

EXHIBIT - A
FILED

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

2014 APR -9 PM 12:43
CONNIE L. ...
CCOP & ...
FLORENCE COUNTY, SC

Jerome James, #288382,

Petitioner,

vs.

South Carolina Department of Corrections;
Warden, Lee Correctional Institution,

Respondent.

C/A No.0:08-4079-DCN-PJG

RETURN AND MEMORANDUM OF
LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Respondent, above-named, hereby makes a Return to the Order filed by United States Magistrate Judge Paige J. Gossett dated January 14th, 2009, in the matter of the *pro se* Petition for Writ of Habeas Corpus filed by Jerome James ("Petitioner"), on December 18th, 2008. Respondent would respectfully show the following.

I.

Procedural History

Petitioner is presently confined to Lee Correctional Institution pursuant to Orders of Commitment from the Clerk of Court from Florence County. At the March 2002 term, the Florence County Grand Jury issued **five** separate multi-count indictments of Petitioner. The first was a four-count indictment of Petitioner for first degree burglary, armed robbery, assault and battery of a high and aggravated nature ("ABHAN"), and possession of a firearm during commission of a violent crime (02-GS-21-331). {PCR App. 112-13}. The second indictment was a four-count indictment of Petitioner for failure to stop for a blue light, possession of a stolen vehicle, resisting arrest, and second degree burglary (02-GS-21-341). {PCR App. 114-15}. The third was a three-count indictment of Petitioner for two charges of armed robbery and one charge of possession of a firearm during commission

of a violent crime (02-GS-21-363). {PCR App. 116}. The fourth was a five-count indictment of Petitioner for two charges of armed robbery, one charge of possession of a firearm during commission of a violent crime, grand larceny, and arson (02-GS-21-364). {PCR App. 117-19}. The final indictment issued at the same March 2002 term was a four-count indictment of Petitioner for breaking and entering into a motor vehicle, malicious injury to personal property, grand larceny, and resisting arrest (02-GS-21-365). {PCR App. 120-21}.

At the October 2002 term, the Florence County Grand Jury issued a seven-count indictment of Petitioner for escape or attempting escape, lynching, assault and battery with intent to kill ("ABIK"), and four counts of assault on a state or local correctional office employee (02-GS-21-1622).

Petitioner was represented at the trial level by Daryl Corbin, Esquire. On October 31st, 2002, Petitioner pled guilty before the Honorable J. Michael Baxley pursuant to a negotiated plea with the State. Pursuant to the plea, Petitioner was to receive a total active sentence of ten (10) years on the indictments issued in March 2002, and for the judge to determine a consecutive sentence on the indictments from October 2002. {PCR App. 3-5; 8; 15}. Pursuant to the plea agreement, Petitioner pled and was sentenced as follows:

- (1) on -331, as to count one for burglary first he pled to a lesser included of burglary second violent, for which he received ten (10) years; and to count two for armed robbery he pled to the charge and received ten (10) years;
- (2) on -341, he pled to count one for failure to stop for a blue light, and received three (3) years; and pled to count three for resisting arrest, and received one (1) year;
- (3) on -363, he pled to counts one and two for armed robbery, and received ten (10) years apiece;
- (4) on -364, he pled to count one for armed robbery, and received ten (10) years consecutive to counts five, six, and seven of 02-GS-21-1622;

(5) on -1622, as to count three for ABIK he pled to the lesser included offense of ABHAN, and received five (5) years consecutive; and on counts five, six and seven for assault on a correctional officer he received five (5) years on each, consecutive to count three.

The charges on -365 were nolle prossed. Thus, Petitioner received a total active sentence of twenty (20) years. {PCR App. 36-38}.

Petitioner did not file a direct appeal from his convictions and sentences.

Petitioner next filed a *pro se* Application for Post-Conviction Relief ("APCR") on July 15th, 2003 (03-CP-21-1303), in which he asserted the following issues:

- A. Ineffective Assistance of Counsel;
- B. Deprivation of Due process of law, lack of subject matter jurisdiction.

{PCR App. 40}. The State filed a Return dated April 16th, 2004. {PCR App. 52}.

