on that basis this application itself was
17 filed on May 29th, 2003, again before the appeal process
18 for the first PCR had ended and, Your Honor, on that basis
19 the State would move to dismiss this based on a failure to
20 file within the statute of limitations and that it is a
21 successive application.

22 THE COURT: All right.

23 MR. LOCKLAIR: May it please the Court, Your Honor.
24 First to clarify the two previous PCRs, they were two
25 separate ones because he had some stuff that was in family

1 court and then some stuff that had been waived up to
2 General Sessions; and so, they were heard on two separate
3 occasions, apparently, is what he told me. We didn't have
4 transcripts from those original two, but ---

5 THE COURT: I wouldn't imagine that I would get a list
6 of anything he's done on family court in regard to this
7 case.

8 MR. NEWTON: Excuse me, Your Honor, I think this case
9 was filed ---

10 THE COURT: Any of these dates?

11 MR. NEWTON: --- this case was filed on his murder
12 conviction in General Sessions court.

13 THE COURT: And so, the dates that you're giving me
14 for the PCRs were in this particular case and the murder
15 case.

16 MR. NEWTON: Your Honor, the -- right, Your Honor.
17 I believe one of his prior PCRs ---

18 MR. LOCKLAIR: I can correct it, Your Honor. One was
19 on a, one was on the waiver hearing and one was on the
20 trial. One was on the waiver for family court and one was
21 on the trial.

22 MR. NEWTON: I believe that's correct, Your Honor.

23 MR. LOCKLAIR: Your Honor, obviously we don't have an
24 argument with the dates of when the things were filed. Mr.
25 Legette would just allege that he didn't have a chance to

1 adequately assert the grounds for relief in his original
2 applications and that he would like to have them fully
3 heard and adjudicated. Basically his complaints in this
4 application deal with fruits of the poisonous tree from a
5 statement that he had given and some evidence that was
6 obtained, along with some failure to give certain jury
7 instructions and he feels they weren't properly, fully
8 presented at the previous PCR applications; and therefore,
9 they should be allowed to be heard.

10 THE COURT: So, there's nothing that sets it -- I
11 mean, he's failed to meet his statute of limitations.
12 Would you agree to that?

13 MR. LOCKLAIR: Yes, ma'am, I would agree that there's,
14 under the statute there's no exception that he's qualified
15 for, Your Honor.

16 THE COURT: It's -- right. Okay, that's, that was my
17 next question. He's failed to meet that statute of
18 limitations. My next question is do you have any reason
19 why we can go outside, newly discovered evidence, anything
20 why we would go outside the statute of limitations?

21 MR. LOCKLAIR: Your Honor, he's not been able to
22 provide me with one. The only grounds is an inadequate
23 presentation. There hasn't been any specific new evidence
24 as far as what would be considered legal evidence that has
25 arisen that would qualify under the statute.

1 THE COURT: Okay, all right. Anything -- you were
2 speaking up. Don't speak directly to me. Talk to your
3 attorney if there's anything that you want him to add.

4 MR. LEGETTE: All right.

5 (Mr. Locklair and Mr. Legette confer.)

6 MR. LOCKLAIR: Your Honor, he was trying to point out
7 something in the statute to me, but it's something that I'd
8 have to explain to him in the back. It's something that if
9 the Court would like me to take a break to talk to him
10 about again or if you'd like to go ahead and rule, but it's
11 something that I don't think unfortunately for him applies
12 under the statute as an exception.

13 THE COURT: All right, and so, there is no exception
14 then. Is that what you're conceding?

15 MR. LOCKLAIR: Yes, ma'am.

16 THE COURT: All right, I respectfully deny the PCR
17 application as -- on the grounds of outside the statute of
18 limitations and successive. Good luck, sir.

19 MR. LOCKLAIR: Thank you, Your Honor.

20 MR. LEGETTE: Could I ask a question to the Court?

21 MR. LOCKLAIR: I'll go back and talk to you.

22 MR. LEGETTE: I mean, I didn't get to speak to the
23 Court.

24 THE COURT: Let him talk to you. He'll explain to
25 you.

Legette v. State (1-20-05)

8

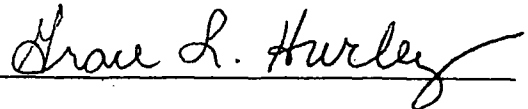
(Adjourned.)

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C E R T I F I C A T E

I, the undersigned Grace L. Hurley, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the PCR hearing in the case of Roger S. Legette v. The State, held in the Court of Common Pleas for Horry County, Horry County Courthouse, Conway, South Carolina, on January 20, 2005.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Grace L. Hurley, CVR-CM

Official Reporter

May 16, 2005.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

2003-CP-26-3207

Roger S. Legette, # 243366,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

FILED
HORRY COUNTY
05 MAR -3 AM 11:46
JILLANE HIGGINS
CLERK OF COURT

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed May 29, 2003. An evidentiary hearing into the matter was convened on January 20, 2005, at the Horry County Courthouse. The Applicant was present at the hearing and was represented by Wesley Locklair, Esquire. The Respondent was represented by Christopher L. Newton of the South Carolina Attorney General's Office. This Court had before it the application, the respondent's return, a copy of the transcript of the proceedings against the Applicant, the records of the Horry County Clerk of Court and the Applicant's records from the South Carolina Department of Corrections.

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 Horry County. The Applicant was indicted at the January 1997 term of the Grand Jury for Horry County for murder, possession of a weapon during the commission of a violent crime and possession of a pistol by a person under the age of twenty-one (96-GS-26-2809). Johnny Gardner, Esquire, and Barbara Krug-Pratt, Esquire, represented the Applicant. On August 5, 1997, the Applicant

a weapon during the commission of a violent crime. Legette v. State, Op. No. 2003-MO-014 (S.C. Sup. Ct. filed February 24, 2004).

The Applicant also filed an application for post conviction relief on April 19, 2001. An evidentiary hearing was convened on November 7, 2001 at the Horry County Courthouse. The Applicant raised the following issues in his second PCR:

1. Trial counsel was ineffective because he failed to object to illegal evidence; failure to investigate the facts surrounding the crime; and failure to abide by the rules of Professional Conduct, S.C. Rule 407; which violated the Applicant's Fourth and Sixth Amendment rights.
2. Appellate counsel was ineffective because of failure to investigate the facts surrounding the crime; and because of his failure to meet with client; and failure to abide by S.C. Rule 407, which violated the Applicant's Fourth and Sixth Amendment rights.
3. Subject matter jurisdiction, illegal arrest of the Applicant was a Fourth Amendment violation; illegal indictment of the Applicant was a Fourth Amendment violation.
4. P.C.R. counsel was ineffective because of violations of the Applicant's Sixth and Fourteenth Amendment rights.
5. Trial counsel failed to object to an erroneous murder charge.
6. Trial counsel failed to obtain a jury charge of an accident.
7. Trial counsel allowed the discussions regarding proposed jury charges to be made in front of the jury.
8. Trial Counsel failed to object to a gun being put into evidence against the Applicant.

The Honorable John L. Breeden, Jr. denied and dismissed the Applicant's PCR application by written Order on August 14, 2002. The Applicant did not appeal the denial of his second application.

In his original filing of the current application, the Applicant alleged that he was being held in custody unlawfully for the following reasons:

1. The trial court's instructions were conflicting and confusing.
2. Prosecutor's comments were improper.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

This Court finds 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, *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 judgement 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 PCR statute of limitations applies to all applications filed after July 1, 1995. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offenses he challenges in this Application on August 5, 1997. The Applicant's direct appeal issues were denied by the South Carolina Supreme Court on November 3, 1999. This Application was filed on May 29, 2003, well after the one year statutory filing period had expired. This Court finds that the Applicant has failed to present sufficient grounds which would exempt him from the application of the statute.

of limitations to this action. Therefore, it is dismissed as barred by the statute of limitations.

In addition, this Court finds that the current application for post conviction relief must be summarily dismissed because it is successive to the Applicant's prior application for post-conviction relief. S.C. Code Ann. §17-27-90 provides that:

All grounds for relief available to an application 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.

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. Foxworth v. State, 275 S.C. 615, 274 S.E.2d 415 (1981); Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); Arnold v. State/Plath v. State, 309 S.C. 157, 420 S.E.2d 834 (1992).

This Court finds that the current allegations were or could have been raised in the proceedings based on Applicant's prior applications for post conviction relief and, thus, the current application is successive and barred under S.C. Code §17-27-90. The Applicant has failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post conviction relief. Therefore, he has failed to meet 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*.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has failed to file

his application within the time limits established in S.C. Code Ann. §17-27-45(a) and because it is successive. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this order to secure the appropriate appellate review. *See* Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED:

1. This application for post conviction relief is denied and dismissed with prejudice.
2. The Applicant is remanded to the custody of the South Carolina Department of Corrections to serve the remainder of his sentence.

AND IT IS SO ORDERED this 14 day of February, 2005.


 Paula H. Thomas
 Presiding Judge
 Fifteenth Judicial Circuit

Conway, South Carolina.

CMTI330D

SCDC OFFENDER MANAGEMENT SYSTEM

08/07/03

OMCOMITA

RELEASE DATE SCREEN

SCDC# > 243366

LOC: EVANS

LEGETTE, ROGER SYNDELL

SCDC CLASSIFICATION... VIOLENT

OFFENDER TYPE...: ADULT-STRAIGHT SENTENCE SEXUAL PREDATOR...:

DNA STATUS.....: COMPLETED

TOTAL SENTENCE...: LIFE

CONSECUTIVE SENTENCE ...:

CURRENT SENTENCE:

CURRENT SENT START DATE: 05/24/1996

PROJECTED COMPLETION DATES

MAXOUT DATE: 99/99/9999 CURRENT EWC ..:

YOA SIX YEAR DATE: CURRENT EEC ..:

INITIAL PAROLE DATE: 00/00/0000 NEXT PAROLE HEARING DATE: 00/00/0000

TOTAL GT DAYS EARNED: 000000

LABOR CREW/WORK PROG DATE: 99/99/9999

TOTAL EARNED WORK CREDITS ...: 000000

LABOR CREW DISQ REASON:

TOTAL EDUCATION CREDITS: 000000

OFFENSE > CAT 3

TOTAL EXTRA EARNED CREDITS ..: 000

TOTAL SERVICE TIME EARNED ...: 000000

PFKEYS: 5:HISTORY OF DATE CHANGES

4-@

1 Sess-1

167.7.50.33

TNET0335

3/11

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

OFFENSE CODE 50549
DATE OF OFFENSE 5-24-96
DATE OF ARREST 5-24-96
ARRESTING AGENCY HCPD
TICKET/WARRANT(S) CAW199612009
ORIGINAL WARRANT CHARGE
CE Murder
PLED CONVICTED
CE Murder

CASE NO. 96 GS-26-2809

SENTENCE

HORRY COUNTY
9 AUG - 6 PM 6:39
JEANNE ROBERTS
CLERK OF COURT

The defendant Roger Syrdell Legette is committed to State Department of Corrections for a term of life days/months/years and/or pay a fine of \$ to days/months/years and/or pay a fine of \$ plus pay court assessments as applicable, with probation for months/years. Restitution to be paid to HCCOC. Victim's information: NAME

STREET ADDRESS CITY STATE

SPECIAL CONDITIONS: Probation Terminated upon full payment Attend Voc. Rehab
 Random Drug/Alcohol Testing Public Service Employment days/hours Obtain GED
 Substance Abuse Counseling OTHER CONDITIONS NONE

SENTENCE: CONCURRENT/CONSECUTIVE

Credit for jail time served on this offense days/months.

DATED 8-5- 1997

PRESIDING JUDGE

COSTS AND ASSESSMENTS

(1) FINE	\$ <u> </u>	RESTITUTION	\$ <u> </u>
(4) ASSESSMENT(100%)	\$ <u> </u>	SERVICE CHARGE(3%)	\$ <u> </u>
(6) SERVICE CHARGE(3%)	\$ <u> </u>		
(13) DUJ ASSESSMENT(12.00)	\$ <u> </u>	TOTALS	\$ <u> </u>
(14) SURCHARGE	\$ <u>100.00</u>		

TOTALS \$ 100.00

INFORMATION ON DEFENDANT

DATE OF BIRTH 8-30-80 M / F
SS# RACE Black
ATTORNEY John Anderson
SOLICITOR Roger Ray
COURT REPORTER Jean Johnson

ALL PAYMENTS MUST BE MADE BY CASH, MONEY ORDER OR CASHIER'S CHECK WE CANNOT ACCEPT PERSONAL CHECKS.

CLERK OF COURT
P O BOX 677
CONWAY, SC 29528

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

OFFENSE CODE 50116
DATE OF OFFENSE 5-24-96
DATE OF ARREST 5-24-96
ARRESTING AGENCY HCPD

TICKET/WARRANT(S) CAW199612007
ORIGINAL WARRANT CHARGE II Poss firearm
during comm. of a violent crime
PLED CONVICTED II Poss of a
weapon during the commission
of a violent crime

CASE NO. 96 GS-26-2809

SENTENCE

The defendant Roger Syndell Leggett is committed to State Department of

Corrections for a term of 5 days/months/years and/or pay a fine of \$
suspended for days/months/years and/or pay a fine of \$ plus pay court
costs and assessments as applicable, with probation for months/years. Restitution to be paid to

VICTIM'S INFORMATION: NAME
STREET ADDRESS CITY STATE

SPECIAL CONDITIONS: Probation Terminated upon full payment Attend Voc. Rehab
 Random Drug/Alcohol Testing Public Service Employment days/hours Obtain GED
 Substance Abuse Counseling OTHER CONDITIONS

SENTENCE: CONCURRENT CONSECUTIVE

Credit for jail time served on this offense days/months.

DATED 8-5, 1997

PRESIDING JUDGE

COSTS AND ASSESSMENTS

(1) FINE	\$ <u> </u>	RESTITUTION	\$ <u> </u>
(4) ASSESSMENT(100%)	\$ <u> </u>	SERVICE CHARGE(3%)	\$ <u> </u>
(6) SERVICE CHARGE(3%)	\$ <u> </u>		
(13) DUI ASSESSMENT(12.00)	\$ <u> </u>	TOTALS	\$ <u> </u>
(14) SURCHARGE	\$ <u>100.00</u>		

TOTALS \$ 100.00

INFORMATION ON DEFENDANT

DATE OF BIRTH 8-30-80 M F
SS# RACE Black
ATTORNEY John Baynes
SOLICITOR Roger Ray
COURT REPORTER Joan Johnson

ALL PAYMENTS MUST BE MADE BY CASH, MONEY
ORDER OR CASHIER'S CHECK WE CANNOT ACCEPT
PERSONAL CHECKS.

CLERK OF COURT
P O BOX 677
CONWAY, SC 29528

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

RECORD SUMMARY, REPORT DATED 08/07/03

EGETTE, ROGER SYNDELL FBI # N/A

SID# SC01137342 SCDC # 243366

OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE

INSTITUTION ...: EVANS CORR INST

SECURITY/CUST.: 3 MINIMUM IN

QT INCARC SENT....: 999 YRS 0 MOS, 0 DYS

CENTRAL MONITORING.: YES

SOCIAL SECURITY #....:

DORM.....: 1A0187X

RACE....: B SEX....: M

PROJ MAXOUT DATE: 99/99/9999

PROJ PAROLE DATE: 00/00/0000

EWC JOB...: NO CURRENT JOB

EDUC PGM.: NO CURR EDUC PROGRAM

EWC LEVEL: 0 EEC LEVEL:

CURRENT PROGRAM...: NO CURRENT PROGRAM

AGE...: 22 DATE OF BIRTH...: 8/30/60

ASSIGNMENT...: GENERAL DETAIL UNEM

PREVIOUS NUMBERS:

* NO PREVIOUS NUMBERS **

SENTENCE

YRS MOS DYS COUNTY

5 0 0 HORRY

999 99 999 HORRY

SENTENCE

START V/VV CATEGORY

5/24/1996 N 3

5/24/1996 V 5

CURRENT OFFENSES

FIREARMS PROVISION

MURDER

PRIOR COMMITMENTS OVER 90 DAYS:

INMATE HAS NO PRIORS

DETAINERS (HOLD, WANTED, NOTIFY):

NO DETAINERS

ESCAPES:

NO ESCAPE HISTORY

CRIMINAL CHARGES:

NO CRIMINAL CHARGES HISTORY

ASSAULTIVE DISCIPLINARIES:

NO ASSAULTIVE DISCIPLINARY HISTORY

NON-ASSAULTIVE DISCIPLINARIES:

6/ 1/ 3	USE OBSCENE, VULGAR, PROFA	CONVICTED	MAJOR
7/29/ 2	OUT OF PLACE	CONVICTED	MINOR
6/28/ 2	USE OBSCENE, VULGAR, PROFA	CONVICTED	MINOR
5/ 8/ 2	INCITING/CREATING A DIST	DROPPED	MINOR
1/14/ 2	REFUSING OR FAILING OBEY	DROPPED	MAJOR
1/14/ 2	INCITING/CREATING A DIST	DROPPED	MAJOR
1/14/ 2	REFUSING OR FAILING OBEY	CONVICTED	MINOR
12/26/ 1	REFUSING OR FAILING OBEY	CONVICTED	MINOR
12/ 2/ 1	CREATING UNNECESSARY NOI	DROPPED	CHARG
9/ 2/ 1	USE OBSCENE, VULGAR, PROFA	DROPPED	MAJOR
9/ 1/ 1	REFUSING OR FAILING OBEY		OTHER
7/30/ 1	FALSE STATEMENT TO HARM	CONVICTED	MAJOR
7/ 9/ 1	USE OBSCENE, VULGAR, PROFA	CONVICTED	MAJOR
6/13/ 1	DISRESPECT	DROPPED	MINOR
4/28/ 1	SEXUAL MISCONDUCT	CONVICTED	MAJOR
4/16/ 1	USE OBSCENE, VULGAR, PROFA	CONVICTED	MAJOR
4/10/ 1	REFUSING OR FAILING OBEY	CONVICTED	MINOR
3/21/ 1	THREATENING TO INFLECT H	DROPPED	MAJOR
2/28/ 1	VIOLATIONS WRITE/POST IN	CONVICTED	MINOR
2/28/ 1	USE OBSCENE, VULGAR, PROFA	CONVICTED	MINOR
2/23/ 1	REFUSING OR FAILING OBEY	CONVICTED	MINOR
1/26/ 1	DAMAGE/DESTROY/DEFACING	DROPPED	MINOR
12/14/ 0	USE OBSCENE, VULGAR, PROFA	CONVICTED	MAJOR
10/ 8/ 0	DISRESPECT	CONVICTED	MINOR
4/25/ 0	LYING TO AN EMPLOYEE	DROPPED	MINOR
1/ 6/ 0	DAMAGE/DESTROY/DEFACING	CONVICTED	MINOR
1/ 6/ 0	REFUSING OR FAILING OBEY	CONVICTED	MINOR
2/ 8/99	VIOLATIONS WRITE/POST IN	NOT GUILTY	MINOR
2/ 8/99	OUT OF PLACE	CONVICTED	MINOR

ETTE, ROGER SYNDELL FBI # N/A SID# SC01137342 SCDC # 3-1-88 (CONTINU

1/ 8/98 OUT OF PLACE DROPPED CHARG
 1/ 8/98 REFUSING OR FAILING OBEY OTHER
 1/ 8/98 STEALING OTHER
 8/ 8/98 IN LIVING QUARTERS W/OUT CONVICTED MINOR
 7/ 7/98 REFUSING OR FAILING OBEY NOT GUILTY MINOR
 6/12/98 REFUSING OR FAILING OBEY OTHER
 5/19/98 USE OBSCENE, VULGAR, PROFA CONVICTED MINOR
 5/19/98 REFUSING OR FAILING OBEY CONVICTED MINOR
 2/14/98 REFUSING TO WORK CONVICTED MINOR
 1/20/98 REFUSING OR FAILING OBEY OTHER
 1/16/98 REFUSING OR FAILING OBEY CONVICTED MINOR
 2/ 7/97 REFUSING TO WORK DROPPED CHARG
 1/20/97 REFUSING OR FAILING OBEY DROPPED CHARG
 1/19/97 OUT OF PLACE DROPPED CHARG
 0/23/97 REFUSING OR FAILING OBEY CONVICTED MINOR
 0/14/97 REFUSING OR FAILING OBEY DROPPED CHARG
 9/28/97 INCITING/CREATING A DIST DROPPED CHARG

TORY OF MOVEMENTS:

7/17/ 3	EVANS	INCARCERATED	ADMINISTRATIVE
5/ 8/ 3	MCCORMICK	INCARCERATED	ADMINISTRATIVE
5/ 8/ 3	RICHLAND CO	ABSENT WITH LEAVE (A	MEDICAL
8/26/ 2	MCCORMICK	INCARCERATED	ADMINISTRATIVE
3/15/ 2	KERSHAW	INCARCERATED	ADMINISTRATIVE
3/14/ 2	KIRKLAND	INCARCERATED	RETURN FROM COURT
3/13/ 2	HORRY CO	ABSENT WITH LEAVE (A	TO COURT
11/ 8/ 1	KERSHAW	INCARCERATED	ADMINISTRATIVE
11/ 7/ 1	KIRKLAND	INCARCERATED	RETURN FROM COURT
11/ 6/ 1	HORRY CO	ABSENT WITH LEAVE (A	TO COURT
7/19/ 1	KERSHAW	INCARCERATED	RETURN FROM COURT
7/19/ 1	RICHLAND CO	ABSENT WITH LEAVE (A	TO COURT
6/22/ 1	KERSHAW	INCARCERATED	ADMINISTRATIVE
6/22/ 1	HORRY CO	ABSENT WITH LEAVE (A	TO FUNERAL
3/ 5/ 1	KERSHAW	INCARCERATED	RETURN FROM COURT
3/ 5/ 1	LANCASTER CO	ABSENT WITH LEAVE (A	TO COURT
12/11/ 0	KERSHAW	INCARCERATED	ADMINISTRATIVE
12/11/ 0	SUMTER CO	ABSENT WITH LEAVE (A	MEDICAL
11/15/ 0	KERSHAW	INCARCERATED	ADMINISTRATIVE
11/15/ 0	RICHLAND CO	ABSENT WITH LEAVE (A	MEDICAL
4/19/ 0	KERSHAW	INCARCERATED	RETURN FROM COURT
4/19/ 0	HORRY CO	ABSENT WITH LEAVE (A	TO COURT
4/14/ 0	KERSHAW	INCARCERATED	RETURN FROM COURT
4/14/ 0	HORRY CO	ABSENT WITH LEAVE (A	TO COURT
8/25/99	KERSHAW	INCARCERATED	ADMINISTRATIVE
8/24/99	KIRKLAND	INCARCERATED	MEDICAL
8/ 9/99	KERSHAW	INCARCERATED	ADMINISTRATIVE
8/ 9/99	KIRKLAND	INCARCERATED	MEDICAL
4/13/99	KERSHAW	INCARCERATED	ADMINISTRATIVE
4/13/99	KIRKLAND	INCARCERATED	MEDICAL
9/18/97	KERSHAW	INCARCERATED	ADMINISTRATIVE
9/ 5/97	BROAD RIVER RAE	INCARCERATED	ADMINISTRATIVE
8/15/97	DJJ DF	INCARCERATED	ADMINISTRATIVE
8/15/97	BROAD RIVER RAE	INCARCERATED	NEW ADMISSION

TORY OF EARNED WORK CREDIT ASSIGNMENTS:

DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
PRAL WORKER	06/26/03	7/17/ 3	INSTIT TRANSFER	YF5
PRAL WORKER	05/28/03	6/ 1/ 3	PLACED IN ST/SP CUSTODY	YF5
PRAL WORKER	04/1 3	5/27/ 3	PROMOTION	YF5
OR TEACHER ASST.	02/16/03	4/16/ 3	REDUCTION IN FORCE	YF5

GETTE, ROGER SYNDELL FBI # N/A SID# SC01137342 SCDC # 243366 (CONTINU
 GENERAL WORKER 10/07/02 10/7/ 2 LATERAL TRANSFER YF5
 ACHER ASSISTANT 05/02/02 8/26/ 2 INSTIT TRANSFER YF5
 OOD SERVICE AIDE 02/12/02 3/ 5/ 2 UNSAT JOB PERFORM YF5
 OOD SERVICE AIDE 01/23/02 2/11/ 2 CUSTODY REVIEW YF5
 ISTODIAL WORKER 11/13/01 1/14/ 2 PLACED IN ST/SP CUSTODY YF5
 ISTODIAL WORKER 07/13/01 11/ 8/ 1 INSTIT TRANSFER YF5
 ATERIAL HANDLING EQ 02/18/99 3/ 7/ 1 UNSAT JOB PERFORM YF5
 OOD SERVICE AIDE 07/22/98 2/17/99 LATERAL TRANSFER YF5
 ENIOR CUSTODIAN 12/31/97 7/21/98 INMATE REQUEST YF5

(STORY OF EARNED EDUCATION CREDITS)

DESCRIPTION	START DATE	END DATE	TERMINATION REASON
ONUS 15 OR MORE	12/31/97	7/21/98	COMPLETED EDUC PROGRAM
PL 3 - FULL TIME(NO EWC)	09/19/97	12/30/97	INMATE REQUEST

***** END OF REPORT *****

COPY RECEIVED

2006 JAN -5 PM

SC SUPREME C

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

CERTIORARI TO Horry COUNTY

PAULA H. THOMAS, CIRCUIT COURT JUDGE

ROGER LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Assistant Appellate DefenderSouth Carolina Office
of Appellate Defense
1205 Pendleton Street, Room 306
Columbia, S. C. 29201
(803) 734-1330

ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether there was any evidence to support the PCR judge's findings that petitioner's current application was barred by the statute of limitations and that it was successive?

STATEMENT

This petition is from the denial of post-conviction relief on grounds that the current application was barred by the statute of limitations and that it was successive.

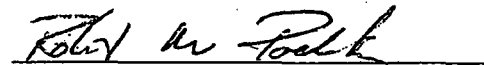
ARGUMENT

There was insufficient evidence to support the PCR judge's findings that petitioner's current application was barred by the statute of limitations and that it was successive.

The PCR judge found that petitioner's direct appeal was denied on November 3, 1999, and this current application was filed on May 29, 2003, well after the one year filing period. The PCR judge also found that the current application was successive. (App. p. 30 – p. 31)

This Court has previously held that it will not uphold the findings of a PCR judge if there is no evidence of probative value to support those findings. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Satterwhite v. State, 325 S.C. 254, 481 S.E.2d 709 (1997); Holland v. State, 322 S.C. 111, 470 S.E.2d 378 (1996). The decision of the PCR judge in this case finding that petitioner's current application was successive and was barred by the statute of limitations should not be upheld.

Respectfully submitted,



Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2006.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
PAULA H. THOMAS, CIRCUIT COURT JUDGE

ROGER LEGETTE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

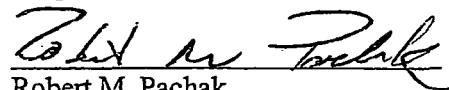
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Roger Legette states:

1. He is Assistant Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on November 7, 2001. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Roger Legette.

Respectfully submitted,



Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

This 5th day of January, 2006

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO HORRY COUNTY
PAULA H. THOMAS, CIRCUIT COURT JUDGE

ROGER LEGETTE,

PETITIONER,

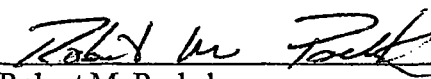
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

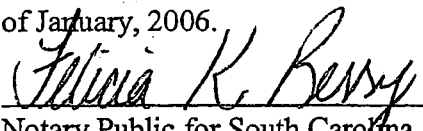
CERTIFICATE OF SERVICE

I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Christopher L. Newton, Esquire, and Roger Legette, #243366, Evans Correctional Institution, this 5th day of January, 2006.


Robert M. Pachak
Assistant Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 5th day
of January, 2006.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 15, 2010.

The Supreme Court of South Carolina

Roger Legette,

Petitioner,

v.

State of South Carolina,

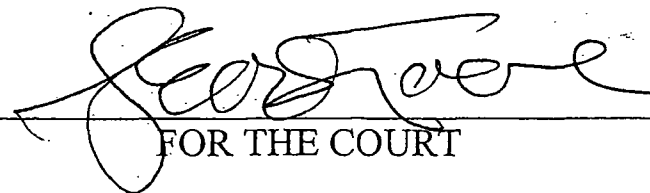
Respondent.

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

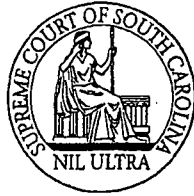
Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has filed a pro se petition.

After careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.


C. J.
FOR THE COURT

Columbia, South Carolina

November 14, 2006



539-06

The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

November 30, 2006

REMITTITUR

The Honorable Melanie Huggins
Government & Justice Center
PO Box 677
Conway, SC 29528-0677

Re: Legette, Roger v. The State – 2003-CP-26-03207

Dear Ms. Huggins:

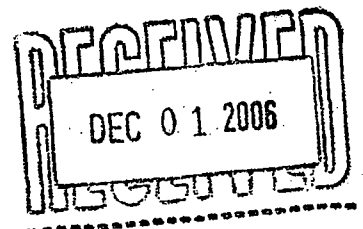
The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

DES/jj

cc: Assistant Appellate Defender Robert M. Pachak
Roger Legette #243366
Assistant Attorney General Christopher L. Newton



IN THE STATE OF SOUTH CAROLINA)
 COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
 FOR THE 15TH JUDICIAL CIRCUIT
 INDICTMENT NO. 96-35-260-2809

Roger S. Legette, Pro-Se,)
)
 Petitioner,)

-vs-

State of South Carolina,)
)
Respondent,)

N O T I C E O F M O T I O N

&

Petition for Writ of Error
 'CORAM NOBIS'

Please take Notice that on Sept. 11th, 2008; The above-named petitioner moves the court for permission to GRANT LEAVE to petition the COURT OF COMMON PLEAS for the Issuance of a WRIT OF ERROR.

This Honorable Court has jurisdiction to issue a 'Writ of Error', pursuant to S.C. Code Of Laws, code ann. § 14-3-320 & 14-3-330, and S.C. Rules of Appellate Proc., Rule 229(B), as well as State v. Bailey, 1 S.C. 1 (1868).

Petitioner respectfully alleges that an ERROR of the MOST FUNDAMENTAL CHARACTER has occurred in his case; Which warrants the issuance of this Extraordinary Writ. Petitioner contends that there is no other remedy available in which to address the merits of his claims. Petitioner further alleges that these claims only became known to him upon the completion of appellate review, in which the S.C. Supreme Court vacated part of petitioner's conviction.

Petitioner seeks the issuance of a WRIT OF ERROR, upon the following grounds:

GROUND ONE

Whether the "Retroactive Misjoinder Doctrine" is applicable to petitioner's case with respect to the improper joinder of the weapons offense??
 Whether this improper joinder constitutes clear prejudice?

GROUND TWO

Whether the "Fruit of the Poisonous Tree Doctrine" apply to petitioner's case with respect to evidence illegally admitted at petitioner's trial.

GROUND THREE

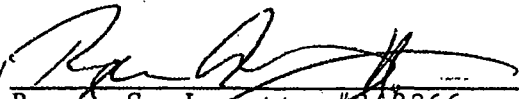
Whether Trial Court committed reversible error, by instructing jury on unconstitutional presumption?

GROUND FOUR

Whether "Prosecutorial Misconduct" is applicable where the prosecution commits perjury; and whether these questionable actions offends Due Process?

This motion is made and based on this Notice and the arguments of petitioner, copies of which are attached and served, and on the pleadings, papers, records and files of this action.

Respectfully Submitted,

s/ 

Roger S. Legette #243366
Lee C. I. / Dar. South #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

Dated: Sept. 11, 2008

A T T A C H M E N T S

Whether the "RETROACTIVE MISJOINDER DOCTRINE" attaches to petitioner's case; with regard to the improper joinder of the weapons offense... Whether this improper joinder constitutes clear prejudice?

Petitioner respectfully argues that the improper joinder of the weapons offense, caused undue prejudice during the course of his trial.

Petitioner further contends that where charges justify an initial joinder rest upon an erroneous construction of law, joinder is void abinitio. U.S. v. Sutton, 605 F.2d. 260 (6th Cir. 1979).

The case at hand involves not a new rule of criminal procedure, but a new interpretation of substantive criminal law. In this the present case resembles Davis v. U.S., 94 S.Ct. 2298 (1974), where the court rendered a decision indicating that where the intervening change is such that the defendant was punished "for an act that the law does not make CRIMINAL";, The new rule of law must be applied RETROACTIVELY. Quoting: U.S. v. Johnson, 102 S.Ct. 2579 (1982)(Dictum)("the court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court LACKED authority to commit or punish a criminal defendant in the first place.").

It was only after the S.C. Supreme Court vacated petitioner's conviction for 'possession of a weapon during the commission of a violent crime', that petitioner was able to invoke the DOCTRINE OF RETROACTIVE MISJOINDER.

Retroactive Misjoinder arises where joinder of multiple counts were proper initially, but rendered improper by later developments, U.S. v. Jones, 16 F.3d. 487 (2nd. Cir. 1994); Such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions render the initial joinder improper.

Exactly, what occurred in petitioner's case was that the S.C. Supreme Court vacated less than all of petitioner's convictions, rendering the joinder improper.

The prejudice spill-over from such an improper joinder, clearly removes any possibility of fundamental fairness. It has been long understood "UNIVERSALLY" that the prejudicial spill-over from evidence used to obtain a conviction subsequently revs'ed on appeal maybe compelling prejudice to invoke retroactive misjoinder doctrine.

However, prejudicial spill-over from evidence used to obtain a conviction subsequently vacated may constitute clear prejudice.

This prejudice is highly probable in the present case, for the only physical evidence presented against petitioner was the weapon, which was clearly improper and inadmissible as a matter of law. See U.S. v. Holloway, 1 F.3d. 307 (5th Cir. 1993).

Under these circumstance it would be clearly unjust not to issue a WRIT OF ERROR; For the afore-mentioned reasons petitioner is entitled to relief.

Respectfully Submitted,

Dated: _____

s/ _____

Roger S. Legette #243366
Lee C.I. / Dar S. #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

Whether the "Fruit of the Poisonous Tree Doctrine" apply to
to petitioner's case with respect to evidence illegally admitted at
petitioner's trial.

The Fifth Amendment guarantees that [N]o person...Shall be compelled in any criminal case to be a witness against himself...Without Due Process of Law.

Petitioner alleges that the police involved in his case engaged in coercive conduct by willfully violating the dictates of Miranda and the Fifth and Fourteenth Amendment rights. In Miranda, the U.S. Supreme Court recognized the fundamental importance of the Fifth Amendment and instituted the requirement that all suspects be informed of their right to REMAIN SILENT, prior to being questioned by law enforcement officials.

Petitioner asserts that he invoked his Fifth Amendment right to remain silent and directs the Court's attention to the following trial transcript testimony:

T.T., pg. 87, lns. 19-25

...okay, let me ask you this part right here where it says, "I'm willing to make a statement at this time. I do not want a lawyer." So on and so forth. How come you didn't have him sign that part. Mr. Legette, after I went over the initial Miranda Rights with him, indicated that he didn't want to make a statement at that time.

T.T., pg. 90, lns. 18-25

...and trying to take care of the crime scene, you were there for awhile before he was taken to J. Reuben Long. Tell me again why it was that you didn't ask him any questions while he was just sitting there, or were y'all waiting on detective Twigg to come? After, I had went over the Miranda Warning with him, Mr. Legette indicated that he did not wish to make a statement to me.

T.T., pg. 94, lns. 23-25

...when, no, I can't- - - just because I didn't put it in my report doesn't mean that Mr. Legette did not indicate that he didn't want to make a statement.

Although, Miranda (rights) are not themselves rights protected by the Constitution, but [are] instead measures to insure that the

right against compulsory self-incrimination [is] protected; When these measures are ignored...A suspect's constitutional rights are directly affected, Michigan v. Tucker, 94 S.Ct. 2357 (1974).

The aim of the requirement of Due Process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence whether true or false, Lisenba v. California, 62 S.Ct. 280 (1941). Indeed, the Fifth Amendment privilege is not concerned with moral and psychological pressures to confess emanating from sources other than official coercion, Oregan v. Elstad, 105 S.Ct. 1285 (1985).

The relinquishment of the right must have been voluntary in the sense that it was the product of free will and deliberate choice rather than intimidation, coercion or deception. [T]he record is full of suggestions that the police resorted to psychological pressure to elicit the statement; the Fourteenth Amendment secures against State invasion.. the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will... Malloy v. Hogan, 84 S.Ct. 1489 (1964). This right requires vigilant protection if the safe-guard of private conscience and human dignity is to hold any substantial values.

It is very clear that the petitioner was denied Due Process of Law; in that his Fifth Amendment right to remain silent (silence) went unprotected, after petitioner made clear his desire to remain silent. It goes without further say that petitioner request to remain silent was violated by law enforcement officials. Petitioner invoked his Fifth Amendment privilege.

Wolf v. People of the State of Colorado, 69 S.Ct. 1361, this Court has not hesitated to enforce as strictly against the States, as it does against the Federal Government, the right of free speech and of a free press, the right to Notice and to a Fair, Public Trial, including, as

it does, the right not to be convicted by use of a coerced confession. However, logically relevant it be, and without regard to it's reliabilit Rogers v. Richmond, 81 S.Ct. 735 (1961), and nothing could be more certain then that when a coerced confession is involved, the relevant rules of evidence are overridden without regard to the incidence of such conduct by police, slight or frequent.

Why, should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc...? The court has found as to the Federal Government, the Fourth & Fifth Amendments, and, as to the States, the Freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an intimate relation in their perpetuation of principle of humanity and Civil Liberty [secured] only after years of struggle. Bram v. U.S., 18 S.Ct. 183 (1897) They express supplementing phases of the same constitutional purpose to maintain inviolate large areas of personal privacy. Feldman v. U.S., 64 S.Ct. 1082 (1944); the philosophy of each amendment and of each freedom is complementary to, although not dependent upon, that of the other in it's sphere of influence - the very least that together they assume in either sphere that no man is to be convicted on unconstitutional evidence. CF Rochin v. California, 72 S.Ct. 205 (1952).

U.S. v Elie, 111 F.3d. 1135 (4th Cir. 1997); the court found that if arrest, search, or interrogation is later held to be unlawful and thus requires suppression of direct evidence, found as a result, derivative evidence must also be suppressed, when it is FRUIT OF THE POISONOUS TREE, U.S.C.A. FOUR (4).

Petitioner, is not making an argument as to the illegality of his statement, the trial court has already decided that to be the matter. Petitioner cause before the court is to test the constitutionality of

the Due Process clause and the fruit of the poisonous tree doctrine. petitioner respectfully allege that the evidence gained by means of an unlawful / unconstitutional statement should have been suppressed as fruits pursuant to the derivative standard. See Wong Sun v. U.S., 83 S.Ct. 407 (1963).

Petitioner, was read his rights and invoked his fifth Amendment right to remain silent, however, the police ignored petitioner's right to silence. The disregard of this right certainly constitutes a denial of fundamental fairness and a further denial of due process of law.

OFFICER: Keith William Strickland, repeatedly told the court that petitioner made clear his desire to remain silent...

In the case of petitioner his Fifth Amendment Right was infringed, evidence gained from a coerced confession used to gain a conviction, indeed raises to the level of a Federal Constitutional violation. Yet, the trial court failed to ensure that the constitutional rights of the petitioner were safe-guarded. The government should have been prohibited from the [use] of this unconstitutional evidence.

Here, as a result of the erroneous evidentiary ruling, the jury improperly heard testimony concerning the handling and possession of a weapon (fire-arm) by the petitioner. The jury was further giving critical instructions on how the weapon is to be regarded when accessing the malice. A review of the record indicates that the jury hearing such testimony (evidence) was indeed crucial, critical, highly significant factor in their decision. The demension of petitioner's trial was for afore-said reasons fundamentally unfair and petitioner is accordingly entitled to the ISSUANCE OF WRIT OF ERROR.

Dated: Sept. 11, 2008

Respectfully Submitted,

st [Signature]
Roger S. Legette #243366

Whether Trial Court committed reversible error, by instructing jury on unconstitutional presumption???