Attorney James M. Saleeby, Jr., Esquire, represented Petitioner at the PCR trial level. On January 18th, 2005, Saleeby filed a "Brief in Support of and Amendment to Application for Post-Conviction Relief, in which he asserted the following issues:

- 1. Here, counsel was ineffective as he failed to have the charges dismissed because the indictment was void.
- 2. Brady disclosures are grounded in the defendant's fundamental right to a fair trial mandated by the due process clause of the Fifth and Fourteenth Amendments.
- 3. Counsel failed to inform the Applicant of the nature of the case and that the court had 180 days to prosecute Applicant.
- 4. The Applicant contends that the plea at issue in this case was both involuntary and defective pursuant to *Pitman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) in that the judge never informed the Applicant of the mandatory minimum sentence and was not made aware of crucial elements of the charged offenses.

An evidentiary hearing in Petitioner's PCR was held before the Honorable John L. Breeden on February 14th, 2005. {PCR App. 57}. Petitioner was present and represented by Saleeby. Petitioner called himself to testify at the hearing; the State called trial counsel. Following submission of proposed orders by both sides, on August 10th, 2005, Judge Breeden issued an Order of Dismissal with Prejudice, in which he rejected Petitioner's claims for relief. {PCR App. 101}.

A PCR appeal was filed with the state supreme court. Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Office of Appellate Defense, was appointed to represent Petitioner in his APCR appeal. On May 15th, 2006, Carter filed a "no merit" Johnson¹ Petition for Writ of Certiorari and Petition to be Relieved as Counsel in which she raised the following issue on behalf of Petitioner:

Trial counsel was ineffective in failing to explain fully sentencing consequences in the case.

The State filed a letter Return to the Johnson Petition on May 22nd, 2006.

By Order dated December 17th, 2007, the case was transferred to the South Carolina Court of Appeals. On December 17th, 2007, the state court of appeals issued an order in which it denied the Johnson petition. The Remittitur was sent down on January 3rd, 2008.

Attached herewith and incorporated herein by reference are the following documents from the state court record:

1. Appendix including: Index; Guilty Plea Transcript; Application for Post-Conviction Relief; Application for Post-Conviction Relief (2003-CP-21-1303); Return; Post-Conviction Relief Hearing Transcript; Order of Dismissal with Prejudice; Indictments;

¹ Johnson v. State, 364 S.E.2d 201 (S.C. 1988).

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|----|-------------------|--|
| 2. | October 2002 | Indictments; |
| 3. | January 18, 2005 | Brief in Support of and Amendment to Application for Post-Conviction Relief; |
| 4. | June 2005 | Proposed Order Granting Application for Post-Conviction Relief; |
| 5. | May 15, 2006 | Johnson Petition for Writ of Certiorari; |
| 6. | May 22, 2006 | Letter from Assistant Attorney General (in lieu of formal return); |
| 7. | June 26, 2006 | Pro-Se Response to Appellate Attorney Petition; |
| 8. | December 17, 2007 | Order (denying Petition for Writ of Certiorari); |
| 9. | January 3, 2008 | Remittitur. |

II.

Applicability of AEDPA

The present habeas corpus petition is dated December 12th, 2008. Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of" clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption

by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.

Petitioner has generally exhausted his state remedies with the expiration of time for filing the direct appeal, and the disposition of the PCR appeal by the South Carolina Court of Appeals. See generally S.C. Code Ann. § 17-27-100 (1985); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). This statement does not constitute a waiver of any procedural bar or bypass arguments from Petitioner's failure to properly preserve or present issues to the state courts.

IV.

Period of Limitations

The AEDPA's amendments to Title 28 provide for a one-year period of limitation on the filing of a federal habeas corpus petition. See 28 U.S.C. § 2244(d). Subsection (d)(1)(A) of section 2244 provides that the limitations period shall run from the date when the judgment of conviction became final at the conclusion of direct review. Subsection (d)(2) of section 2244 provides that the limitations period tolls while state post-conviction or collateral attack actions are pending.

Since Petitioner did not file a direct appeal, his conviction was finalized by the conclusion of direct review on November 11th, 2002, or ten (10) days after his sentence was given by Judge Baxley on October 31st, 2002.² Rule 203(b)(2), SCACR. Because Petitioner did not file a direct appeal, the ninety (90) day period for seeking certiorari from the United States Supreme Court is not included. See, e.g. Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) (direct review concludes at expiration of time for seeking certiorari from United States Supreme Court); 28 U.S.C. § 1257 (United States Supreme Court can only

² November 10th, 2002, was a Sunday.

review on certiorari the final judgments of "highest court of a state"); U.S. Sup. Ct. R. 10(b) (certiorari considered where "state court of last resort" has decided important federal question); U.S. Sup. Ct. R. 13 (time period for petition for writ of certiorari is 90 days from decision or judgment of state court of last resort); Rule 203(b)(2), SCACR (10 day requirement for filing of Notice of Appeal from criminal conviction). Petitioner thus had until November 11th, 2003 to file his federal habeas corpus action, unless the period was at any time tolled. See, e.g. Hernandez v. Caldwell, 225 F.3d 435 (4th Cir. 2000); Harris, supra; Brown v. Angelone, 150 F.3d 370 (4th Cir. 1998).