Petitioner respectfully argues that the trial court committed reversible error by instructing jury on unconstitutional presumption. It is well established that the court instructs the jury as to the rules of law and that the juries applies the facts as they find them to those rules. Delli Poali v. U.S., 77 S.Ct. 294 (1957); Sparf & Hansen v. U.S., 15 S.Ct. 273 (1895).

The Fifth & Sixth Amendment requires the government to prove each element of a criminal charge beyond a reasonable doubt, whether or not the defendant presents evidence contesting the element, U.S. v. Gaudin, 115 S.Ct. 2310; Sullivan v. Louisiana, 113 S.Ct. 2078.

When a jury instruction is ambiguous and open to an unconstitutional interpretation the instruction is error, if there is a reasonable likelihood the jury accepted the erroneous interpretation. See Jones v. U.S., 119 S.Ct. 2090, Boyde v. California, 110 S.Ct. 1190; Frey v. Fulcomer, 132 F.3d. 916; 118 S.Ct. 2076; U.S. v. Thayer, 201 F.3d. 214; 120 S.Ct. 2691.

Jury charge must be clearly articulate relevant legal standard; it must therefore, be structured in such a way as to avoid confusion the jury or misleading the jury. U.S. v. Johnstone, 107 F.3d. 200.

The Instruction Here:

Tr. Tn. pg. 341, Lns. 6 - 21:

Our law makes it illegal to possess or display a firearm during the commission of a violent crime.

I charge you under our law murder is classified as a violent crime. I further charge you that involuntary manslaughter is not classified as a violent crime...For you to - - - for you to find the defendant guilty of this count 2, separate offense, that is, possession of a firearm or weapon during the commission of a violent crime, you must first find the defendant guilty of murder. Then you must determine whether the state has proved beyond a reasonable doubt that the defendant possessed or displayed a firearm during the commission of murder, and the burden, of course, is upon the state to prove him guilty of that beyond a reasonable doubt. A firearm is simply - - it could be a pistol, revolver, gun.

Tr. Tn. pg. 342, Lns. 7 - 15:

Now, the verdict form, if I can locate it, the verdict form is two pages. The first page deals with count 1, murder, and the lesser included offense of involuntary manslaughter. The second page deals with the possession of a weapon or firearm during the commission of a violent crime. You will not take up - - - you will not go to page two unless you find the defendant guilty of murder on page one for the reasons that I've stated in my charge. Okay...

This instruction certainly seems clear and articulate, however, it lacked all essence of a legal or constitutional foundation. For this reason the trial court must be reversed, for it's ruling on points of law with respect to charged offense. The instruction of the trial court confused and mislead the jury into believing that they could only convict petitioner of possession of a weapon, if they [jury] convicted him of murder first. This instruction, certainly, is capable of misleading the jury. U.S. v. Fischbach, 105 S.Ct. 1307. In fact the instruction itself was based upon an unconstitutional and erroruousness legal standard.

Here, the trial court's failure to instruct the jury on every element of the offense charged; rendered the instruction unlawful, because the jury never knew that the negligent handling of a loaded gun would support a finding for involuntary manslaughter. State v. Burris, 513 S.E.2d. 104 (1999); State v. White, 171 S.E.2d. 712 (1969).

Effectively, removing from the jury charge the essential ingredients of the only offense on which the conviction could rest. See Carella v. California, 109 S.Ct. 2419 (1989); Rose v. Clark, 106 S.Ct. 3101 (1986); Connecticut v. Johnson, 103 S.Ct. 969 (1983); Jackson v. Virginia, 99 S.Ct. 2281 (1979).

In the case at hand, the jury could have returned a verdict of guilty for both involuntary manslaughter and possession of a weapon. The trial court court erred by instructing the jury that it must convict petitioner of murder if they are convinced that petitioner had possession of the weapon in question. State v. Avery, 509 S.E.2d 476.

Certainly, instructing the jury that petitioner COULD NOT be convicted of involuntary manslaughter and possession of a weapon, is a mis-statement of law. Said instruction relieved the state of its burden of proof.

The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every element / fact necessary to constitute the crime," In Re Winship, 90 S.Ct. 1073. This "Bedrock axiomatic and elementary" [constitutional] principle," prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. Sandstrom v. Montana, 99 S.Ct. 2457; Patterson v. New York, 97 S.Ct. 2319 (1977). This prohibition protects the 'fundamental value determination of our society,' "given voice in Justice Harlan's concurrence in Winship, that" it is far worse to convict an innocent man than to let a guilty man go free."

The question now before the court is almost identical to that before the court in Sandstrom; Whether The Challenged Jury Instruction Had The Effect Of Relieving The State Of Its Burden Of Proof??? By creating a mandatory presumption of intent, upon proof by the state of other elements of the offense: Trial Transcript pages: 337, Lns. 15-25.

The analysis here is straight-forward. "The threshold inquiry in ascertaining the constitutional analysis applicable to this type of jury instruction is to determine the nature of the presumption it describes." The court must determine whether the challenged portion of the instruction creates a mandatory presumption, or merely a permissive inference, Ulster Co. Court v. Allen, 99 S.Ct. 2213 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate facts. A premissive inference suggests to the jury a possible conclusion to be drawn if

if the state proves predicate facts, but does not require the jury to draw that conclusion.

Petitioner, contends here that the instruction regarding the use of a deadly weapon, and the latter instruction concerning the possession of a weapon during the commission of a violent crime, relieved the state of proof to both intent and malice... The jury was instructed that if the state proved that petitioner had gun (weapon) in question then they (jury) must convict him of murder. That is the only interpretation to be drawn from this instruction. Because of this conclusive presumption, petitioner was convicted without the jury ever examining evidence concerning any element of the crimes charged. Such an error deprived petitioner of "constitutional rights so basic to a fair trial that the infraction can never be treated as harmless." Chapman v. California, 87 S. Ct. 827. Petitioner has never conceded the issue of intent with respect to either of the counts at issue. As noted above the instruction was not so ill-suited to both the theory on which the case was tried and the evidence presented, U.S. v. Winter, 663 F.2d. 1120; That it can be deemed harmless.

Formulation of authoritative laws, rules, and remedies designed to protect people from infractions by the states of federally guaranteed rights cannot be left to the states themselves. The federal rule emphasizes "SUBSTANTIAL RIGHTS" as do most others. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." At the same time, however, like the federal harmless error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "AFFECT SUBSTANTIAL" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under Fahy v. Connecticut, 84 S.Ct. 229, supra, be conceived as harmless.

Certainly error, constitutional error, in illegally admitting high-

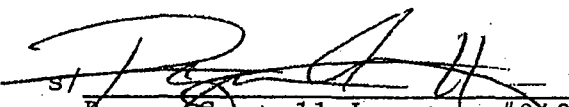
ly prejudicial evidence or comments, casts upon someone other than the person prejudicial by it a burden to show that it was harmless. It is for that reason that the Original Common-Law Harmless-Error Rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.

There is little, if any, difference between the Supreme Court statement in Fahy, supra; about whether "Whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

WHEREFORE, petitioner is entitled to the issuance of WRIT OF ERROR.

Respectfully Submitted,

Dated: Sept. 11, 2008


Roger Syntell Legette #243366
Lee C.I. / Dar. South #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

Whether "Prosecutorial Misconduct" is applicable where the prosecution commits perjury; and whether these questionable actions offends Due Process?

It is the petitioner's purpose in this petition to test the substantive due process protections and legality of his detention. McCall v. State, 247 S.C. 15, 145 S.E.2d. 419 (1965). Substantive due process protections are limited to a number of issues. This would mean state action which deprives a person of life, liberty or property which is governed by a more specifically relevant provision of the constitution. Substantive due process provides a great protection to the Fifth & Fourteenth Amendments; So there must be a rational basis for the deprivation where the judiciary characterize it as arbitrary. Hamiliton v. Board of Trustees at Oconee School Dist., 282 S.C. 519, 319 S.E.2d. 717

The Court held in U.S. v. Schettz, 293 F.3d. 175 (4th Cir. 2002); that in reviewing a claim of PROSECUTORIAL MISCONDUCT, they review the claim to determine whether the conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." U.S. v. Mosley, 64 F.3d. 907 (4th Cir. 1995).

It is a fundamental corner stone of due process that the constitution "cannot tolerate a criminal conviction obtained by the knowing use of false evidence. U.S. v. Mosley, 64 F.3d. 907 (4th Cir. 1995).

It is a fundamental corner stone of due process that the constitution "cannot tolerate a criminal conviction obtained by the known use of false evidence." Miller v. Pate, 87 S.Ct. 785 (1967). The prosecution offends due process when false evidence is used, whether it solicits the evidence or simply allows it "to go uncorrected when it appears." See Napue v. Illinois, 79 S.ct. 1173 (1959).

Due Process is equally offended by direct statements which are untrue and the eliciting of testimony which "taken as a whole" gives the

jury a "false impression". Alcorta v. Texas, 78 S.Ct. 103 (1957). When false evidence is used, even unwittingly, a new trial is required "if there is a reasonable possibility that [without the evidence] the result of the proceedings would have been different." U.S. v. Young, 17 F.3d. 1201 (9th Cir. 1994).

Petitioner contends that the prosecutor lied under oath, thereby committing perjury; Petitioner asserts that the prosecutor made the following statement to the jury knowing that it was untrue:

T.T., pg. 317, Lns. 2-8

... I ain't got no gun because they're smart enough to know, I'm on probation. I'm on parole. Well, he's smart. he's been in the system. He's smart enough to know the police can't do nothing to him because he ain't got the gun, they've got no evidence, but as soon as they leave, what does he do? Right back like a martin to his ground getting that gun out of them woods..."

Surely this is improper conduct, the prosecutor certainly knows that petitioner never been on probation or parole. In fact petitioner's never been in the system as the prosecutor stated so many times. Lies of this nature are extremely influential. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury." U.S. v. Agers, 96 S.Ct. 2392 (1976). When speaking of reasonable likelihood this court held in Kotteakos v. U.S., 66 S.Ct. 1239 (1946); IF ONE CANNOT SAY WITH FAIR ASSURANCE, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the the error, it is impossible to conclude that the substantial rights of the accused were not effected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Certainly, the record here establishes just how the lies of the

prosecution mislead and improperly influenced the jury. Prosecutor's may not knowingly present false testimony, and have a duty to correct false testimony. Prosecutor's may not make material mis-statements of law or facts. Here the prosecution did all of these acts with ill intentions. The misconduct displayed here by the prosecutor has caused undue prejudice, painting the petitioner as a career criminal denied petitioner of even the basic right to a FAIR TRIAL.

Petitioner further contends that the prosecution used an unconstitutional method to convict him. Petitioner respectfully argues that the prosecution shifted the burden of proof to the petitioner by improperly advancing the unconstitutional [ROBBERY THEORY] advanced at T.T., pgs. 314-315; Lns. 23-25 & 1-10.

Arguing to jury that petitioner was engaged in the act of robbery relieved the state of its burden to prove every element of the offense charged. This robbery theory violates the Forth and Fourteenth Amendment. Certainly, having to address this robbery theory to the jury when petitioner was never charged with any robberies, shifted the burden of proof to the petitioner.

The rule in connection with prosecutorial over-reaching has been stated in many opinions. That rule has been framed as the maxim that "[i]t is often said and often forgotten that the duty of the prosecuting attorney is not to convict defendants but to try them fairly." Mcfarland v. U.S., 150 F.3d. 593 (D.C. Cir. 1945). Is there now any doubt that the prosecutor committed perjury, isn't he an officer of the court bound by the oath of truth?

In U.S. v. Berger, 55 S.Ct. 629 (1935); The Supreme Court held: "The United States Attorney is the representative not of any ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor - indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

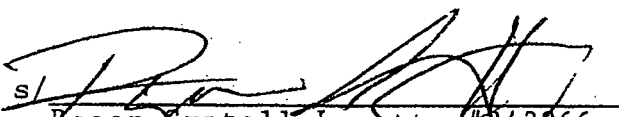
The methods used here were improper, after all the prosecutor lied under oath, it was the prosecution who choose to implore unconstitutional arguments to the jury, with his robbery theory. In U.S. v. Samad, 754 F.2d. 1091 (4th Cir. 1984); The court observe "(that a prosecutor may not argue evidence not presented to the jury.)" Such conduct "raises the concern that a defendant might be convicted for reasons outside the of the evidence presented." This is exactly what occurred in the case of petitioner.

For the above-mentioned reasons petitioner is entitled to the issuance of WRIT OF ERROR.

Respectfully Submitted,

Dated:

Sept. 11, 2004


s/ Roger Syntell Legette #243366
Lee C.I. / Dar. South #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

State of South Carolina)
County of Horry)

In The Court of Common Pleas
Fifteenth Judicial Circuit

Roger Snytell Legette, 243366,)
Petitioner,)
-vs-)
State of South Carolina,)
Respondent,)

Case No. 96-GS-26-2809

A F F I D A V I T
O F S E R V I C E B Y
M A I L

I, Roger Syntell Legette, #243366, hereby certify that:

1. I am the Petitioner in this 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 PRO-SE MOTION FOR WRIT OF ERROR 'CORAM NOBIS' in the above captioned matter by depositing same in the United States Mail, Postage Prepaid:

Service upon the following person(s):

1. Henry D. McMaster, Attorney General
Attorney General's Office
Post Office Box 11549
Columbia, S.C. 29211
2. Clerk of Court
Horry Co. Courthouse
Post Office Box 677
Conway, S.C. 29526

Sworn to and Subscribed before me
on this 11 day of Sept., 2008.
Notary of Public for South Carolina
My Commission Expires: 11-4-2015

Dubois Sire

Respectfully Submitted,

s/

Roger S. Legette
Roger S. Legette #243366
Lee C.I. / Dar. South #2213

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Roger S. Legette, # 243366,

2008-CP-26-7535

Petitioner,

v.

RETURN AND MOTION TO DISMISS
("Petition for Writ of Error Coram Nobis")

State of South Carolina,

Respondent.

The Respondent, making its Return and Motion to Dismiss to the "Petition for Writ of Error Coram Nobis" filed September 15, 2008, by Roger S. Legette, would respectfully show this Court:

I. – Procedural History

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from Horry County. Petitioner was indicted in December of 1996 for murder, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of twenty-one (1996-GS-26-2809, Counts I - III). Because Petitioner was a minor at the time (born August 30, 1980), a waiver proceeding was held in the Family Court on September 26, 1996 and on October 9, 1996, to determine whether the matter would be transferred to the Court of General Sessions. Petitioner was represented by Barbara W. Pratt, Esquire, and Johnny Gardner, Esquire, in the waiver proceedings. By Amended Order dated April 7, 1997, the Honorable H. T. Abbott, III, waived jurisdiction of the entire case to the General Sessions Court.

Thereafter, on August 4, 1997, Petitioner commenced a jury trial in the Court of General Sessions for Horry County. He was represented by Johnny Gardner, Esquire. Prior to trial, the

State dismissed Count III of the indictment. On August 5, 1997, the jury found Petitioner guilty on both remaining counts. The Honorable David H. Maring, Sr., sentenced Petitioner to life for murder, and five years, concurrent, for the weapon charge. A timely notice of appeal was filed on Petitioner's behalf, and an Anders appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed Petitioner's convictions and sentences on November 3, 1999 (State v. Legette, 1999-MO-072). Petitioner's Certiorari Petition was denied by the United States Supreme Court on April 24, 2000.

Petitioner filed his first Application for post-conviction relief on April 27, 2000 (2000-CP-26-1962). An evidentiary hearing was held on March 14, 2002, at which the Applicant was present and represented by J. Matthew Dove, Esquire. The Applicant withdrew all of his allegations except for his allegation that the Family Court did not have jurisdiction to waive the possession of weapon charge (Count II of the indictment) up to the General Sessions Court. By Order dated June 27, 2002, the Honorable J. Michael Baxley denied and dismissed the Application. However, on February 24, 2003 (2003-MO-014) the South Carolina Supreme Court vacated Petitioner's conviction for possession of a weapon during the commission of a violent crime, finding that the Family Court did not have jurisdiction to waive that charge up to General Sessions Court, under Austin v. State, 352 S.C. 473, 575 S.E.2d 547 (2003), because the offense was not enumerated in S.C. Code § 20-7-430(5). That charge was remanded to the Family Court, and the appeal was remitted to the circuit court on March 14, 2003.

Petitioner filed his second Application for PCR on April 19, 2001 (2001-CP-26-1911), while the first Application was still pending.¹ An evidentiary hearing was held before the Honorable John L. Breeden, Jr., on November 7, 2001, at which Petitioner was present and

¹ Petitioner also filed a federal habeas corpus action in August of 2001; this action was dismissed on September 16, 2002.

represented by Gabriel P. Joseph, Jr., Esquire. In this action, Petitioner challenged only the alleged errors with respect to the trial in the General Sessions Court. By Order dated September 18, 2002, Judge Breeden denied and dismissed the Application, finding that none of Petitioner's allegations had merit. Petitioner did not appeal from the dismissal of this PCR.

Petitioner then filed a third PCR Application on May 29, 2003 (2003-CP-26-3207). A hearing on the State's Motion to Dismiss was held on January 20, 2005, before the Honorable Paula H. Thomas. Petitioner was present in court and represented by J. Wesley Locklair, Esquire. Judge Thomas granted the State's Motion to Dismiss, and thereafter dismissed the Application as successive and as barred by the statute of limitations by Order dated February 14, 2005. A timely appeal was filed on Petitioner's behalf, and a Johnson appeal was perfected by Robert M. Pachak, Esquire. The South Carolina Supreme Court denied certiorari on November 14, 2006, and remitted the case to the circuit court on November 30, 2006.²

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the conviction, Petitioner's prior post-conviction relief files, including civil action numbers 2000-CP-26-1962, 2001-CP-26-1911, and 2003-CP-26-3207, and Petitioner's prior appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Current Allegations

In his current Petition, Mr. Legette alleges he is being held in custody unlawfully for the following reasons:

² Most recently, in March of 2007, Petitioner filed a second habeas corpus action in federal court. (6:07-CV-00633-HMH). The action was dismissed by Order dated November 26, 2007. Petitioner appealed, and the United States Court of Appeals for the Fourth Circuit denied a certificate of appealability on June 4, 2008 (case # 08-6088). Thereafter, the Petitioner's request for rehearing was denied by Order dated July 8, 2008. A Mandate was issued by the Fourth Circuit on July 16, 2008, reinstating the June 4, 2008 denial.

1. Retroactive misjoinder doctrine: undue prejudice from admission of improper evidence of the weapon;
2. Fruit of the poisonous tree doctrine: improper testimony regarding the weapon;
3. Trial court error: jury instruction contained an unconstitutional presumption and did not allow for conviction of involuntary manslaughter (accident) and possession of a weapon; and
4. Prosecutorial misconduct: due process offended by prosecutor lying under oath regarding Petitioner being on probation or parole; prosecutor made improper and prejudicial argument regarding "robbery theory."

The Applicant states that he is seeking issuance of a Writ of Error Coram Nobis.

III.

Petitioner has styled his action as a "Petition for Writ of Error Coram Nobis." Historically, "[t]he principal function of the writ of *coram nobis* is to afford the Court an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered and which could not have been presented by a motion for a new trial, appeal or other existing statutory proceeding." State v. Liles, 246 S.C. 59, 73-74, 142 S.E.2d 433, 440 (1965). The writ "lies for an error of fact not apparent on the record, not attributable to the appellant's negligence, and which if known by the Court would have prevented rendition of the judgment." Id. The writ "does not lie for newly discovered evidence or newly arising facts or facts adjudicated on the trial." Id. "A person seeking relief by a writ of *coram nobis* has the burden of sustaining the allegations of his petition by a preponderance of evidence. Id. (citation omitted).

However, the PCR Act now "comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence." S.C. Code Ann. § 17-27-20(b) (2003); Finklea v. State, 273 S.C. 157, 255 S.E.2d 447 (1979) (aim of PCR Act is to consolidate in one simple statute all the remedies presently available for challenging the validity of a sentence of imprisonment). Accordingly, the Writ of

Error Coram Nobis would be available, if at all, only where PCR is inadequate to test the legality of detention. See Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Al-Shabazz v. State, 338 S.C. 354, 365-366, 527 S.E.2d 742, 748 (2000). The PCR Act is broadly inclusive and will rarely be inadequate or unavailable; PCR is not rendered “unavailable or inadequate” merely because an application might be dismissed as procedurally barred. See Gibson, supra.

The Petitioner in this case has failed to allege any reason why PCR is inadequate to test the legality of his detention. See id. Therefore, the State submits that this Petition is insufficient, improper, and must be summarily dismissed. However, if this Court sees fit, the Petition may be construed as an Application for post-conviction relief. See id.; Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994).

IV.

Should this Court construe the Petition as an Application for post-conviction relief, the State submits that the action must nevertheless be dismissed as time-barred. 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 applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). In this case, the sentence was imposed on August 5, 1997, and the direct appeal concluded in April of 2000. Therefore, this Application, which was not filed until September 15, 2008, is barred by the statute of limitations. Petitioner alleges that, “these claims only became known to him upon the completion of appellate review, in which the S.C. Supreme Court vacated part of petitioner’s conviction.” (Page 1, Notice of Motion & Petition for Writ of Error Coram Nobis). However, it

is clear that the South Carolina Supreme Court "completed appellate review" and vacated the possession of weapon conviction in February of 2003. Therefore, assuming, for argument's sake, that Petitioner was entitled to another PCR application regarding his murder conviction based upon the vacation of his other conviction, this action is still time-barred because over four years have passed since that time. Accordingly, the action must be summarily dismissed.

A motion for summary judgment may properly be used to raise a statute of limitations defense. See RWE Nukem Corp. v. ENSR Corp., 73 S.C. 190, 194, 644 S.E.2d 730, 732 (2007). 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 State submits that the action should be summarily dismissed for failure to file within the time mandated by statute.

V.

Each and every allegation, statement, or claim contained within the Petition not expressly admitted, qualified, or explained is hereby denied.

VI.

WHEREFORE, having made its Return and Motion to Dismiss, the Respondent requests that the Application be summarily dismissed as improper and/or as barred by the statute of limitations.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General

A handwritten signature in cursive script, reading "Christina J. Catoe", written over a horizontal line.

ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

October 15, 2008

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS

2008-CP-26-7535

Roger S. Legette, # 243366,)

Petitioner,)

v.)

State of South Carolina,)

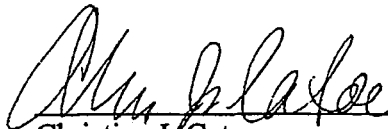
Respondent.)

CERTIFICATE OF SERVICE BY MAIL

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 State's **RETURN AND MOTION TO DISMISS** in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

**Roger S. Legette, # 243366
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010**

DATED this 15th day of October, 2008.



Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Roger S. Legette, # 243366,

2008-CP-26-7535

Petitioner,

v.

CONDITIONAL ORDER OF DISMISSAL
Statute of Limitations & Successive

State of South Carolina,

Respondent.

COPY

FILED
HORRY COUNTY
2008 OCT 28
CLERK OF COURT
MELANIE EUGENES
JAN 10:15

PROCEDURAL HISTORY

This matter comes before the Court by way of a "Petition for Writ of Error Coram Nobis" filed September 15, 2008, by Roger S. Legette. Respondent made its Return and Motion to Dismiss on October 15, 2008, requesting that the Petition be summarily dismissed. Incorporated herein by reference are the Horry County Clerk of Court records regarding the conviction, and the Petitioner's prior post-conviction relief and appellate files, including 2000-CP-26-1962, 2001-CP-26-1911, and 2003-CP-26-3207.

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment from Horry County. Petitioner was indicted in December of 1996 for murder, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of twenty-one (1996-GS-26-2809, Counts I - III). Because Petitioner was a minor at the time (born August 30, 1980), a waiver proceeding was held in the Family Court on September 26, 1996 and on October 9, 1996, to determine whether the matter would be transferred to the Court of General Sessions. Petitioner was represented by Barbara W. Pratt, Esquire, and Johnny Gardner, Esquire, in the waiver proceedings. By Amended Order

dated April 7, 1997, the Honorable H. T. Abbott, III, waived jurisdiction of the entire case to the General Sessions Court.

Thereafter, on August 4, 1997, Petitioner commenced a jury trial in the Court of General Sessions for Horry County. He was represented by Johnny Gardner, Esquire. Prior to trial, the State dismissed Count III of the indictment. On August 5, 1997, the jury found Petitioner guilty on both remaining counts. The Honorable David H. Maring, Sr., sentenced Petitioner to life for murder, and five years, concurrent, for the weapon charge. A timely notice of appeal was filed on Petitioner's behalf, and an Anders appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed Petitioner's convictions and sentences on November 3, 1999 (State v. Legette, 1999-MO-072). Petitioner's Certiorari Petition was denied by the United States Supreme Court on April 24, 2000.

Petitioner filed his first Application for post-conviction relief on April 27, 2000 (2000-CP-26-1962). An evidentiary hearing was held on March 14, 2002, at which the Applicant was present and represented by J. Matthew Dove, Esquire. The Applicant withdrew all of his allegations except for his allegation that the Family Court did not have jurisdiction to waive the possession of weapon charge (Count II of the indictment) up to the General Sessions Court. By Order dated June 27, 2002, the Honorable J. Michael Baxley denied and dismissed the Application. However, on February 24, 2003 (2003-MO-014) the South Carolina Supreme Court vacated Petitioner's conviction for possession of a weapon during the commission of a violent crime, finding that the Family Court did not have jurisdiction to waive that charge up to General Sessions Court, under Austin v. State, 352 S.C. 473, 575 S.E.2d 547 (2003), because the offense was not enumerated in S.C. Code § 20-7-430(5). That charge was remanded to the Family Court, and the appeal was remitted to the circuit court on March 14, 2003.

Petitioner filed his second Application for PCR on April 19, 2001 (2001-CP-26-1911), while the first Application was still pending. An evidentiary hearing was held before the Honorable John L. Breeden, Jr., on November 7, 2001, at which Petitioner was present and represented by Gabriel P. Joseph, Jr., Esquire. In this action, Petitioner challenged only the alleged errors with respect to the trial in the General Sessions Court. By Order dated September 18, 2002, Judge Breeden denied and dismissed the Application, finding that none of Petitioner's allegations had merit. Petitioner did not appeal from the dismissal of this PCR.

Petitioner then filed a third PCR Application on May 29, 2003 (2003-CP-26-3207). A hearing on the State's Motion to Dismiss was held on January 20, 2005, before the Honorable Paula H. Thomas. Petitioner was present in court and represented by J. Wesley Locklair, Esquire. Judge Thomas granted the State's Motion to Dismiss, and thereafter dismissed the Application as successive and as barred by the statute of limitations by Order dated February 14, 2005. A timely appeal was filed on Petitioner's behalf, and a Johnson appeal was perfected by Robert M. Pachak, Esquire. The South Carolina Supreme Court denied certiorari on November 14, 2006, and remitted the case to the circuit court on November 30, 2006.

In his current action, Petitioner alleges he is being held in custody unlawfully for the following reasons:

1. Retroactive misjoinder doctrine: undue prejudice from admission of improper evidence of the weapon;
2. Fruit of the poisonous tree doctrine: improper testimony regarding the weapon;
3. Trial court error: jury instruction contained an unconstitutional presumption and did not allow for conviction of involuntary manslaughter (accident) and possession of a weapon; and
4. Prosecutorial misconduct: due process offended by prosecutor lying under oath regarding Petitioner being on probation or parole; prosecutor made improper and prejudicial argument regarding "robbery theory."

The Applicant states that he is seeking issuance of a Writ of Error Coram Nobis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

First, this Court finds that the current action must be construed as an Application for post-conviction relief. The PCR Act now “comprehends and takes the place of *all other common law, statutory, or other remedies* heretofore available for challenging the validity of the conviction or sentence.” S.C. Code Ann. § 17-27-20(b) (2003) (emphasis added); see also Finklea v. State, 273 S.C. 157, 255 S.E.2d 447 (1979) (aim of PCR Act is to consolidate in one simple statute all the remedies presently available for challenging the validity of a sentence of imprisonment). Accordingly, the Writ of Error Coram Nobis is not available where PCR is adequate to test the legality of detention. See Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998); Al-Shabazz v. State, 338 S.C. 354, 365-366, 527 S.E.2d 742, 748 (2000). The PCR Act is broadly inclusive, and post-conviction relief is not rendered unavailable or inadequate merely because an application might be dismissed as procedurally barred. See Gibson, supra. Because the Petitioner in this case has failed to allege any sufficient reason why PCR is inadequate, this Court must construe his action as an Application for post-conviction relief. See Gibson, supra; Hunter v. State, 316 S.C. 105, 447 S.E.2d 203 (1994).

Nevertheless, this Court finds that the action must be dismissed as time-barred. 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 applies to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). In this case, the sentence was imposed on August 5, 1997, and the direct appeal was concluded on April 24, 2000. This Application was not filed until September 15, 2008. Petitioner alleges that, "these claims only became known to him upon the completion of appellate review, in which the S.C. Supreme Court vacated part of petitioner's conviction." (Page 1, Notice of Motion & Petition for Writ of Error Coram Nobis). However, it is clear that the South Carolina Supreme Court completed appellate review and vacated the weapon conviction in February of 2003. Therefore, even if Petitioner was entitled to another PCR application based upon vacation of the weapon conviction, this action is still time-barred because over four years have passed since that time.

This Court also finds that the current action is impermissibly successive. 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 (2003) 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.

Under this statute, 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 the 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, supra.

Petitioner had two PCR Applications that were filed prior to the vacation of Petitioner's weapon conviction in February 2003. He also filed a PCR Application after the vacation of the conviction, on May 29, 2003 (2003-CP-26-3207). Petitioner could have raised the current allegations in his May 2003 Application, and could have argued that the vacation of the conviction in February 2003 entitled him to another PCR. However, Petitioner failed to do so. Accordingly, this Court finds that the current action is impermissibly successive.

A motion for summary judgment may properly be used to raise a statute of limitations defense. See RWE Nukem Corp. v. ENSR Corp., 73 S.C. 190, 194, 644 S.E.2d 730, 732 (2007). In addition, S.C. Code Ann. § 17-27-70(c) (2003) 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 Petitioner's action must be summarily dismissed as time-barred and as impermissibly successive.

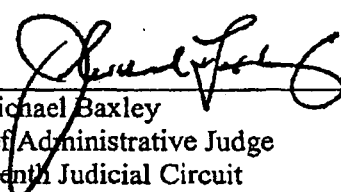
CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to **DISMISS** this action **WITH PREJUDICE** unless Petitioner provides specific reasons, factual or legal, why the action should not be dismissed in its entirety. Petitioner is granted **TWENTY (20) DAYS** from the date of service of this Order to show why the conditional dismissal should not become final. The

Petitioner shall file any reasons he may have with the Horry County Clerk of Court and shall serve the State using the following address:

Office of the Attorney General
Attn: Christina J. Catoe, Esq.
P.O. Box 11549
Columbia, South Carolina 29211

AND, IT IS SO ORDERED this 20th day of OCTOBER, 2008.



J. Michael Baxley
Chief Administrative Judge
Fifteenth Judicial Circuit

CONWAY, South Carolina

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
 FIFTEENTH JUDICIAL CIRCUIT
 CASE No. 2008-CP-26-7535

Roger S. Legette, #243366,
 Petitioner,

-vs-

STATE OF SOUTH CAROLINA,
 Respondent.

PETITION
 OF
 FACTS

FILED
 HORRY COUNTY
 2008 NOV 26 AM 10:12
 KELLANIE HUGGINS
 CLERK OF COURT

Petitioner now comes before this Honorable Court with this petition of facts, with respect to the 'CONDITIONAL ORDER OF DISMISSAL' signed by the Hon. Judge J. Michael Baxley on October 20th, 2008; Served on petitioner November 6th, 2008. Judge Baxley granted petitioner Twenty (20) Days to provide this Court with factual and/or legal reasons why his case should not be dismissed.

STATEMENT OF FACTS

This Court's (Conditional Order of Dismissal); underscores the truism of the 'ENDS OF JUSTICE' Doctrine. Due process, unlike some legal rules, is not a technical conception with fixed content unrelated to time, place and circumstances. Cafeteria Workers v. McElroy, 81 S.Ct. 1743 (1961). "[D]ue process is flexible and calls for such procedural protections as a particular situation demands". Morrissey v. Brewer, 92 S.Ct. 2593 (1972).

Petitioner has sought to assert his rights through the laws and statutes of the State of South Carolina, as well as the laws of the land. However, petitioner has been frustrated at every turn due to procedural snarls and obstacles, despite the exercise of diligent efforts. "The inability of petitioner to adequately prepare/present his case skewed the fairness of the entire system." Barker v. Wingo,

...92 S.Ct. 2593 (1972).

This Court concluded at (pg. 4 of the Order); that the petitioner failed to allege any sufficient reasons why the POST-CONVICTION RELIEF ACT is inadequate to test the legality of his detention.

Petitioner respectfully contends that he attended a PCR Hearing on January 20th, 2005, with respect to the application filed in May of 2003 (2003-CP-26-3207); Petitioner, was not afforded an opportunity to make a colorable showing, in fact petitioner was denied the right to develop the legal novelty of his claims in Court. Quoting Price v. Johnston, 68 S.Ct. 1049 (1948); "The Court explained that the State must plead an abuse of the writ with particularity, and that the burden then shifts to the petitioner to show that presentation of the new claim does not constitute abuse. The Court further reasoned that petitioner must be afforded the opportunity to explain the basis for raising his claims late, further finding that petitioner must be given the opportunity to develop these matters in a hearing.

Petitioner again contends [he] was denied even the basic right to be heard in court. [Emphasis Added][See Attached Transcript].

Under these circumstances petitioner respectfully asserts that there is now no avenue under the PCR Act for the vindication of his repressed constitutional rights. Petitioner did all he could to preserve his right during the hearing of the 2003 Application, yet, the Court failed to safe-guard any of the rights afforded petitioner by the court in Price, supra. In Witt v. Wainwright, 755 F.2d. 1396 (11th Cir. 1985); "The Court explained that the 'ends of justice' which requires reconsideration, is determined by objective factors, such as whether there was a 'full and fair' hearing on the original petition or whether there was an intervening change in the facts of the case or the applicable law".

Petitioner argues here that the objective factors invisioned by

the court in Wainwright, supra, are apparent in the petitioner's case, (1) Petitioner was denied a 'full and fair' hearing. Also see Odom v. State, 523 S.E.2d. 753 (1999). (2) Petitioner's counsel was indifferent to everything that petitioner sought to establish at the hearing of the (2003-CP-26-3207) Application, which is clearly shown by the record in this case, which petitioner has attached. Even the Courts of this very circuit has held that counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, Coles v. Peyton, 389 F.2d. 224 (4th Cir. 1968). The ABA Code of Professional Conduct, E.C. 2-30, cautions that a lawyer should not accept employment when he is unable to render competent service. The ABA Code, D.R. 6-10 (a), further provides that once a case has been accepted, a lawyer shall not handle a legal matter without preparation adequate in the circumstances, Via v. Superintendent, 643 F.2d. 167 (6th Cir. 1981).

Inspite, of these requirements counsel failed to protect petitioner's interest in court. Counsels action certainly seems shocking to the universal sense of justice. Counsel's actions at the hearing fail well below the reasonable norms of professionalism. The court held in Murray v. Carrier, 106 S.Ct. 2639 (1986); "that [ilf [a] procedural default is the result of ineffective assistance of counsel, the Sixth Amendment...requires that responsibility for the default be imputed to the [government]". Petitioner's counsel failed to put forth any colorable arguments that would substantiate petitioner's cause before the court. Counsels outright refusal to argue the allegations petitioner wanted presented constitutes a denial of fundamental fairness, especially here where counsel failed to present any reasonable or sound defense. The court's failure to afford petitioner an opportunity to be heard is also a violation of the dictates of Price supra,; For the afore-mentioned reasons the PCR Act is no-

longer adequate to test the legality of petitioner's detention.

This court further held that "petitioner could have raised the allegations now alleged in his May (2003-CP-26-3207)", concluding that petitioner failed to raise these claims in May 2003 application was the result of clearly erroneous facts. Petitioner in fact raised each current allegation with exception to the [Retroactive Misjoinder] claim. It was petitioner's belief that he would have been afforded the opportunity to present the retroactive misjoinder claim at the PCR Hearing of the 2003 Application, atleast that was the information that counsel relayed to petitioner. Furthermore, petitioner was denied any chance of making his case at that hearing, as the record clearly reflects.

Dismissal is not appropriate in petitioner's case because the successive application doctrine is not applicable here because all current grounds for relief were indeed presented in the prior application (original subsequent application 2003-CP-26-3207). The respondent's as well as this court concedes that petitioner could have argued these allegations at the 2003 application hearing, yet, at the hearing the respondent's presented a preliminary motion for dismissal, alleging both statutory limitations violations and successive application. The Court granted the Respondent's Motion without allowing petitioner an opportunity to develop his case before the court. Had petitioner been afforded an opportunity he would have indeed established the basis of in his claims in the PCR Court at the hearing of the 2003 Application. The actions of the PCR Court precluded the development of facts necessary to constitute petitioner's innocence. The court has long held that at a minimum, "the ends of justice will demand consideration of the merits of a claim on a successive petition, where there is a colorable showing of factual innocence". Moore v.

Kemp, 824 F.2d. 847 (11th Cir. 1987); Kuhlmann v. Wilson, 106 S.Ct. 2616 (1986).

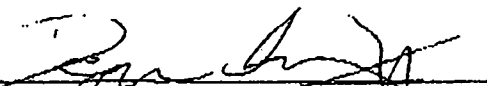
In Sanders v. U.S., 83 S.Ct. 1068 (1963); The Supreme Court held: "even if some ground was rejected on the merits in a prior application, it is open to the applicant to show that the 'ends of justice' would be served by permitting the redetermination of the ground. If factual issues are involved, the applicant is entitled to a new hearing on the prior application, upon showing that the evidentiary hearing was not 'full and fair'. If purely legal questions are involved, the applicant may be entitled to a new hearing upon showing an intervening change in law or some other justification for having failed to raise a crucial point or argument in the prior application."

C O N C L U S I O N

Petitioner having met the burden placed upon him by this Hon. Court and the Respondents, now respectfully request and forever pray that this court vacate the 'CONDITIONAL ORDER OF DISMISSAL'. Petitioner further request that this court schedule a hearing to decide this matter, if the record before this court is insufficient for actual determination of the relevant factors. WHEREFORE, it should be apparent that the dismissal of petitioner's case does not serve the 'ENDS OF JUSTICE'.....

Respectfully Submitted,

Dated: 11-25-08

s/ 
 Roger S. Leggett #243366
 Lee C.I. / Dar. South #2213
 990 Wisacky Hwy.
 Bishopville, S.C. 29010

A F F A D I V I T
O F
S E R V I C E
B Y
M A I L

I, Roger S. Legette, #243366; an inmate incarcerated at Lee Correctional Institution, South Carolina Dept. of Corr.; do hereby affirm that ONE COPY OF PETITION CAPTIONED 'PETITION OF FACTS' was placed into the hands of prison officials for deposit in the United States Mail, with the first class postage duly affixed and a return address clearly indicated on the envelope; for service on the following person(s):

- (1) Office of the Attorney General
Attn: Christina J. Catoe, Esq.
P.O. Box 11549
Columbia, S.C. 29211
- (2) Melanie Huggins, Clerk
Horry Co. Clerk of Court
Horry Co. Courthouse
P.O. Box 677
Conway, S.C. 29528-0677

FILED
HORRY COUNTY
2008 NOV 26 AM 10:12
MELANIE HUGGINS
CLERK OF COURT

Respectfully Submitted,


s/ Roger S. Legette #243366

Sworn to and subscribed before me
on this 25 day of Nov., 2008.

s/ Delna Jones
Notary of Public for South Carolina

My Commission Expires: 11-4-2015

A T T A C H M E N T S
S H E E T S

South Carolina
 by of HARRY

IN THE COURT OF COMMON PLEAS
 CA: 2003-CP-26-3207

Roger Syntell Legette, #243366
 Applicant,

MOTION TO AMEND P.C.R.

-vs-

APPLICATION

State of South Carolina,
 Respondent,

PURSUANT TO RULE 71.1(d)
 of South Carolina Rules of
 Civ. Proc.