Petitioner did not file his APCR until July 15th, 2003, so two hundred and forty six (246) days of non-tolled time ran since the period of limitations began on November 11th, 2002. The period of limitations was tolled during the pendency of the APCR until no later than January 3rd, 2008, when the South Carolina Supreme Court issued the Remittitur following its Order denying certiorari review on the APCR Order of Dismissal. See, e.g. Ott v. Johnson, 192 F.3d 510 (5th Cir. 1999) (tolling does not include 90 days for United States Supreme Court certiorari petition from final denial by state's highest court of collateral action); Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) (running clock from when state appellate court denied leave to appeal denial of state post-conviction petition).

With regard to the rule in Houston v. Lack, 487 U.S. 266 (1988), the delivery date of this habeas petition is December 16th, 2008. Therefore, a further total of three hundred and forty-eight (348) days of non-tolled time between the South Carolina Court of Appeals' disposition of the APCR appeal and the filing of this habeas petition. Aggregating the two periods on either side of the pendency of the APCR action equals exactly five hundred and ninety-four (246 + 348 = 594) days, which is in excess of one year. Therefore, the present Petition for Writ of Habeas Corpus is time-barred and should be denied and dismissed.

V.

Substantive Discussion

In the event this Court disagrees on the preceding limitations analysis, Petitioner's claims are still insufficient for relief. Petitioner raises various claims of ineffective assistance of counsel. To receive relief in federal habeas on an issue that was litigated on the merits in state court, Petitioner must show that the state court decision was either: (1) an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented at the state court hearing. 28 U.S.C. § 2254(d)(1) & (d)(2).

In explaining these statutory standards, the United States Supreme Court has noted that the State court must be more than just wrong:

[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable.

Williams v. Taylor, 120 S.Ct. 1495, 1522 (2000) (construing the standard of review in 28 U.S.C. § 2254(d)(1)).

As to claims of ineffective assistance, a defendant who pleads guilty upon the advice of counsel can only attack the voluntary or intelligent character of his plea by showing ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52 (1985) (cited in Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)).

Petitioner first must show that counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668 (1985). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir.

2000). In the context of a guilty plea, Petitioner also must establish prejudice by proving that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). The defendant must show that "there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." Id.

As will be seen, Petitioner's claims are insufficient for relief.

A. Ground One

Petitioner's first ground for relief is as follows:

Ineffective Assistance of Counsel / Lack of
subject Matter Jurisdiction.

Petitioner first contends his counsel was ineffective for failing to assert the circuit court lacked subject matter jurisdiction because Petitioner was not tried within 180 days as required by an Order of former South Carolina Chief Justice Ernest Finney, dated March 5th, 1999. A copy of the order ("180 day order") is attached to the habeas petition.

This issue was raised in the amended petition, and at the PCR hearing Petitioner testified he believed his charges should have been dismissed based on the 180 day order. {PCR App. 69-70}. The issue was not specifically addressed in the PCR order of dismissal, although the PCR court did generally find that the trial court had subject matter jurisdiction. {PCR App. 109-10}. The issue was not addressed by the appellate defender in the Johnson petition, but Petitioner did raise it in his *pro se* petition. The state court of appeals denied certiorari after Johnson review.

As an initial matter, the issue is procedurally barred. To exhaust state remedies, a habeas petitioner must present the substance of his claims to the state's highest court. See, e.g. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). Claims not presented to a state's highest court may be treated as exhausted if it is clear that the claims would be

procedurally defaulted under state law if the petitioner attempted to raise them now. George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). However, a claim is procedurally barred from federal habeas corpus review if the state court to which the Petitioner would be required to present the claim would now find it procedurally defaulted. (Williams v. Taylor, 163 F.3d 860, 872 (4th Cir. 1998) (quoting Coleman v. Thompson, 501 U.S. 722 (1991))).