NOW COMES APPLICANT ROGER S. LEGETTE, Pursuant to SOUTH CAROLINA RULES CIV. PROC., Rule 71.1(d); respectfully requesting this Court to Amend his post conviction application. This amendment is necessary for the applicant to be able to perfect his case before the Court. Applicant is aware that he should have allowed his lawyer to present this Motion to the Court but applicant is sure that appointed counsel would raise the following issue. Applicant request that his application reflect the following amendment:

(I) Whether the Fruit of the Poisonous Tree Doctrine apply to Applicant, with respect to evidence illegally admitted at Applicant's trial....

WHEREFORE, Applicant will forever pray that this Court Amended his application for POST CONVICTION RELIEF.

DATED: MARCH 25, 2004

Respectfully Submitted,

Roger Syntell Legette #243366
 Evans Corr. Inst.

Santee-A, 187
 610 Hwy. #9
 Bennettsville, S.C. 29512

Sworn to and Subscribed before me
 on this 25th day of MARCH, 2004.

Oscar W. Bunker

HARRY COUNTY CLERK OF COURT

BY A. Daniel

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT
03-CP-26-3207

Roger S. Legette,)
Plaintiff,) TRANSCRIPT OF RECORD
-versus-) January 20, 2005
The State,)
Defendant.)

B E F O R E:

Honorable Paula H. Thomas
Horry County Courthouse
Conway, South Carolina

A P P E A R A N C E S:

Wesley Locklair, Esquire
Attorney for Plaintiff

Christopher L. Newton, Esquire
Attorney for the State

Grace L. Hurley, CVR-CM
Official Reporter

Legette v. State (1-20-05)

20 3

1 (On the record, Thursday, January 20, 2005.)

2 MR. NEWTON: Judge, this is the case of Roger S.
3 Legette versus State of South Carolina. Mr. Legette is
4 represented by Mr. Wesley Locklair, and the State has a
5 preliminary motion on this case relating to the statute of
6 limitations ---

7 THE COURT: Be glad to hear from you.

8 MR. NEWTON: --- and as a successive application.

9 THE COURT: All right.

10 MR. NEWTON: Now, Your Honor, I can give you the time
11 line of this case.

12 THE COURT: Yes, sir.

13 MR. NEWTON: Okay, Your Honor, this Applicant
14 originally underwent a trial in August, August 5th of 1997,
15 and he was found guilty of murder and possession of a
16 weapon during a violent crime. He was sentenced to life
17 for murder and five years for the possession of a weapon,
18 those sentences running concurrently.

19 He filed a timely notice of appeal. The South
20 Carolina Supreme Court affirmed his convictions. On
21 November 3rd of 1999 he subsequently filed an application
22 for post conviction relief. On April 27th of the year 2000
23 the application was denied and dismissed by order on June
24 27th, 2002.

25 There was an appeal filed of that dismissal. The

21

4

Legette v. State (1-20-05)

1 Supreme Court vacated the Applicant's conviction for
2 possession of a weapon during the commission of a violent
3 crime during that appeal but left his murder sentence
4 untouched. That was on February 24th of 2004.

5 There was another application filed on April 19th of
6 2001 while the appeal was still in process and another
7 hearing was held. That application was denied by a written
8 order on August 14th of 2000 [sic].

9 THE COURT: I'm surprised it was heard if there was
10 ---

11 MR. NEWTON: I believe it was, I believe it was
12 denied based on a motion by the State.

13 THE COURT: All right.

14 MR. NEWTON: But that was on August 14th of 2002 and
15 the Applicant did not appeal that second PCR denial.

16 Your Honor, on that basis this application itself was
17 filed on May 29th, 2003, again before the appeal process
18 for the first PCR had ended and, Your Honor, on that basis
19 the State would move to dismiss this based on a failure to
20 file within the statute of limitations and that it is a
21 successive application.

22 THE COURT: All right.

23 MR. LOCKLAIR: May it please the Court, Your Honor.
24 First to clarify the two previous PCRs, they were two
25 separate ones because he had some stuff that was in family

1 court and then some stuff that had been waived up to
2 General Sessions; and so, they were heard on two separate
3 occasions, apparently, is what he told me. We didn't have
4 transcripts from those original two, but ---

5 THE COURT: I wouldn't imagine that I would get a list
6 of anything he's done on family court in regard to this
7 case.

8 MR. NEWTON: Excuse me, Your Honor, I think this case
9 was filed ---

10 THE COURT: Any of these dates?

11 MR. NEWTON: --- this case was filed on his murder
12 conviction in General Sessions court.

13 THE COURT: And so, the dates that you're giving me
14 for the PCRs were in this particular case and the murder
15 case.

16 MR. NEWTON: Your Honor, the -- right, Your Honor.
17 I believe one of his prior PCRs ---

18 MR. LOCKLAIR: I can correct it, Your Honor. One was
19 on a, one was on the waiver hearing and one was on the
20 trial. One was on the waiver for family court and one was
21 on the trial.

22 MR. NEWTON: I believe that's correct, Your Honor.

23 MR. LOCKLAIR: Your Honor, obviously we don't have an
24 argument with the dates of when the things were filed. Mr.
25 Legette would just allege that he didn't have a chance to

Legette v. State (1-20-05)

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1 adequately assert the grounds for relief in his original
2 applications and that he would like to have them fully
3 heard and adjudicated. Basically his complaints in this
4 application deal with fruits of the poisonous tree from a
5 statement that he had given and some evidence that was
6 obtained, along with some failure to give certain jury
7 instructions and he feels they weren't properly, fully
8 presented at the previous PCR applications; and therefore,
9 they should be allowed to be heard.

10 THE COURT: So, there's nothing that sets it -- I
11 mean, he's failed to meet his statute of limitations.
12 Would you agree to that?

13 MR. LOCKLAIR: Yes, ma'am, I would agree that there's,
14 under the statute there's no exception that he's qualified
15 for, Your Honor.

16 THE COURT: It's -- right. Okay, that's, that was my
17 next question. He's failed to meet that statute of
18 limitations. My next question is do you have any reason
19 why we can go outside, newly discovered evidence, anything
20 why we would go outside the statute of limitations?

21 MR. LOCKLAIR: Your Honor, he's not been able to
22 provide me with one. The only grounds is an inadequate
23 presentation. There hasn't been any specific new evidence
24 as far as what would be considered legal evidence that has
25 arisen that would qualify under the statute.

1 THE COURT: Okay, all right. Anything -- you were
2 speaking up. Don't speak directly to me. Talk to your
3 attorney if there's anything that you want him to add.

4 MR. LEGETTE: All right.

5 (Mr. Locklair and Mr. Legette confer.)

6 MR. LOCKLAIR: Your Honor, he was trying to point out
7 something in the statute to me, but it's something that I'd
8 have to explain to him in the back. It's something that if
9 the Court would like me to take a break to talk to him
10 about again or if you'd like to go ahead and rule, but it's
11 something that I don't think unfortunately for him applies
12 under the statute as an exception.

13 THE COURT: All right, and so, there is no exception
14 then. Is that what you're conceding?

15 MR. LOCKLAIR: Yes, ma'am.

16 THE COURT: All right, I respectfully deny the PCR
17 application as -- on the grounds of outside the statute of
18 limitations and successive. Good luck, sir.

19 MR. LOCKLAIR: Thank you, Your Honor.

20 MR. LEGETTE: Could I ask a question to the Court?

21 MR. LOCKLAIR: I'll go back and talk to you.

22 MR. LEGETTE: I mean, I didn't get to speak to the
23 Court.

24 THE COURT: Let him talk to you. He'll explain to
25 you.

25

Legette v. State (1-20-05)

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(Adjourned.)

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STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Roger S. Legette, # 243366,

Petitioner,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

COPY

2008-CP-26-7535

FINAL ORDER OF DISMISSAL
Statute of Limitations & Successive

DEC 15 2008

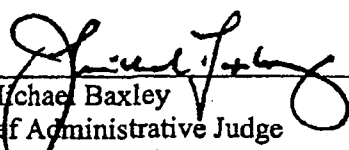
This matter came before the Court by way of a "Petition for Writ of Error Coram Nobis" filed September 15, 2008, by Roger S. Legette. Respondent made its Return and Motion to Dismiss on October 15, 2008, requesting that the Petition be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal dated October 20, 2008, construing the action as an Application for post-conviction relief, and provisionally denying and dismissing this action, while giving the Applicant twenty days from the date of service of the Order in which to show why the conditional dismissal should not become final. Incorporated herein by reference is an Affidavit of Service dated November 6, 2008, personally serving the Conditional Order of Dismissal upon the Applicant at Lee Correctional Institution.

Applicant has failed to serve or file a response to the Conditional Order of Dismissal within the applicable time period. Therefore, this Court 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, the Application for PCR is hereby **DENIED** and **DISMISSED** with prejudice.

This Court hereby directs the Applicant's attention to Rules 203 and 227, South Carolina Appellate Court Rules, for the appropriate procedures to be followed in order to commence an appeal from this Order. A Notice of Appeal must be served within **thirty (30) days** of the service of this Order to secure appellate review. But see Edith v. State 369 S.C. 408, 632 S.E.2d 844 (2006) (failure to file a response to a conditional order of dismissal will preclude an appeal after final order is issued).

AND, IT IS SO ORDERED this 8th day of December, 2008.



J. Michael Baxley
Chief Administrative Judge
Fifteenth Judicial Circuit

Codway, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

C/A No. 2008-CP-26-7535

Roger S. Legette, #243366,

Petitioner,

-vs-

State of South Carolina,

Respondent.

M O T I O

T O

V A C A T E

O R D E R

2009 JAN-9 AM 10:32
CLERK OF COURT
HARRIS COUNTY

Petitioner respectfully contends that this Honorable Court must vacate it's Final Order of Dismissal signed on December 8th, 2008; Served on petitioner on December 30th, 2008.

Petitioner brings this Motion pursuant to S.C. RULES OF CIVIL PROC. Rule 60(a); In the case at hand this Honorable Court has held that petitioner has 'failed to serve or file a response to the Conditional Order of Dismissal within the applicable time period'.

Petitioner argues to the contrary stating that he was allotted twenty(20) days to inform the court of any reasons why the Conditional Order should not become Final.....

Petitioner respectfully contends that he filed a Motion captioned 'PETITION OF FACTS' with the Horry County Clerk of Court and the Office of the Attorney General on November 25th, 2008. On November 26th, 2008, Horry Co. Clerk of Court filed said Motion in the Court of Common Pleas. As is indicated in the Court's Final Order of Dismissal; petitioner was served with the Conditional Order on November 6th, 2008, which clearly means that the twenty(20) day deadline for making a response was Nov.

26th, 2008, which is the exact date that said Motion was filed in Horry County. Enclosed herein are filed stamped copies of the above-mentioned Motion.

Having made this Motion petitioner believes he is entitled to the requested relief as a prerequisite to the Court's unintentional failure to examine the merits of his Motion captioned 'PETITION OF FACTS'...

Furthermore, petitioner would argue that his Motion was timely filed, and as a matter of law he is entitled to have this Honorable Court address the merits of his claims.

WHEREFORE, petitioner should be granted the requested relief as well as a hearing on the claims alleged in his Writ of Error 'Coram Nobis'.

Respectfully Submitted,

Dated: JAN. 7th, 2009



Roger S. Legette #243366
Lee Co. I. / Dar. South #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

A F F A D I V I T
O F
S E R V I C E
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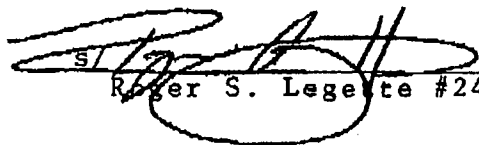
I, Roger S. Legette, #243366; an inmate incarcerated at Lee C.I. in the South Carolina Department of Corrections; do hereby affirm that ONE MOTION TO VACATE ORDER, WAS PLACED INTO THE HANDS OF PRISON OFFICIAL for deposit in the United States Mail, with the First Class Postage duly affixed and a return address clearly indicated on the envelope; for service on the following person(s):

Melanie Huggins, Clerk
Horry Co. Courthouse
P.O. BOX 677
Conway, S.C. 29528-0677

2009 JAN -9 AM 10:32
MELANIE HUGGINS
CLERK OF COURT
HORRY COUNTY

Respectfully Submitted,

Dated: 1-8-09


s/ Roger S. Legette #243366

* Sworn to and Subscribed before me
on this 8 day of Dec., 2009.

Notary of Public for South Carolina

s/ L. Bracy
My Commission Expires: 3/16/11

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

Roger S. Legette, # 243366,

2008-CP-26-7535

Petitioner,

v.

**ORDER VACATING AND REPLACING
THE COURT'S DECEMBER 8, 2008
FINAL ORDER OF DISMISSAL**

State of South Carolina,

Respondent.

This matter comes before the Court by way of a "Petition for Writ of Error Coram Nobis" filed September 15, 2008, by Roger S. Legette. Respondent made its Return and Motion to Dismiss on October 15, 2008, requesting that the Petition 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 dated October 20, 2008, provisionally denying and dismissing the action, construing it as an Application for post-conviction relief, and giving Petitioner twenty days from the date of service of the Order in which to show why the conditional dismissal should not become final. Petitioner was personally served with the Conditional Order at Lee Correctional Institution on November 6, 2008.

On November 26, 2008, Petitioner filed a document with the Horry County Clerk of Court captioned "Petition of Facts." Petitioner states that he served this document upon the Office of the Attorney General on November 25, 2008. Thereafter, unaware of the Petitioner's November 26, 2008 filing, this Court issued a Final Order of Dismissal dated December 8, 2008. This Order was served upon Petitioner on December 30, 2008. On January 7, 2009, Petitioner submitted a Motion to vacate this Order. This Court hereby **GRANTS** the Petitioner's Motion to

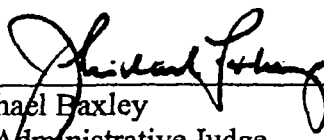
vacate the December 8, 2008 Final Order of Dismissal, so as to give full consideration to the Petitioner's timely response to the Conditional Order of Dismissal.

In his Petition of Facts, Mr. Legette asserts that the PCR Act is inadequate to test the legality of his detention, and he cites to several federal cases to support his assertion. However, these cases do not interpret South Carolina law or the South Carolina Post-Conviction Relief Act. South Carolina law is clear that the PCR Act is not rendered "unavailable or inadequate" merely because an application might be dismissed as procedurally barred. Gibson v. State, 329 S.C. 37, 495 S.E.2d 426 (1998). Petitioner also asserts that his prior PCR counsel failed to protect his rights and that his inactions precluded Petitioner from having a full and fair hearing. This is not a claim that is recognized as a basis for permitting a successive action in these circumstances. See Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991); see also Pennsylvania v. Finley, 481 U.S. 551 (1987) (no constitutional right to counsel in PCR proceedings). This Court cannot engage in an exploration of why Petitioner's grounds were not raised or fully litigated in his prior actions; it is sufficient that they could have been fully raised, but were not. See Graham v. State, 378 S.C. 1, 661 S.E.2d 337 (2008). Petitioner admits that he previously raised, or had the opportunity to raise, the same issues, and therefore, the claims are clearly impermissibly successive. Therefore, this Court must find 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 above and in the Court's Conditional Order of Dismissal, the action is hereby **DENIED** and **DISMISSED** with prejudice.

This Court hereby directs Petitioner's attention to Rules 203 and 227, South Carolina Appellate Court Rules, for the appropriate procedures to be followed in order to commence an appeal from this Order. A Notice of Appeal must be filed with the South Carolina Supreme Court, and properly served, **within thirty (30) days** of the service of this Order to secure appellate review.

AND, IT IS SO ORDERED this 28th day of JANUARY, 2009.



J. Michael Baxley
Chief Administrative Judge
Fifteenth Judicial Circuit

CONWAY, South Carolina

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT**RECEIVED**

APPEAL FROM HORRY COUNTY

COURT OF COMMON PLEAS

JAN 30 2009

J. Michael Baxley, Circuit Court Judge

S.C. SUPREME COURT

CASE No. 2008-CP-26-7535

Roger S. Legette #243366,

Appellant,

-VS-

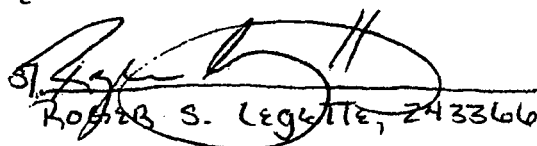
THE STATE OF SOUTH CAROLINA,

Respondent.

NOTICE OF APPEAL

Roger S. Legette, Pro-se, appeals the Order of the Honorable J. Michael Baxley, dated December 8th 2008. Appellant received written notice of entry of this order from the Court on December 30, 2008 by way of the South Carolina Attorney General's office.

Respectfully Submitted,

Dated: Jan. 28, 2009.


ROGER S. LEGETTE, 243366

PRO-SE

PROOF OF SERVICE BY MAIL

I, Roger Leggett # 243366, Herby affirm that I have on this Jan. 28th, 2009, served upon the Horry Co. Clerk of Court and the S.C. Supreme Court a "NOTICE OF APPEAL" By delivering said papers in to the hands of prison officials, for deposit in the United States Mail for service on the following person

1) Melaine Huggins, Clerk
Horry Co. Courthouse
P.O. Box 677
Conway, S.C. 29528

2) Daniel E. Shearouse, Clerk
SOUTH CAROLINA SUPREME COURT
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED

JAN 30 2009

S.C. SUPREME COURT

Dated: Jan. 28, 2009.

Respectfully Submitted,

~~ST [Signature]~~
Roger S. Leggett # 243366

Lee C.I. / Darlington S. 2213
990 WISACKY HWY.
Bishopville, S.C. 29010

The Supreme Court of South Carolina

Roger S. Legette, #243366, Petitioner,

v.

State of South Carolina, Respondent.

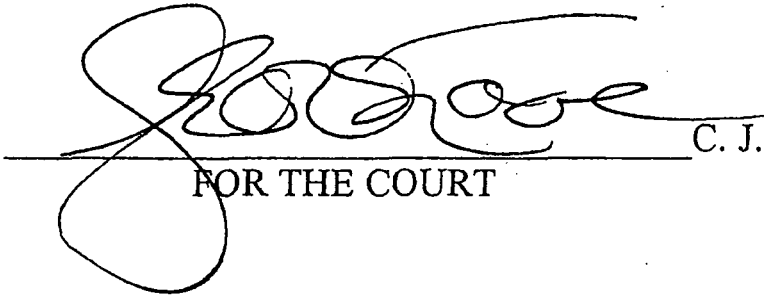
The Honorable J. Michael Baxley
Horry County
Trial Court Case No. 2008-CP-26-7535

ORDER

On October 20, 2008, the circuit court issued a conditional order of dismissal in this post-conviction relief (PCR) case. This order gave petitioner twenty days to show cause why the conditional order should not become final. According to the final order of dismissal, Petitioner did not file a response to the conditional order of dismissal, and the circuit court issued the final order of dismissal on December 8, 2008. Petitioner has now served and filed a notice of appeal from this last order.

Where, as here, a PCR applicant fails to file a response to a conditional order of dismissal, this Court has held that the applicant cannot

appeal. Edith v. State, 369 S.C. 408, 632 S.E.2d 844 (2006). Accordingly, the notice of appeal is dismissed. The remittitur will be sent as provided by Rule 221, SCACR.

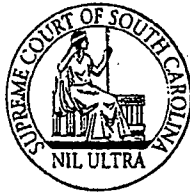


C. J.
FOR THE COURT

Columbia, South Carolina

February 3, 2009

cc: Roger S. Legette #243366
Assistant Attorney General Christina J. Catoe



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1489

February 19, 2009

REMITTITUR

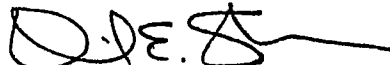
The Honorable Melanie Huggins
Government & Justice Center
PO Box 677
Conway, SC 29528-0677

Re: Legette, Roger S. v. The State – 2008-CP-26-07535

Dear Ms. Huggins:

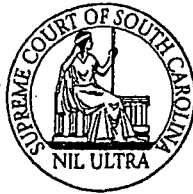
The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,


CLERK

DES/jj

cc: Roger S. Legette #243366
Assistant Attorney General Christina J. Catoe



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 23, 2009

Roger S. Legette #243366
Lee Correctional Institution
990 Wasacky Highway
Bishopville, SC 29010

Re: Legette, Roger S. v. The State

Dear Mr. Legette:

This responds to your Motion for Reconsideration dated February 17, 2009. This motion was received by this Court on February 20, 2009.

The order dismissing the appeal in this matter was filed on February 3, 2009. Under Rule 221(a), SCACR, any petition for rehearing in this matter must have been actually received by this Court on or before February 18, 2009. Therefore, your request for rehearing is untimely.

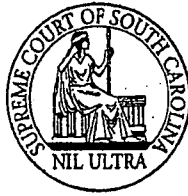
Further the remittitur in this matter (copy attached) was sent to the circuit court on February 19, 2009. The sending of the remittitur ended this Court's jurisdiction over this case. Accordingly, no action will be taken on your motion.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/jj

cc: Assistant Attorney General Christina J. Catoe



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

February 27, 2009

Mr. Roger S. Legette #243366
Lee Correctional Institution
990 Wasacky Highway
Bishopville, SC 29010

Re: Legette, Roger S. v. The State

Dear Mr. Legette:

I want to follow up on the letter this office sent to you February 23, 2009. As indicated by that letter, the remittitur has been sent regarding the notice of appeal from the order dated December 8, 2008. The sending of the remittitur has ended appellate jurisdiction regarding that notice of appeal.

If, of course, you want to seek review from the circuit court's order dated January 28, 2009, which vacated the order of December 8, 2008, and denied your request for post-conviction relief, then you will need to timely serve and file a notice of appeal from that order. I note that the judge's order of January 28th advised you of your right to serve and file a notice of appeal from that order.

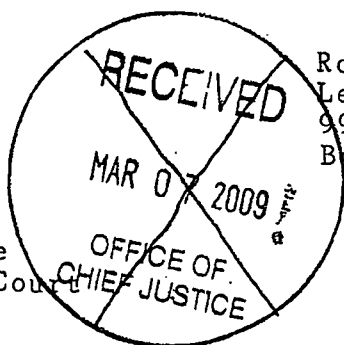
Very truly yours,



CLERK

cc: Assistant Attorney General Christina J. Catoe

Jean Toal, Chief Justice
South Carolina Supreme Court
Post Office Box 11330
Columbia, S.C. 29211



Roger S. Legette, #243366
Lee Corr. Inst./ Dar. S. 2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

RECEIVED

MAR - 5 2009

SC SUPREME COURT 2009

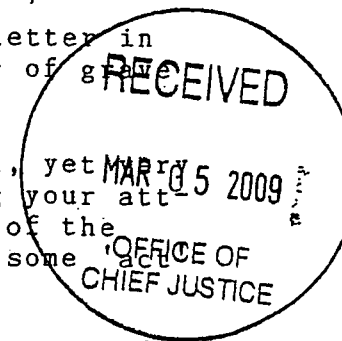
LEECI MAIL ROOM

IN RE: Legette v. State, (08-CP-30-5935)

Dear Mrs. Toal,

I'm respectfully forwarding to you at this time a letter in quest of attaining your immediate assistance in a matter of great importance (MY FREEDOM)!

My plight is one that is very confusioning, complex, yet clear. In explaining this matter I'll start by directing your attention to the fact that I have complied with all rules of the court. Only to be denied a chance at justice because of some that is well beyond my immediate control.



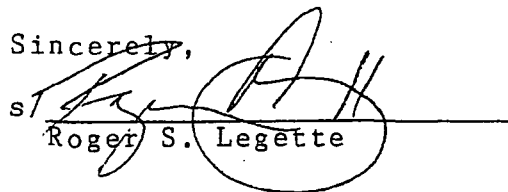
Here, in the present case the Court of Common Pleas entered an 'ORDER' dated December 8th, 2008; Dismissing my Appeal..... I immediately moved to the Court of Common Pleas to Vacate its final order of Dismissal, in which the Court of Common Pleas eventually did do. On Janurary 28th, 2009 the Court Vacated its Order of Dismissal. I have sent to this Hon. Court copies of all material in my possession, in hope of correcting the record.

I have since been advised that my Notice of Appeal has been dismissed for failure to comply with the mandates of Edith v. State, 369 S.C. 408, 632 S.E.2d 844 (2006). This is the exact reason the Court of Common Pleas vacated its prior 'Order', here the Lower Court made a mistake which it later corrected, however, the pleadings in this Hon. Court continued as if nothing has changed, when infact everything has changed, for the very order this Court has relied upon to make its findings is an order that nolonger has any footing for it was vacated by the very court that entered it, which certainly would make the 'order' moot.....

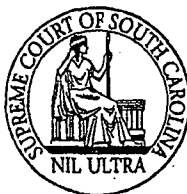
I filed with this Court a Motion for Reconsideration and Rein-statement of Notice of Appeal upon the basis that the Court acted without all documents of relevance being before the Court. In any event I feel that the clerk of Court (Daniel E. Shearouse) acted in a manner contrary to the evidence presented along with the Motion for Reconsideration.

Chief Justice Toal, I'm respectfully requesting that you look into this matter immediately, this is the only avenue I have left in which to seek justice.

Sincerely,

st. 
Roger S. Legette

Date: March 2, 2009



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 5, 2009

Mr. Roger S. Legette #243366
Lee Correctional Institution
990 Wasacky Highway
Bishopville, SC 29010

Re: Legette, Roger S. v. The State

Dear Mr. Legette:

This responds to your letter to Chief Justice Toal dated March 2, 2008. As I explained in my letter of February 27, 2009 (copy enclosed), if you are aggrieved by the circuit court's order of January 28, 2009, then you should timely serve and file a notice of appeal from that order.

I do caution you that if you serve a notice of appeal you must provide proof of service showing that the notice of appeal has been served on opposing counsel. Rules 227 and 203, SCACR. Please note that the time to serve the notice of appeal cannot be extended. Rule 231(b), SCACR.

Finally, any correspondence or filings that you make with this Court regarding this case must be served on opposing counsel. This Court cannot act on ex parte communications.

Very truly yours,



CLERK

Enclosure

cc: Assistant Attorney General Christina J. Catoe

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
J. MICHAEL BAXLEY, JUDGE

Roger S. Legette, #243366,

Appellant,

-VS-

State of South Carolina,

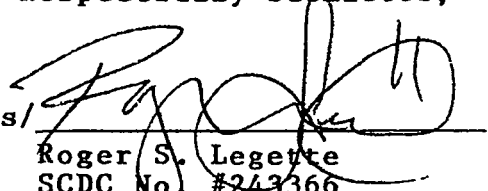
Respondent.

NOTICE OF APPEAL

Please be advised that the above-named appellant does hereby appeal the decision of the Horry Co. Court of Common Pleas entered on January 28th, 2009, by the Hon. Judge J. Michael Baxley.

Respectfully Submitted,

Dated: 3/11/09

s/ 

Roger S. Legette
SCDC No. #243366
Lee Corr. Institution
Darlington South #2213
990 Wisacky Hwy.
Bishopville, S.C. 29010

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Roger S. Legette, #243366,

Appellant,

-vs-

State of South Carolina,

Respondent.

P R O O F

O F

S E R V I C E

I, Roger S. Legette, #243366, do hereby affirm that I am presently incarcerated at Lee Corr. Inst. in Bishopville S.C.; I am the party in this matter. Enclosed is ONE COPY OF NOTICE OF APPEAL. I swear that said documents was delivered into the hands of Prison Officials for deposit in the United States Mail with the First Class Postage duly affixed and a return address clearly indicated on the envelope, for service on the following person(s):

Christina J. Catoe
 Assistant Atty. General
 Post Office Box 11549
 Columbia, S.C. 29211

Respectfully Submitted,

s/ 
 Roger S. Legette, #243366
 Lee C.I. / Dar. S. #2213
 990 Wisacky Hwy.
 Bishopville, S.C. 29010

Dated: 3/11/09



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

March 13, 2009

Roger S. Legette #243366
Lee Correctional Institution
990 Wasacky Highway
Bishopville, SC 29010

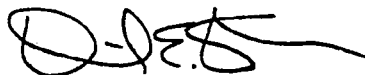
Re: Legette, Roger S. v. The State

Dear Mr. Legette:

This Office has received a notice of appeal in the above post-conviction relief action. Since the order of the circuit court determined that this action is barred as being successive and as being untimely under the statute of limitations, Rule 227(c), SCACR, requires you to provide a written explanation as to why this determination was improper. This explanation must contain sufficient facts, argument and citation to legal authority to show that there is an arguable basis for asserting that the determination by the lower court was improper. The failure to make a sufficient showing may result in the dismissal of this matter.

I ask that you provide the explanation required by Rule 227(c) within twenty (20) days of the date of this letter.

Very truly yours,



CLERK

DES/jj

cc: Appellate Defense
Assistant Attorney General Christina J. Catoe

The Supreme Court of South Carolina

Roger S. Legette,

Petitioner,

v.

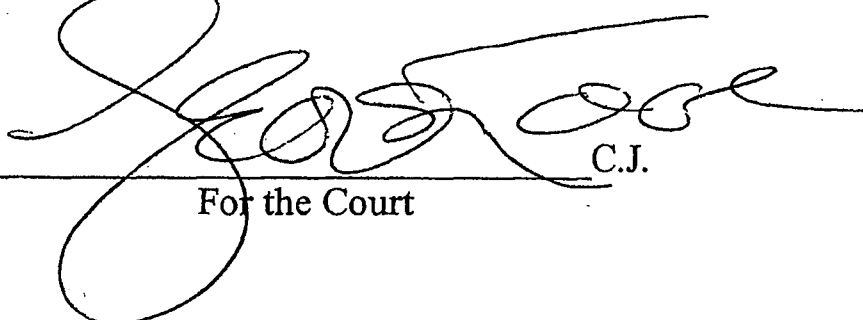
State of South Carolina,

Respondent.

The Honorable J. Michael Baxley
Horry County
Trial Court Case No. 2008-CP-26-07535

ORDER of DISMISSAL

In the explanation required by Rule 227(c), SCACR, petitioner has failed to show that there is an arguable basis for asserting that the determination by the lower court was improper. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.



C.J.
For the Court

Columbia, South Carolina

April 9, 2009

cc: Appellate Defense
Roger S. Legette #243366
Assistant Attorney General Christina J. Catoe



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080
FAX (803) 734-1499

May 14, 2009

Roger S. Legette #243366
Lee Correctional Institution
990 Wasacky Highway
Bishopville, SC 29010

Re: Legette, Roger S. v. The State

Dear Mr. Legette:

The following Order has been endorsed on your Petition for Rehearing in the above entitled case on appeal.

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.
For the Court

May 14, 2009."

The remittitur will be sent to the lower court as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

Daniel E. Shearouse
CLERK

DES/jj

cc: Appellate Defense
Assistant Attorney General Christina J. Catoe



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

May 14, 2009

REMITTITUR

The Honorable Melanie Huggins
Government & Justice Center
PO Box 677
Conway, SC 29528-0677

Re: Legette, Roger S. v. The State – 2008-CP-26-07535

Dear Ms. Huggins:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Very truly yours,

Daniel E. Shearouse

CLERK

DES/jj

cc: Appellate Defense
Roger S. Legette #243366
Assistant Attorney General Christina J. Catoe

2010-10314

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of Horry)Norma Bigbee Leggett #243366)

Full name and prison number, if any, of applicant)

v.)

STATE OF SOUTH CAROLINA)ATTORNEY GEN. HEAVY MENARD)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

RECEIVED

OCT 8 2010

MAIL ROOM

LIEBER C.I.

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (verbally, 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 it clear to which question any such continued answer refers.

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

If the applicant 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 applicant was convicted.

1. Place of detention S.C. Dept. of Corr.; Lieber Corr. Inst.,
Ridgelyville, S.C. 29477
2. Name and location of Court which imposed sentence Horry Co. Court of General
Session, Conway, S.C. 29526
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 96-65-26-2909, MURDER
 - (b) _____
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) August 5th, 1997 - life without Parole
 - (b) _____
 - (c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty N/A
- (b) after a plea of not guilty YES
- (c) after a plea of nolo contendere N/A

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

YES

7. If you answered "yes" to (6), list

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

- i. South Carolina Supreme Court.
- ii. U.S. Supreme Court.
- iii. _____

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

- i. Denied.
- ii. Denied.
- iii. _____

(c) the date of each such result:

- i. Nov. 3rd, 1999
- ii. April 24th, 2000
- iii. _____

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

- i. 99-MO-072
- ii. No. 99-81642
- iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

- (a) _____
- (b) N/A
- (c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Belcher violation (Belcher v. State) # Op No. 216729
- ~~(b)~~ The implied Malice instruction in Belcher Suprem. raises
- ~~(c)~~ a constitutional question as to the 14th Amendments
- Due Process and Equal Protection clauses which requires
- full retroactivity.

10. State concisely and in the same order the facts which support each of the grounds set out in (9)

(a) SEE ATTACHMENT

(b) N/A

(c) N/A

11. 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 petitions in State or Federal Courts for habeas corpus or post-conviction relief?

YES

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)

NO

(d) any other petitions, motions or applications in this or any other Court?

YES

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. (P.C.B.) Horry Co. Court of Common Pleas

ii. _____

iii. _____

iv. _____

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

i. (Habeas Corpus) U.S. District Court

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. Denied

ii. Deny

iii. _____

iv. _____

(d) the date of each such disposition:

- i. Denied
- ii. _____
- iii. _____
- iv. _____

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) 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) Belcher v STATE was recently heard by the state
- (b) Supreme Court. Partial Retroactive!
- (c) _____

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

- (a) your arraignment and plea? _____
- (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?
YES
- (e) preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction, which you filed? YES

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

- i. TRIAL (Johnny Goodner)
- ii. POST CONVICTION RELIEF (MATTHEW DOVE)
- iii. APPEAL (Joseph Savitz)

(b) the proceedings at which each such attorney represented you:

- i. TRIAL
- ii. P.C.R.
- iii. APPEAL

18. State clearly the relief you seek in filing this application.

VACATION AND REVERSAL OF CONVICTION AND
SENTENCE.

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

NO

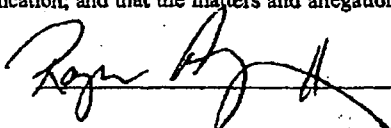
2010-10314

STATE OF SOUTH CAROLINA)

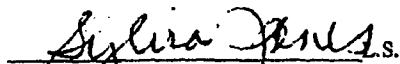
VERIFICATION

COUNTY OF Horry)

I, Rogge Syntell Leggett # 243366, 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.



Sworn to and subscribed before me

This 6th day of Oct, 2010


Notary Public for South Carolina

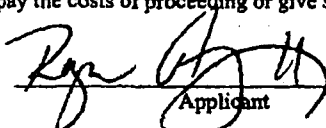
My Commission Expires 1/24/2013

CLERK OF COURT
2010 NOV -3 AM 11:00
COUNTY

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

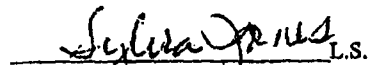
I, Rogge Syntell Leggett # 243366, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty or perjury that the following facts are true:

- (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 proceeding or give security therefor.



Applicant

Sworn to and subscribed before me

This 6th day of Oct, 2010


Notary Public for South Carolina

My Commission Expires: 1/24/2013

THE IMPLIED MALICE INSTRUCTION IN BELCHER SUPRA,
RAISES A CONSTITUTIONAL QUESTION AS TO THE 14TH AMENDMENTS
DUE PROCESS AND EQUAL PROTECTION CLAUSES, WHICH PROVIDES FULL
RETROACTIVITY.

Applicant contends that the trial court committed a reversible error by instructing jury on unconstitutional presumption. It is well established that the court instructs the jury as to the rules of law and that the jury or jurors apply the facts as they find them to those rules. Deft. Pool v U.S., 77 S.Ct. 294 (1957); Spaul v. Hansen v. U.S., 15 S.Ct. 273 (1895).

When a jury instruction is ambiguous and open to an unconstitutional interpretation, the instruction is error, if there is a reasonable likelihood the jury accepted the erroneous interpretation. Jones v. U.S., 119 S.Ct. 2090; Boyd v. California, 110 S.Ct. 1190; Eddy v. Fulcomer, 132 F.2d 916; 119 S.Ct. 2076; U.S. v. Thayer, 201 F.2d 214; 120 S.Ct. 2691.

Jury charge must be clearly articulate relevant legal standard; it must therefore, be structured in such a way as to avoid confusing the jury or misleading the jury. U.S. v. Johnston, 107 F.2d 200. Certainly, the instruction here was capable of misleading the jury. See U.S. v. Egan, 105 S.Ct. 1807. In fact the instruction itself was based on unconstitutional and erroneous legal standards.

Effectively, removing from the jury charge the essential ingredients of the only offense upon which the conviction could truthfully rest. See: Carroll v. California, 109 S.Ct. 2119 (1989); Boyd v. Clark, 106 S.Ct. 2101 (1986);

...Connecticut v. Johnson, 103 S.Ct. 969 (1982); Jackson v. Virginia, 99 S.Ct. 2291 (1979).

The Due Process Clause of the 14th Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 90 S.Ct. 1073; This "bedrock axiomatic and elementary" [constitutional] principle, "prohibits the state from using evidentiary presumptions in a jury charge that have the effect of relieving the state of its burden of persuasion beyond a reasonable doubt of every essential element of a crime." Sandstrom v. Montana, 99 S.Ct. at 2457; Patterson v. New York, 97 S.Ct. 2319 (1977); Mullaney v. Wilbur, 95 S.Ct. 1881 (1975); Merisette v. USA, 72 S.Ct. 240 (1952). The prohibition protects the fundamental value determination of our society, "given voice in Justice Harlan's concurrence in Winship, that "it is far worse to convict an innocent man than to let a guilty man go free." The question now before this court is almost identical to that before the court in Sandstrom supra; WHETHER THE CHALLENGED JURY INSTRUCTION HAD THE EFFECT OF RELIEVING THE STATE OF ITS BURDEN OF PROOF? By creating a mandatory presumption of intent and malice, upon proof by the state of other elements of the offense: see Trial In. pg 337, Lns. 15-25.

In other words, the inference of malice from the use of a deadly weapon is simply an evidentiary fact to be taken into consideration by you the jury, determine along with other evidence in the case and to be given such weight as you the jury, determine that it should receive.

If the evidence should show under the circumstances a deadly weapon was used which took the life of another, then you,

...the jury would have to determine whether under such circumstances the act was malicious.

In short, the implication of malice from proof of the use of a deadly weapon is not required; However, this implication is permitted if after considering all of the facts and circumstances in evidence, you conclude beyond a reasonable doubt that such an inference is proper.

The analysis is straightforward. "The threshold inquiry to determining the constitutional analysis applicable to this kind of instruction (jury) is to determine the nature of the presumption it describes." The court must determine if the challenged portion of the instruction creates a mandatory presumption, or merely a permissive inference, Witte Co. v. United States, 99 S.Ct. 2213 (1979). A mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate facts. A permissive inference suggests to the jury a possible conclusion to be drawn if the state proves predicate facts, but does not require the jury to draw that conclusion.

This analysis "require careful attention to the words actually spoken to the jury, for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction."

Applicant, alleges here that the instruction regarding the use of a deadly weapon, and the latter instruction regarding the use and possession of a weapon during the commission of a violent crime, relieved the state of its burden of proof to both intent and malice. The jury was further instructed that they could only convict applicant

... of possession of a weapon during the commission of a violent crime if they convicted him of murder; Because of this conclusive presumption, the jury was permitted to convict applicant without ever examining the evidence concerning any element of the crimes charged. Such an error deprived applicant of "constitutional rights so basic to a fair trial that the infraction can never be treated as harmless. see Chapman v. California, 37 Oct. 827

When constitutional error occurs in a state criminal trial, federal law places certain limits on state appellate court's disposition on the case. If the error is sufficiently grievous, it must reverse. If the error is less grievous, it also must reverse, unless it declares its conviction beyond a reasonable doubt that the constitutional error was harmless.

Such an exception, regardless of its precise boundaries, does not apply here. Applicant never conceded the issue of intent or malice with respect to either of the COUNTS at issue. As noted above the instruction was not "so ill-suited to both the theory on which the case was tried and the evidence presented," U.S. v. Winter, 663 F.2d. 1120; That it can be deemed harmless.

When a jury is instructed with an unconstitutional presumption, the conviction must be overturned, though there ~~may be~~ ample evidence apart from the presumption to sustain the conviction or verdict. Ballewback v. USA, 66 S.Ct. 402.