* The South Carolina Supreme Court has stated that the dismissal of an appeal filed pursuant to the "no merit" procedure set forth in Anders v. California, 386 U.S. 738 (1967), does not constitute a decision on the merits but rather that the "court was unable to ascertain a non-frivolous issue requiring further briefing." State v. Lyles, __ S.E.2d __, 2009 W.L. 427239 (S.C. 2009). The same "no merit" procedure set forth in Anders was mandated for PCR appeals by Johnson v. State, 364 S.E.2d 201 (S.C. 1988), and that procedure was followed here. Since the dismissal of the PCR appeal did not result in a decision on the merits by the state supreme court, then the state appellate court in this case "declined to consider the claim's merits on the basis of an adequate and independent state procedural rule." See Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998). As such, the claim – and indeed any collateral attack claim in this case – would be procedurally barred from federal habeas corpus review. See See, e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to the state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas). Cf. also Kornahrens v. Evatt, 66 F.3d 1350, 1362-63 (4th Cir. 1995) (discussing Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988), for the proposition that the prospect of *in favorem vitae* review in a capital case did not mean a habeas petition had preserved every direct appeal claim for federal review where they were not specifically

raised to the state court on direct appeal)).

* Regardless of the preceding argument, this specific claim is procedurally defaulted as it was not specifically ruled upon by the PCR court. As such, it would not have been preserved for review on PCR appeal by the appellate court. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); Rule 59(e), SCRPC (providing avenue for any party to move to alter or amend a judgment). Since Petitioner did not present this claim to the South Carolina Supreme Court for review in a procedurally viable manner, and the South Carolina state courts would find it procedurally defaulted if Petitioner attempted to raise it now, then the claim is procedurally barred in federal habeas corpus. See, e.g. Coleman v. Thompson, 501 U.S. 722 (1991).

In any event, the claim fails substantively. Claims of subject matter jurisdiction are not cognizable in federal habeas corpus, so the freestanding claim is barred. See Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) (citing Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir.1976), which held that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary"). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions.").

Regardless, there is no subject matter jurisdiction issue. The 180 day Order itself is purely administrative and specifically notes it does not "create or define a right of a defendant to a speedy trial". The Order expressly cites as its basis Chief Justice Finney's state constitutional authority as the chief administrator of the courts (S.C. Const. Art V. § 4). And, the state supreme court has expressly held that the provision in Rule 3, SCRCrimP, requiring solicitors to take action on arrest warrants within a certain time

period, to be purely administrative and nonjurisdictional, and to provide no benefit to a criminal defendant from its violation. State v. Culbreath, 316 S.E.2d 681 (S.C. 1984) (discussing the predecessor to Rule 3(c), SCRCrimP). Similarly, under Culbreath and the express language of the 180 day order, Petitioner's claim of a lack of subject matter jurisdiction fails as well.

Finally, the South Carolina Supreme Court has abandoned the view that a defective or insufficient indictment was a question of subject matter jurisdiction that could be raised at any time regardless of whether the issue was properly preserved. State v. Gentry, 610 S.E.2d 494 (S.C. 2005). Gentry noted a difference between the issue of a court's general power to try the class of case on which the defendant was convicted – which could be raised for the first time on appeal – and the insufficiency or defective nature of the indictment itself, which required a contemporaneous objection to be preserved on appeal. Id. – and counsel could not have been deficient nor Petitioner prejudiced from a failure to object. Here, the circuit court sitting in general sessions clearly had subject matter jurisdiction to resolve felony criminal charges against Petitioner. There is no subject matter jurisdiction issue and counsel could not have been deficient nor Petitioner prejudiced from a failure to object.

The issue should be dismissed or denied.

B. Ground Two

Petitioner's second ground for relief is as follows:

Ineffective Assistance of Counsel / Brady Violation

Petitioner contends his counsel was ineffective in failing to disclose to him the state's evidence.

Petitioner raised a Brady claim in his amended petition. At PCR, he claimed his

counsel did not have the file when they first met, only met for 20 to 30 minutes a second time, and the third time was on the day he pled. {PCR App. 67-68}.

Counsel testified they met and extensively discussed the facts. {PCR App. 78; 84; 86}. Counsel noted that when he would go to the jail to see Petitioner, he would take whatever documents he had been provided from the State. He recalled going over those documents with Petitioner during their meetings. He did not recall if he provided copies to Petitioner, but remembered that Petitioner did have some documents of his own. {PCR App. 91-92}.