HERE, the jury was instructed erroneously, such an instruction resulted in a complete denial of substantial rights so basic to the constitution that it could never be deemed harmless. Reversal is required when a conviction may have been rested on a constitutional impermissible ground, despite

the fact that there may have been a valid alternative ground on which the conviction could have been sustained. Strawberry v. California, 51 S.Ct. 522; Williamson v. North Carolina, 43 S.Ct. 207.

Recently, the South Carolina Supreme Court held in Belcher v. State, Op. No. 26729; "that under our policy-making role in the common law," we hold that the "use of a deadly weapon implied malice instruction has no place in a murder prosecution where evidence is presented that would reduce, mitigate, excuse or justify the killing."

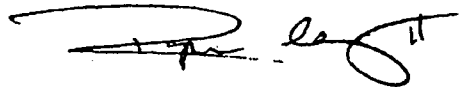
The question now is rather the courts holding in Belcher supra, raises a constitutional issue as to the 14th Amendments 'Due Process' and 'Equal Protection' clauses..... Applicant asserts that the U.S. Supreme Court in both Votes v. Ryan, 430 U.S. 158, and Strawberry supra, addressed this very constitutional concern.

WHERE EVIDENCE for prosecution and evidence for defense presented to jury a conflict which only jury could resolve, it was necessary that no prejudicial evidence be admitted in violation of any rule of evidence law. Wade v. Rehalla, 369 F.2d. 220.

Furthermore, applicant contends that the failure of the South Carolina Supreme Court to extend full retroactivity to the Belcher case, underscores the truism of Due Process; Equal Protection completely contrary to the U.S. Supreme Court's decision in Davis v. U.S., 346 U.S. 228 (1954).

WHEREFORE, applicant is entitled to relief under Post-conviction.

Respectfully Submitted,



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Roger Syndell Legette, # 243366,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-10314

RETURN AND MOTION TO DISMISS

The Respondent, making its Return and Motion to Dismiss to the PCR Application filed November 3, 2010, by Roger Syndell Legette, would respectfully show this Court:

I. – Procedural History

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from Horry County. The Applicant was indicted in December of 1996 for murder, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of twenty-one (1996-GS-26-2809, Counts I - III). Because the Applicant was a minor at the time (born August 30, 1980), a waiver proceeding was held in the Family Court on September 26, 1996 and on October 9, 1996, to determine whether the matter would be transferred to the general sessions court. The Applicant was represented by Barbara W. Pratt, Esquire, and Johnny Gardner, Esquire, in the waiver proceedings. By Amended Order dated April 7, 1997, the Honorable H. T. Abbott, III, transferred jurisdiction of the entire case (including all three charges) to the general sessions court.

Thereafter, on August 4, 1997, the Applicant proceeded to jury trial in the circuit court. He was represented by Johnny Gardner, Esquire. Prior to trial, the State dismissed Count III

(possession of pistol under age 21) of the indictment. On August 5, 1997, the jury found the Applicant guilty on both remaining counts. The Honorable David H. Maring, Sr., sentenced the Applicant to life without parole for murder, and five years, concurrent, for the weapon charge. A timely notice of appeal was filed on the Applicant's behalf, and an Anders appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed the Applicant's convictions and sentences on November 3, 1999. (State v. Legette, 1999-MO-072). Petitioner's request for certiorari was denied by the United States Supreme Court on April 24, 2000.

Mr. Legette filed his first Application for post-conviction relief on April 27, 2000 (2000-CP-26-1962). An evidentiary hearing was held on March 14, 2002, at which the Applicant was present and represented by J. Matthew Dove, Esquire. The Applicant withdrew all of his allegations except for his allegation that the family court did not have jurisdiction to waive the possession of weapon charge (Count II of the indictment) up to the general sessions court. By Order dated June 27, 2002, the Honorable J. Michael Baxley denied and dismissed the Application. However, on February 24, 2003 (2003-MO-014) the South Carolina Supreme Court vacated the Applicant's conviction for possession of a weapon during the commission of a violent crime, finding that the family court did not have jurisdiction to waive that charge up to general sessions court, under Austin v. State, 352 S.C. 473, 575 S.E.2d 547 (2003), because the offense was not enumerated in S.C. Code § 20-7-430(5). That charge was remanded to the family court, and the case was remitted to the circuit court on March 14, 2003.

The Applicant filed his second Application for PCR on April 19, 2001 (2001-CP-26-1911), while the first Application was still pending. An evidentiary hearing was held before the Honorable John L. Breeden, Jr., on November 7, 2001, at which the Applicant was present and represented by Gabriel P. Joseph, Jr., Esquire. In this action, Mr. Legette challenged only the

alleged errors with respect to the trial in the general sessions court. By Order dated September 18, 2002, Judge Breeden denied and dismissed the Application, finding that none of the allegations had merit. The Applicant did not appeal from the dismissal of this PCR.

The Applicant then filed a third PCR Application on May 29, 2003 (2003-CP-26-3207). A hearing on the State's Motion to Dismiss was held on January 20, 2005, before the Honorable Paula H. Thomas. The Applicant was present in court and represented by J. Wesley Locklair, Esquire. Judge Thomas granted the State's Motion to Dismiss, and thereafter dismissed the Application as successive and as barred by the statute of limitations by Order dated February 14, 2005. A timely appeal was filed on the Applicant's behalf, and a Johnson appeal was perfected by Robert M. Pachak, Esquire. The South Carolina Supreme Court denied certiorari on November 14, 2006, and the case was remitted to the circuit court on November 30, 2006.

On September 15, 2008, the Applicant filed a "Petition for Writ of Error Coram Nobis" (2008-CP-26-7535). The State made a Return and Motion to Dismiss on October 15, 2008. On October 20, 2008, the Honorable J. Michael Baxley issued a Conditional Order of Dismissal. This Conditional Order was served upon the Applicant on November 6, 2008. A Final Order of Dismissal was issued on December 8, 2008, and served on December 30, 2008. Thereafter, on January 28, 2009, Judge Baxley issued an Order vacating and replacing the Final Order, because the Final Order erroneously stated that the Applicant failed to submit a response to the Conditional Order of Dismissal. The Applicant filed a timely notice of appeal, but the appeal was denied and dismissed on April 9, 2009, pursuant to Rule 243(c), SCACR (formerly Rule 227(c), SCACR). The matter was thereafter remitted to the circuit court.

Incorporated herein by reference are the records of the Horry County Clerk of Court regarding the murder conviction, Petitioner's previous post-conviction relief and similar files,

including civil action numbers 2000-CP-26-1962, 2001-CP-26-1911, 2003-CP-26-3207, and 2008-CP-26-7535, and Petitioner's previous appellate records. Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II. – Current Allegations

In the current Application, Mr. Legette alleges he is being held in custody unlawfully for the following reasons:

1. Belcher violation – (Belcher v. State) Op. No. 26729 – The implied malice instruction in Belcher, supra, raises a constitutional question as to the 14th Amendment's Due Process and Equal Protection Clauses which requires full retroactivity.

The Applicant states that he is seeking vacation and reversal of his conviction and sentence.

III. - State v. Belcher Does Not Apply Retroactively

Respondent submits that the Applicant's claim fails as a matter of law. The case of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), was decided by the South Carolina Supreme Court on October 12, 2009.¹ It held that, "where evidence is presented that would reduce, mitigate, excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher at 612, 685 S.E.2d at 810. However, the Supreme Court also expressly stated that "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810. Respondent submits that the South Carolina Supreme Court's conclusion that its holding in Belcher does not apply to cases on collateral review does not violate the Applicant's constitutional rights. See State v. Belcher at 612-13, 685 S.E.2d at 810-11; Teague v. Lane, 489 U.S. 288, 316 (1989). Therefore, because Belcher does

¹ Respondent would note that the Application is not timely pursuant to S.C. Code Ann. § 17-27-45(c), since it was filed more than a year past the date of the Belcher opinion.

not apply to the Applicant's PCR case, Respondent moves for summary dismissal of this PCR Application.

IV.

Each and every allegation contained within the application not expressly admitted, qualified, or explained is hereby denied.

V.

WHEREFORE, having made its Return and Motion to Dismiss, the Respondent requests that the Application be summarily dismissed because the claim fails as a matter of law.

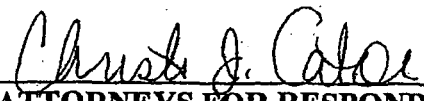
Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

CHRISTINA J. CATOE
Assistant Attorney General


ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

December 30, 2010

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Roger Syndell Legette, # 243366,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

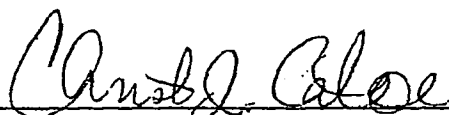
2010-CP-26-10314

CERTIFICATE OF SERVICE BY MAIL

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 State's RETURN AND MOTION TO DISMISS in the above-captioned matter on the following person(s) by depositing in the United States mail, postage prepaid:

**Roger S. Legette, # 243366
Lieber Correctional Institution
P.O. Box 205
Ridgeville, SC 29472**

DATED this 30th day of December, 2010.


Christina J. Catoe
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

STATE OF SOUTH CAROLINA)
County of Horry)

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH JUDICIAL
CIRCUIT

ROGER S. LEGGETT # 243366,
Petitioner,

C/A No. 2010-CP-76-10314

-vs-

MOTION TO ADDRESS ALL
ISSUES / QUESTIONS PRESENTED

STATE OF SOUTH CAROLINA,
Respondent,

Pursuant to S.C. Code Ann.
§ 17-27-80.

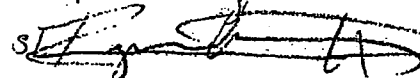
NOW COMES PRO-SE Petitioner Roger S. Leggett # 243366 who herein respectfully petitions this Honorable Court to direct the Attorney General's Office to address [ALL] issues / Questions Presented Pursuant to S.C. Code Ann. § 17-27-80, as decided by the S.C. Supreme Court in Pratt v. State, 423 S.2d 127. THAT EACH and EVERY issues presented / Questions be addressed at any P.C.R. Hearing that is held according to Bryson v. State, 493 S.2d 500 (1997).

Petitioner further asks that each issue / Questions raised herein be addressed by the Court, at any hearing that is held and/or that this Court direct that all issues / Questions be addressed in any order issued by this Court.

FOR THE REQUESTED, petitioner respectfully prays.

Dated: 3/1/11

Respectfully Submitted,



Roger S. Leggett # 243366, Pro-se

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON
IN THE FIFTEENTH JUDICIAL CIRCUIT
C/A No. 2010-CP-26-1034

ROGER S. LEGETTE # 243316,

Applicant,

SUPPLEMENT TO APPLICATION

-vs-

FOR

STATE OF SOUTH CAROLINA,

Respondent,

POST CONVICTION RELIEF

The herein Applicant respectfully has a pending application for Post Conviction Relief which he invokes this Supplement to his Application for Post Conviction Relief, as follows:

This Application for Post Conviction Relief is based on new precedent State v. Belcher, op. no. 26729 October 12th, 2009 that Applicant submits that overturned cases dating back to the year 1894 that involved accidental deaths; or self-defense, which the Applicant submits his jury was charged in his murder conviction with an offense of Accidental death and Involuntary Manslaughter as there included offenses as will be discussed in the facts of this case, herein.

The Applicant further brings to the court's attention as to the express language in the Belcher opinion on p. 8

It is not our ruling, however, will not apply to convictions challenged on Post Conviction Relief. SEE: GENERALLY Teague v. LANE, 489 U.S. 288 (1989)

Applicant submits to this Court that under generally in TEAGUE V. LANE, 489 U.S. 288 (1989) the expressed language is as follows:

Id. at 16, pg. 1062.

6. Courts xxx 100(1)

NEW CONSTITUTIONAL RULES OF CRIMINAL PROCEDURE will not be applicable to those cases which have become final before new rules are announced, unless they fall within exception to general rule. (Per Justice O'Connor, with whom the Chief Justice and two (2) Justices concur, and three (3) Justice concur in part and concur in judgment).

Two (2) exceptions which applicant submits he can meet with the facts of his case:

Two (2) EXCEPTIONS TO THIS GENERAL RULE:

- (1) if it places "CERTAIN KINDS OF PRIMARY, PRIVATE Individual conduct beyond the power of the criminal law-making authority to proscribe", OR - - - - -
- (2) if it requires the observance of "those procedures that are implicit in the concept of ordered liberty".

The second (2) exception is that a new rule should be applied retroactively if it would "alter our understanding of the bedrock procedural elements", thus making it "WATERSHED" case announces a new rule if the results was not dictated by precedent existing at the time the defendant's conviction became final.

Applicant submits that the Malice Instruction in his case is in violation of the controlling Federal standard i.e., clearly established Federal law Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) which applicant submits " was precedent existing at the time the applicant's conviction became final", which would make the case of STATE V. BELCHER, op. no. 26729 Oct. 12th, 2009 a "EXTENSION" OF SANDSTROM SUPRA But also a reaffirmation of the state case Yates v. Aiken, 349 S.E.2d 84, 290 S.C. 291, cert. GRANTED 107 S.Ct. 1101, 480 U.S. 945, 94 L.Ed.2d 788, REVERSED 108 S.Ct. 634, 484 U.S. 211, 98 L.Ed.2d 646.

Full retroactivity, even by collateral attack, should be permitted when ruling establishes that trial court's action is void ab initio or that defendant's conduct was not subject to criminal punishment.

THE QUESTIONS IN THIS SUPPLEMENT APPLICATION FOR POST CONVICTION RELIEF, THAT WARRANTS REVIEW BY THIS COURT ARE AS FOLLOWS: APPLICANT FURTHER REQUEST AN EVIDENTIARY HEARING AND/OR RULING ON EACH QUESTION

(1) IS SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), THE controlling Federal standard is, clearly established Federal Law of the state case STATE V. BELCHER, Op. No. 26729 Oct. 12, 2009?

- (2) IS STATE V. BELCHER, Op. No. 26729 Oct. 12, 2009; an "EXTENSION" of SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)?
- (3) IS STATE V. BELCHER, Op. No. 26729 Oct. 12, 2009; a reaffirmation of the state case YATES V. Aiken, 349 S.E.2d 84, 290 S.2d 231, cert. granted 107 S.Ct. 1601, 480 U.S. 945, 94 L.Ed.2d 788, Reversed 108 S.Ct. 534, 484 U.S. 211, 98 L.Ed.2d 546?
- (4) DID State V. Belcher, Op. No. 26729 Oct. 12, 2009; "CREATE" the law or "DECLARE" what the law already was?
- (5) DOES Teague V. Lane, 489 U.S. 288 (1989) constrain the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion?
- (6) ARE state courts FREE to give a decision of the U.S. Supreme Court announcing a new constitutional rule of criminal procedural broader "retroactivity" application than that given by the U.S. Supreme Court, pertaining to Teague V. Lane, 489 U.S. 288 (1989)?
- (7) DOES STATE V. BELCHER, Op. No. 26729 Oct. 12, 2009; fall within the "WATERSHED" rule; in the two(2) exceptions under the two(2) GENERAL EXCEPTIONS of Teague V. Lane, 489 U.S. 288 (1989)?
- (8) Was the given Malice instruction in violation of applicant's U.S. Constitutional protected rights under "Due Process" of the

14th Amendment which prohibits Jury instructions that have the effect of relieving the state of its Burden of Proof the critical question of intent in ~~Applicant's~~ case?

(9) Does State v. Belcher, Op. No. 26729 Oct. 12, 2009; improve the accuracy of convictions and alter one's understanding of the BECK elements necessary for a fair proceeding, thus making it "WATERSHED"?

(10) Does STATE V. BELCHER, Op. No. 26729 Oct. 12, 2009; forbid criminal punishment of certain primary conduct?

(11) Was State v. Belcher, Op. No. 26729 Oct. 12, 2009; dictated by precedent of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) at the time of applicant's conviction?

(12) Is applicant's DUE PROCESS of the 14th Amendment violated because the giving of an unconstitutional burden shifting instruction as to Malice charge or inferred malice from the use of a deadly weapon in this particular case as a matter of law Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)?

(a) Since there was evidence presented to applicant's jury that would reduce, mitigate, excuse or justify the homicide, would applicant be entitled to the benefit of clearly established Federal law Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)?

(14) Does STATE V. BELCHER, Op. No. 26729, Oct. 12, 2009, decisions conflict with Federal Law?

(15) Does STATE V. BELCHER, Op. No. 26729, Oct. 12, 2009, apply an unreasonable standard to the Federal law?

(16) Is SANDSTROM V. MONTANA, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed2d 39 (1979) the existing precedent of state case State V. Belcher, op. No. 26729, Oct. 12, 2009?

(17) At the time of applicant's conviction was the case Sandstrom v. Montana, 442 U.S. 510 (1979), the clearly established Federal law; and is the existing precedent of State v. Belcher, op. No. 26729, an "extension" of Sandstrom, super? Is Sandstrom v. Montana, 442 U.S. 510 (1979), old law?

(18) Does collateral review of applicant's challenge to state case STATE V. BELCHER, op. No. 26729, Oct. 12, 2009, result in a decision contrary to, or involving an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States?

SUPPORTING FACTS

(I)

Applicant's case presents conflicting versions of the events as they supposedly occurred. The state's view is that applicant without justification or excuse, fatally shot

... victims. Conversely, applicant presented evidence to the contrary. In that all of the state's witnesses testified that applicant accidentally shot victim as the record clearly indicates. SEE Tr. Tws. pgs. 270, LWS. 20-25, pg. 271, LWS. 1-12; pg. 305, LWS. 7-9; for support of applicant's contentions.

The Malice Instruction then given by the trial court, taking as a whole, relieved the state of its burden of proof, violating the dictates of SANDSTROM V MONTANA, 442 U.S. 810, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), effectively, denying the applicant due process of law as required by the 14th Amendment of the U.S. Constitution.

This error along with the Belcher violation shifted the burden of proof to the applicant, relieving the state of its burden and duty to prove every element of the offense charged. The trial court acknowledged this possibility in applicant's case; SEE Tr. Tws. pg. 303, LWS. 12-18; yet, does nothing to assure that applicant's rights as a matter of law were protected.

Belcher v. State, Op. No. 26729 Oct. 12, 2009; presents virtually the same question. SANDSTROM supra, addressed: "WHETHER THE CHALLENGED JURY INSTRUCTION HAD THE EFFECT OF RELIEVING THE STATE OF ITS BURDEN OF PROOF?" By creating a mandatory presumption of intent, upon proof by the state of other elements of the offense.

As in Belcher supra, it is entirely conceivable that the only evidence of malice was applicant's use of a hand-gun, as can be ascertained from the facts of the record now before this court. SEE Tr. Tws. pgs. 304-306; pgs. 310-314 (prosecution's closing Argument).

Applicant contends that this Honorable Court must determine whether the challenged portion of the jury instruction create a mandatory presumption, or merely a permissive inference. While the Belcher Court held that "jurors shall not be charged that malice may be inferred from the use of a deadly weapon. The permissive inference charge concerning the use of a deadly weapon remains a correct statement of law where the only issue presented to the jury is whether the defendant has committed murder (or assault and battery with intent to kill)."

Applicant's jury was presented with the question of both involuntary manslaughter and accidentally death as lesser included offenses to the offense of murder. SEE CHARGE OF TRIAL COURT.

An error of this magnitude certainly raises a constitutional question as to due process and equal protection of the law.

(II)

TIMELINESS OF APPLICATION FOR P.C.R.

- (1) Applicant originally filed P.C.R. application # 2010-CP-26-10344, on October 8th, 2010.
- (2) Applicant's P.C.R. was then returned with no time stamp, and with a hand written post-it (note) stating that applicant must sign and complete (ADR Forms).
- (3) Applicant signed and completed said (ADR Forms) and sent

them back to the clerk of court on Oct. 15, 2010.

(4) The clerk again failed to file applicant's application again sending a written post-it stating applicant must sign and complete (Proof of ADR Forms).

(5) Applicant again signed and completed said forms and forwarded them back to the clerk on Oct. 29, 2010.

(6) Application was then stamped filed November 3rd, 2010.

ANALYSIS of law

Rule 77(A) SCRCP "The courts of this state shall be deemed always open for the purpose of filing any pleading or proper paper."

In State v. Martin, 471 S.E.2d 134 (1995); the state Supreme Court ruled on the clerk of courts responsibility concerning filing motions.

SEE Rule 5(c), SCRCP.

According to Rule 77 SCRCP and State v. Martin, the clerk's responsibility is to file applicant's application. Instead the clerk returned the application twice without filing, based on the signing and completion of (ADR forms) that are not even required in post conviction matters, as the form clearly indicates.

Moreover, the P.C.R. Statute 17-27-45 does not require exemption to ADR, the clerk's actions were for this reason.

premature, and violation of Rule 77 SCRPC, Rule 5 SCRPC, and
 State v. Martin, 471 S.E.2d 134 (1995).

Applicant did follow and proceed to file application on time with
 all necessary information indicated on the application as being required.
 Therefore, the clerk should have filed applicant's application on October 9th
 2010 as applicant's P.C.R. Application notarization states. (See: P.C.R. Applicant

Respectfully Submitted,

Frederic S. Leggett, #24336

Dorchester, South Carolina

(Pro-Se)

Dated: 3/1/11

Kiefer C.I. / C.A. #47

P.O. Box 205

Ridgeville, SC 29472

State of South Carolina

County of Horry

In the Court of Common Pleas

CA No. 2010-CP-26-10314

Roger S. Leggett # 243366

Applicant/Attendant,

AFFIDAVIT/PROOF OF SERVICE

BY MAIL

-v.s.-

SUPPLEMENT TO APPLICATION

FOR POST-CONVICTION RELIEF

State of South Carolina,

Respondent,

I, Roger S. Leggett, 243366, the undersigned Applicant, attest that on October 8th, 2010, the following did occur and here by declares I had served an original P.C.R. application, dated Oct. 8th, 2010, on the Horry Co. Clerk of Court, for filing purposes, by depositing the same documents in the U.S. Mail, properly addressed with first class postage prepaid, as follows:

First Class Mail

(1) Clerk of Court

Horry Co. Courthouse

P.O. Box 677

Conway, S.C. 29472

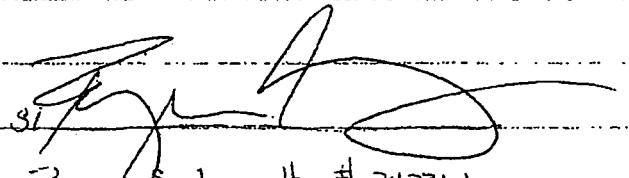
(2) Christina J. Catanz

Office of the Attorney General

P.O. Box 11549

Columbia, S.C. 29211

I declare under penalty of perjury the foregoing is true and correct.



Roger S. Leggett # 243366

Liebke C.I. / C.A. # 47

Dorchester, South Carolina

P.O. Box 205

DATED: 3/1/11

Ridgelyville, S.C. 29472

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Roger Syndell Legette, # 243366,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-10314

CONDITIONAL ORDER OF DISMISSAL

This matter comes before the Court by way of an Application for post-conviction relief filed November 3, 2010, by Roger Syndell Legette. Respondent made a Return and Motion to Dismiss dated December 14, 2010, requesting that the Application be summarily dismissed. The Applicant then filed a "Motion to Address All Issues/Questions Presented" and a "Supplement to Application for Post-Conviction Relief" on March 2, 2011. Incorporated herein by reference are the Horry County Clerk of Court records regarding the conviction and the Applicant's prior post-conviction relief files.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to a conviction from Horry County. The Applicant was indicted in December of 1996 for murder, possession of a weapon during the commission of a violent crime, and possession of a pistol by a person under the age of twenty-one (1996-GS-26-2809, Counts I - III). Because the Applicant was a minor at the time (born August 30, 1980), a waiver proceeding was held in the Family Court on September 26, 1996 and on October 9, 1996, to determine whether the matter would be transferred to the general sessions court. The Applicant was represented by Barbara W. Pratt, Esquire, and Johnny Gardner, Esquire, in the waiver proceedings. By Amended Order dated April 7, 1997, the Honorable H. T. Abbott, III, transferred jurisdiction of the entire case (including all three charges) to the general sessions court.

Thereafter, on August 4, 1997, the Applicant proceeded to jury trial in the circuit court. He was represented by Johnny Gardner, Esquire. Prior to trial, the State dismissed Count III (possession of pistol under age 21) of the indictment. On August 5, 1997, the jury found the Applicant guilty on both remaining counts. The Honorable David H. Maring, Sr., sentenced the Applicant to life without parole for murder, and five years, concurrent, for the weapon charge. A timely notice of appeal was filed on the Applicant's behalf, and an Anders appeal was perfected by Joseph L. Savitz, III, Esquire. The South Carolina Supreme Court affirmed the Applicant's convictions and sentences on November 3, 1999. (State v. Legette, 1999-MO-072). Petitioner's request for certiorari was denied by the United States Supreme Court on April 24, 2000.

Mr. Legette filed his first Application for post-conviction relief on April 27, 2000 (2000-CP-26-1962). An evidentiary hearing was held on March 14, 2002, at which the Applicant was present and represented by J. Matthew Dove, Esquire. The Applicant withdrew all of his allegations except for his allegation that the family court did not have jurisdiction to waive the possession of weapon charge (Count II of the indictment) up to the general sessions court. By Order dated June 27, 2002, the Honorable J. Michael Baxley denied and dismissed the Application. However, on February 24, 2003 (2003-MO-014) the South Carolina Supreme Court vacated the Applicant's conviction for possession of a weapon during the commission of a violent crime, finding that the family court did not have jurisdiction to waive that charge up to general sessions court, under Austin v. State, 352 S.C. 473, 575 S.E.2d 547 (2003), because the offense was not enumerated in S.C. Code § 20-7-430(5). The possession of a weapon charge was remanded to the family court, and the PCR case was remitted to the circuit court on March 14, 2003.

The Applicant filed his second Application for PCR on April 19, 2001 (2001-CP-26-1911), while the first Application was still pending. An evidentiary hearing was held before the

Honorable John L. Breeden, Jr., on November 7, 2001, at which the Applicant was present and represented by Gabriel P. Joseph, Jr., Esquire. In this action, Mr. Legette challenged only the alleged errors with respect to the trial in the general sessions court. By Order dated September 18, 2002, Judge Breeden denied and dismissed the Application, finding that none of the allegations had merit. The Applicant did not appeal from the dismissal of this PCR.

The Applicant then filed a third PCR Application on May 29, 2003 (2003-CP-26-3207). A hearing on the State's Motion to Dismiss was held on January 20, 2005, before the Honorable Paula H. Thomas. The Applicant was present in court and represented by J. Wesley Locklair, Esquire. Judge Thomas granted the State's Motion to Dismiss, and thereafter dismissed the Application as successive and as barred by the statute of limitations by Order dated February 14, 2005. A timely appeal was filed on the Applicant's behalf, and a Johnson appeal was perfected by Robert M. Pachak, Esquire. The South Carolina Supreme Court denied certiorari on November 14, 2006, and the case was remitted to the circuit court on November 30, 2006.

On September 15, 2008, the Applicant filed a "Petition for Writ of Error Coram Nobis" (2008-CP-26-7535). The State made a Return and Motion to Dismiss on October 15, 2008. On October 20, 2008, the Honorable J. Michael Baxley issued a Conditional Order of Dismissal. This Conditional Order was served upon the Applicant on November 6, 2008. A Final Order of Dismissal was issued on December 8, 2008, and served on December 30, 2008. Thereafter, on January 28, 2009, Judge Baxley issued an Order vacating and replacing the Final Order, because the Final Order erroneously stated that the Applicant failed to submit a response to the Conditional Order of Dismissal. The Applicant filed a timely notice of appeal, but the appeal was denied and dismissed on April 9, 2009, pursuant to Rule 243(c), SCACR (formerly Rule 227(c), SCACR). The matter was thereafter remitted to the circuit court.

In the current Application, Mr. Legette alleges he is being held in custody unlawfully for the following reason:

1. Belcher violation – (Belcher v. State) Op. No. 26729 – The implied malice instruction in Belcher, *supra*, raises a constitutional question as to the 14th Amendment's Due Process and Equal Protection Clauses which requires full retroactivity.

The Applicant states that he is seeking vacation and reversal of his conviction and sentence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the pleadings and all relevant supporting documents. Pursuant to S.C. Code Ann. § 17-27-70(b), the Court makes the following findings of fact and conclusions of law:

First, this Court finds that the Application must be dismissed for failure to comply with the statute of limitations. S.C. Code Ann. § 17-27-45(B) states:

When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and *if the standard or right is intended to be applied retroactively*, an application under this chapter may be filed *not later than one year after the date on which the standard or right was determined to exist*. (emphasis added).

Even assuming that the case of State v. Belcher qualified as a new substantive standard or right under this section of the statute, the Applicant failed to file his PCR Application within one year of the date of the Belcher opinion, which was October 12, 2009. This Application was not filed until November 3, 2010; therefore, it is procedurally barred under S.C. Code Ann. § 17-27-45(B). In any event, as will be discussed below, this Court finds that the Belcher opinion was clearly not "intended to be applied retroactively;" thus, S.C. Code Ann. § 17-27-45(B) does not

apply. Instead, the usual one-year statute of limitations in § 17-27-45(A) applies. Under either provision, this Application is barred.

Second, this Court finds that the Applicant's claim fails as a matter of law. The case of State v. Belcher, 385 S.C. 597, 685 S.E.2d 802 (2009), was decided by the South Carolina Supreme Court on October 12, 2009. It held that, "where evidence is presented that would reduce, mitigate excuse or justify a homicide (or assault and battery with intent to kill) caused by the use of a deadly weapon, juries shall not be charged that malice may be inferred from the use of a deadly weapon." State v. Belcher at 612, 685 S.E.2d at 810. The case was decided solely under the common law prohibition against charging juries on the facts. Id. at 601, 685 S.E.2d at 804. The Supreme Court expressly stated that "[o]ur ruling, however, will not apply to convictions challenged on post-conviction relief." Id. at 613, 685 S.E.2d at 810.

Therefore, this Court finds that Belcher does not apply retroactively and does not apply to the Applicant's PCR case. This Court further finds that there is no basis to conclude that anything in the Belcher case "raises a constitutional question as to the 14th Amendment's Due Process and Equal Protection Clauses which requires full retroactivity." (See PCR Application, page 2). This Court rejects the Applicant's arguments on page 2-3 of his "Supplement to Application for Post-Conviction Relief," regarding the two exceptions to the general rule of retroactivity. Again, the Belcher decision was decided solely on *common law* principles, not on *constitutional* principles. State v. Belcher, *supra*, at 601, 685 S.E.2d at 804; *see Teague v. Lane*, 489 U.S. 288, 299-316 (1989). Accordingly, the Applicant's argument that Belcher should apply retroactively to his case is without merit, and the PCR Application must be summarily dismissed.

The Applicant's "Motion to Address All Issues/Questions Presented Pursuant to S.C. Code Ann. § 17-27-80" is denied because the eighteen different questions presented by the Applicant in his "Supplement to Application for Post-Conviction Relief" need not be answered

in order for this Court to resolve the single issue raised, i.e., whether Belcher v. State applies to the Applicant's case.

A motion for summary judgment may properly be used to raise a statute of limitations defense. See RWE Nukem Corp. v. ENSR Corp., 73 S.C. 190, 194, 644 S.E.2d 730, 732 (2007). S.C. Code Ann. § 17-27-70(c) (2003) 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 must be summarily dismissed for the reasons discussed above.

CONCLUSION

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to **DISMISS** this Application for post-conviction relief **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 the conditional dismissal should not become final. The Applicant shall file any reasons he may have with the Horry County Clerk of Court and shall serve the State using the following address:

Office of the Attorney General
Attn: Christina J. Catoe (PCR)
Post Office Box 11549
Columbia, South Carolina 29211

AND, IT IS SO ORDERED this 20 day of March, 2011.



Larry B. Hyman, Jr.
Chief Administrative Judge
Fifteenth Judicial Circuit

Canway, South Carolina

11 APR 19 AM 8:03

CLERK OF COURT

Roger Leggett #2433660

LCI / CA # 47

P.O. Box 205

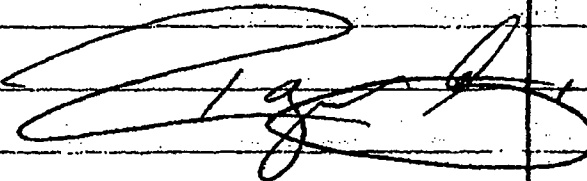
Bidgeville, S.C. 29472

DEAR CLERK,

PLEASE FILE THE ENCLOSED DOCUMENTS AND
RETURN TO ME A STAMPED CLOCKED COPY AT YOUR
EARLIEST OPPORTUNITY.

Thanks kindly.

Dated: April 14, 2011.



STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

11 APR 19 AM 8:03

C/A NO. 2010-CP-26-10314

Roger S. Legette, # 243346

Applicant,

RESPONSE TO CONDITIONAL

-VS-

ORDER OF DISMISSAL

STATE OF SOUTH CAROLINA,

Respondent.

NOW COMES PRO-SE Applicant Roger S. Legette, before this Honorable Court by way of Motion Titled "Response to Conditional Order of Dismissal".

(I) Applicant would like to address the timeliness of his application, which has seemingly become a matter of controversy. This Court has found applicant's application to be untimely filed, while this court has correctly applied the facts provided by the clerk of court, this court has failed to review the filed documents (Application etc.) that would have easily provided this court with the truth.

Applicant at pg. 9 of his "Supplement to Application for Post Conviction Relief" addressed this very motion, as to the clerk's failure to follow the mandates of SCRPC Rule 77(a) & Rule 8(e) as well as State v. Martin, 471 S.E.2d 134 (1995), which specifically directed that the clerk's responsibility is to file

applicant's application. A review of pg. 9 of applicant's "Supplement to P.C.R." and enclosed documents clearly refute the notion that applicant's application was not timely filed.

Moreover should this Court not accept applicant's version of the facts, applicant respectfully request this court to conduct an evidentiary hearing to ascertain the reason(s) that the clerk of court failed to file applicant's application on time, when it was in her possession for filing on time.

Since this controversy exist there is a need for a hearing to determine the truth, furthermore a dismissal of applicant's ~~application~~ application on this ground would result in a complete miscarriage of justice.

(1) THE NOTION THAT NOTHING in State v. Belcher, 695 S.E.2d 802 raises a constitutional question as to the 14th amendment is misplaced. Collateral attack of a criminal conviction on the basis of legal precedent that developed after the conviction became final must be reserved for those cases in which the trial court's action was without jurisdiction or is void because the defendant's conduct is not subject to criminal sanction. State v. Zimone, 279 S.C. 417, 308 S.E.2d 781 (1983).

Here, the trial court's action was unconstitutional because the trial court was without jurisdiction as to the offense of 'possession of weapon during commission of violent crime' even foreclosing any instruction regarding

malice from the use of a deadly weapon. Hence, the vacation of applicant's sentence and conviction for possession of weapon during commission of violent crime removed jurisdiction from the trial court, making any action by the trial court in this regard void.

Moreover, the South Carolina Supreme Court has held that full retroactivity, even by collateral attack, should be permitted when ruling establishes that the trial court's action is void ab initio.

Certainly, this court has failed to acknowledge the decision rendered in Yates v. Nixen, 349 S.E.2d 84 (1986); regarding retroactivity; Hese the court held: "that a New Rule of CRIMINAL LAW which is not a "CLEAR BREAK" from earlier precedent and which does not establish that the trial court's action is void ab initio should be applied retroactively to all cases pending on direct review at time new decision is issued.

Belchse supra, announces a new rule which is a CLEAR BREAK FROM MODERN PRECEDENT The SC. Supreme has further held in the case at hand, "that the trial court was without jurisdiction as to the very essence of the offense that lead to the unconstitutional malice instruction.

The case at hand presents a serious miscarriage of justice in that one(1) the trial court was with-

--- out jurisdiction; two(2) that the given Malice instruction was in violation of the constitution in light of the decisions rendered in Francis v. Franklin, 105 S.Ct. 1965 (1985); Sandstrom v. Montana, 99 S.Ct. 2450 (1979); Yates v. Arken, 349 S.Ct. 84 (1986); and State v. Belcher, 185 S.Ct. 802 (2009); Now there should be no question that Due process was denied to applicant.

CONCLUSION

For the foregoing reason(s) this court should allow applicant's application to proceed, summary dismissal is in appropriate under these circumstances.

Respectfully Submitted,

DATED: April 14, 2011


Roger S. Lagette # 248366
PRO-SE

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Horry.

FIFTEENTH JUDICIAL CIRCUIT

CA No. 2010-CP-26-10314

ROGER S. LEGGETT, # 243366

Applicant,

- vs -

AFFIDAVIT OF
SERVICE BY
MAIL

STATE OF SOUTH CAROLINA,

Respondent.

I, ROGER S. LEGGETT, # 243366, THE UNDERSIGNED AFFIDANT, DO
 ATTEST THAT ON April 14th, 2011, THE FOLLOWING DID OCCUR
 AND HEREBY DECLARES: I HAVE SERVED AN ORIGINAL "RESPONSE TO
 CONDITIONAL ORDER OF DISMISSAL"; DATED April 14th, 2011, ON
 THE Horry CO. CLERK OF COURT, AND COPY OF SAME ON THE ATT
 GENERAL, BY PLACING SAID DOCUMENTS IN THE HANDS OF PRISON
 MAILROOM STAFF FOR DEPOSIT IN THE U.S. MAIL POSTAGE PAID
 AND A RETURN ADDRESS CLEARLY INDICATED ON THE ENVELOPE.

AS FOLLOWS:

(1) CLERK OF COURT	(2) CHRISTINA J. CATOR
Horry CO. COURTHOUSE	OFFICE OF ATT. GEN.
P.O. Box 677	P.O. Box 11549
CONWAY, S.C. 29526	Columbia, SC. 29211

Sworn to and subscribed before me on this
 14th day of April 2011.

Sylvia Jones

My commission expires on January 24, 2018.

[Signature]
 Roger Leggett #243366

LCT/CA 47

P.O. Box 205

Ridgeville, S.C. 29472

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Roger Syndell Legette, # 243366,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT

2010-CP-26-10314

FINAL ORDER OF DISMISSAL

CLERK OF COURT
AUG 29 AM 10:05
JUDICIAL CIRCUIT

This matter came before the Court by way of an Application for post-conviction relief filed November 3, 2010, by Roger Syndell Legette. Respondent made a Return and Motion to Dismiss dated December 14, 2010, requesting that the Application be summarily dismissed. The Applicant then filed a "Motion to Address All Issues/Questions Presented" and a "Supplement to Application for Post-Conviction Relief" on March 2, 2011. On March 20, 2011, this Court issued a Conditional Order of Dismissal provisionally denying and dismissing the action, while giving the Applicant twenty days from the date of service of the Order in which to show why the conditional dismissal should not become final. The Applicant was served with a copy of the Conditional Order of Dismissal on March 31, 2011, at Lieber Correctional Institution.

On April 19, 2011, the Applicant submitted a response to the Conditional Order of Dismissal. In this response, he asserts that his PCR application was in fact timely filed and ~~requests an evidentiary hearing on this issue. He also re-asserts his argument that the case of~~ State v. Belcher is to be retroactively applied, and contends that the trial court was without jurisdiction and that the malice instruction given in his case was unconstitutional.

The Court will assume, for purposes of this Order, that the Applicant's allegations regarding the timeliness of his Application are true. This Court finds that, even if the PCR

Application was timely filed, the case must nevertheless be summarily dismissed because, this Court concludes, State v. Belcher is not to be applied retroactively to cases on PCR, as fully discussed in the Conditional Order of Dismissal at page 5. This Court also finds the Applicant's arguments regarding lack of jurisdiction and an unconstitutional jury instruction to be without merit. Therefore, the conditional dismissal must become final.

IT IS THEREFORE ORDERED that, for the reasons set forth above and in the Court's Conditional Order of Dismissal, the Application for PCR is hereby **DENIED** and **DISMISSED** with prejudice.

This Court hereby directs the Applicant's attention to Rules 203 and 243, South Carolina Appellate Court Rules, for the appropriate procedures to be followed in order to commence an appeal from this Order. A Notice of Appeal must be served **within thirty (30) days** of the service of this Order to secure appellate review.

AND, IT IS SO ORDERED this 16 day of Aug, 2011.


 The Honorable Larry B. Hyman, Jr.
 Chief Administrative Judge
 Fifteenth Judicial Circuit

Court, South Carolina