The PCR court credited trial counsel's testimony that he and Petitioner met for extended periods of time and discussed the charges. Thus, the court rejected any claim of ineffectiveness. {PCR App. 109-10}. Petitioner asserted the issue of ineffectiveness for failure to disclose the evidence in his *pro se* petition on PCR appeal. The state court of appeals denied certiorari after Johnson review.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate court does not constitute a decision on the merits. See V(A), *supra*.

Regardless, the claim fails on the merits. Counsel's testimony, detailed above, provides sufficient support in the record to sustain the state court's decision that counsel fully discussed the facts and the state's evidence with Petitioner. And, Petitioner at the plea hearing stated he was satisfied with counsel and had not been pushed or forced into pleading guilty by his lawyer. Counsel also stated at the plea hearing he had long discussions with Petitioner as to the charges. {PCR App. 7; 16-17}.

In any event, Petitioner has not shown prejudice, as he has not identified one specific bit of evidence that would have caused him to insist on trial. This failure of the

burden of proof is even more persuasive given that Petitioner was able to resolve multiple charges totaling over 200 potential years for a negotiated plea that resulted in a sentence of only twenty years. See Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial); Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986) (habeas corpus petitioner did not establish prejudice because he failed to allege what exculpatory evidence would have been produced had counsel made a Brady motion); Cf. United States v. Robinson, 585 F.2d 274, 281 (7th Cir. 1978) ("It is simply impossible for a court to rule on an alleged Brady violation unless a defendant identifies with reasonable particularity the evidence to be considered.").

The issue should be dismissed or denied.

C. Ground Three

Petitioner's third ground for relief is as follows:

Ineffective Assistance of Counsel / Involuntary Guilty Plea

Petitioner contends he was not made aware of the mandatory minimum sentence or his parole eligibility.

This issue was mentioned in the amended application, at least with regard to the mandatory minimums.

At PCR, Petitioner testified counsel never told him about the mandatory minimum sentence as to armed robbery, and stated that he could not remember if counsel discussed parole because counsel was going so fast. {PCR App. 65-66}. On cross, Petitioner admitted he knew it was a negotiated plea, and also admitted counsel mentioned he was facing over 200 years. {PCR App. 70-71}. On examination by the PCR court, Petitioner claimed his counsel did not explain what a negotiated plea was, but admitted his counsel

told him he would get the 10 years if the judge accepted the plea. However, Petitioner continued to state his counsel did not tell him that was a mandatory minimum. Petitioner admitted he understood the charges regarding the incident at the jail would be handled above the ten year deal on the other charges. However, Petitioner claimed his counsel told him he could get parole after serving a portion of the initial ten year sentence. Finally, he stated Judge Baxley only mentioned the possibility of serving every day of the ten years until after the plea was accepted. {PCR App. 72-77}.

Counsel noted no one pressured Petitioner into pleading guilty, and Petitioner was very pleased that they were able to negotiate a total sentence of ten years on all the charges excluding the subsequent charges for the incident in the jail. Counsel noted they discussed the fact he was facing over 200 years, and specifically testified they discussed the potential sentence for armed robbery. {PCR App. 79-80}. Counsel stated he believed he discussed parole eligibility with Petitioner, and noted Petitioner was told he would have to do 85% of the ten years. Plus, Judge Baxley made it clear Petitioner might have to serve every day of the first ten (10) years. Counsel pointed out the statute would not allow the charges from the jail incident to be concurrent to the other charges, and Petitioner was fully aware he would have to serve whatever sentences he received on those additional charges on top of the ten years. {PCR App. 82-84}.

The PCR court credited trial counsel's testimony, and found counsel was not deficient in discussing the charges with Petitioner. {PCR App. 108-10}. The issue was raised by Petitioner and the appellate defender on PCR appeal, but the state court of appeals denied certiorari.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate

court does not constitute a decision on the merits. See V(A), supra.

Regardless, the claim fails on the merits. (A criminal defendant must be informed of the direct consequences of his plea. Misinformation as to the direct consequences of a plea renders the plea involuntary. Manley v. U.S., 588 F.2d 79 (4th Cir.1978) (erroneous statement of court as to maximum possible punishment). Neither the court nor defense counsel is obligated to advise a defendant as to the collateral consequences of a plea. Strader v. Garrison, 611 F.2d 61 (4th Cir.1979) (parole eligibility is a collateral consequence of a plea). "The distinction between 'direct' and 'collateral' consequences of a plea ... turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.1973).

Under these principles, if an attorney substantially misinforms a defendant about the date he will become eligible for parole, and the defendant decides to plead guilty instead of going to trial based on the misinformation, the defendant will be entitled to relief. Strader, supra; O'Tuel v. Osborne, 706 F.2d 498 (4th Cir.1983); and Ostrander v. Green, 46 F.3d 347 (4th Cir.1995). On the other hand, a plea is involuntary if the defendant is not advised that parole ineligibility will result as a direct consequence of his plea. Cuthrell, 475 F.2d at 1365-66; Bell v. North Carolina, 576 F.2d 564, 565 (4th Cir.1978); and Chapman v. Angelone, 187 F.3d 628, 1999 WL 511062 (4th Cir.1999) (unpublished).)

In South Carolina, armed robbery is punishable by a "mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence." S.C. Code Ann. 16-11-330 (Supp. 1992). Pursuant to section 24-13-150, armed robbery is a "no parole" offense, and

one must serve 85% before the possibility of other early release.

Here, there is ample support in the record that Petitioner understood what he was facing with regard to the penalties. As noted before, Petitioner admitted and counsel testified Petitioner was advised he would get a negotiated plea of ten years on the various charges indicted in March 2002, and that any sentence for the jail incident would be consecutive to that ten years. Counsel stated he discussed the armed robbery time with Petitioner. Further, the plea record belies any claim of misunderstanding. The solicitor mentioned the range of sentencing at the plea, noting that armed robbery carries "ten to thirty", but Petitioner was receiving the negotiated sentence of ten years. {PCR App. 4}. Counsel told the judge at the hearing he had discussed the possible penalties {PCR App. 7}, and stated on the record that Petitioner was aware he was "most likely looking at serving every day of that ten years". {PCR App. 8}. Petitioner also told the judge he understood he could face an additional thirty years for the jail incident over the negotiated ten. {PCR App. 15}. The judge then told Petitioner a second time he would most likely serve every day of the negotiated ten, and then whatever sentence the judge gave on the jail charges. {PCR App. 27}.

As to parole eligibility, Petitioner was advised by the judge repeatedly he would likely have to serve every day of the ten years, and then time for the jail incident on top of that. Moreover, counsel informed Petitioner of the 85% rule.

Even if counsel did not mention the mandatory minimum, it is hard to see how that could possibly be prejudicial when Petitioner got a time certain of ten years for all the charge – which in fact would be the minimum for just one charge of armed robbery. As to both issues, Petitioner presented no credible evidence that he relied upon any misinformation on these issues in pleading guilty, especially given the extremely favorable

plea deal which resulted in the minimum possible sentence he could have received on all the charges indicted in March 2002.

The issue should be dismissed or denied.

D. Ground Four

Petitioner's fourth ground for relief is as follows:

Ineffective Assistance of Counsel / Lack of Subject Matter Jurisdiction.

Petitioner contends his counsel was ineffective and the court lacked subject matter jurisdiction because he did not receive a preliminary hearing as requested.

This issue was raised in the amended application, and Petitioner complained about it at the PCR hearing. {PCR App. 67}. Counsel noted that there was no need for a preliminary hearing once one is indicted. {PCR App. 86}.

The PCR court found that there was no constitutional right to a preliminary hearing, and that there was no need for one once the indictments were issued. {PCR App. 110}. Petitioner asserted this issue in his *pro se* petition on PCR appeal. The state court of appeals denied certiorari after Johnson review.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate court does not constitute a decision on the merits. See V(A), supra.

Regardless, the issue is without merit. A defendant does not have a constitutional right to a preliminary hearing in South Carolina. State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982). Indictments constitute a finding of probable cause and thus eliminate the need for a preliminary hearing. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982). Thus, counsel could not have been deficient nor Petitioner prejudiced.

As to a claim of subject matter jurisdiction, it is not cognizable in federal habeas

corpus. Thus, the freestanding claim is barred. See Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) (citing Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir.1976), which held that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary"). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions.").

Regardless, as noted before, State v. Gentry, 610 S.E.2d 494 (S.C. 2005) held that subject matter jurisdiction in South Carolina refers to the court's general power to try a case. Again, the circuit court sitting in general sessions certainly had the general power to address these criminal charges set forth in the indictments.

The issue should be dismissed or denied.

VI.

CONCLUSION

Each and every allegation contained within the Petition which was not previously either expressly admitted, qualified, or explained is hereby denied.

WHEREFORE, having made Return, Respondent submits there is no genuine issue of material fact and that the State is entitled to prevail as a matter of law. Thus, Respondent respectfully requests that this Court grant its motion for summary judgment and dismiss the action.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

By: s/ S. Creighton Waters

April 8, 2009.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

"EXHIBIT-B"

IN THE COURT OF COMMON PLEAS

WILSON W. JAMES, 288382

APPLICANT,

V.

STATE OF SOUTH CAROLINA,
RESPONDENT.

2012-CP-21-3233

AFFIDAVIT of WILSON W. JAMES

2013 MAR 14 PM 2:30

CONNIE REED-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

FILED

FILED

06 APR -9 PM 12:43

CONNIE REED-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

I, WILSON W. JAMES, DECLARE THAT ON
OCT. 30th, 2002, THAT I ALONG WITH, DARYL CORBIN,
ATTORNEY AND ROBERT WILLS, ASSISTANT SOLICITOR WILD
ON THAT DAY NEGOTIATE A SENTENCE FOR THE
FOLLOWING INDICTMENTS 02-GS-21-331, 02-
GS-21-341, 02-GS-21-364, 02-GS-21-363 AND 02-
GS-21-1622. 02-GS-21-341 CONSISTED OF A ONE (1)
YEAR SENTENCE FOR ONE (1) COUNT OF ~~THE~~ RESISTING
ARREST AND A THREE (3) YEAR SENTENCE FOR ONE (1)
COUNT OF FAILURE TO STOP FOR BLUE LIGHT, 02-GS-
21-331 CONSISTED OF A TEN (10) YEAR SENTENCE FOR
ONE (1) COUNT OF 2ND DEGREE BURGLARY AND A TEN
(10) YEAR SENTENCE FOR ONE (1) COUNT OF ARMED ROBBERY,

(1)

CERTIFIED: A TRUE COPY

Connie Reed-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

02-GS-21-363 CONSISTED OF A TEN (10) YEAR
SENTENCE FOR TWO (2) COUNTS OF ARMED ROBBERY,
02-GS-21-364 CONSISTED OF A TEN (10) YEAR
SENTENCE FOR ONE (1) COUNT OF ARMED ROBBERY,
AND 02-GS-21-1622 CONSISTED OF THREE (3)
COUNTS OF ASSAULT ON STATE OR LOCAL CORRECTIONAL
FACILITY EMPLOYEES WITH A FIVE (5) YEAR SENTENCE
FOR EACH COUNT AND ONE (1) COUNT OF ASSAULT
AND BATTERY OF A HIGH AND AGGRAVATED NATURE
CARRYING A FIVE (5) YEAR SENTENCE. EVERYTHING
WAS TO BE SERVED CONCURRENT. ALL THE PAPER-
WORK WAS DONE, THEN LATER THAT EVENING, THE
CASE WAS PRESENTED BEFORE JUDGE HARVEY, WHICH
HE REFUSE TO ACCEPT THE PEA DUE TO FAMILY
TIES WITH MY FAMILY AND HIS. SO, DUE TO THE
FACT IT WAS SO LATE IN THE DAY AND THERE
WASN'T TIME TO GO BEFORE ANOTHER JUDGE, IT
WAS POSTPONED UNTIL THE FOLLOWING DAY.

THEREFORE, ON OCT. 31ST, 2002 I WAS
(2)

TAKEN BEFORE JUDGE ~~LEE S. ALFORD~~ ^{LEE S. ALFORD} WHO ACCEPTED
THE PLEA, AND IMPOSED AN ADDITIONAL SENTENCE
FOR INDICTMENT 02-GS-21-1622. THIS WAS DUE
TO THE FACT ROBERT WELLS, ASSISTANT PROSECUTOR,
INFORMED THE COURTS THAT, ANY SENTENCE THAT
WAS IMPOSED FOR THE OTHER INDICTMENTS, THAT
02-GS-21-1622 HAD TO BE CONSECUTIVE AS MANDATED
BY LAW. THE LAW MR. WELLS WAS REFERRING TO WAS
§16-3-630 OF S.C. CODES OF LAW.

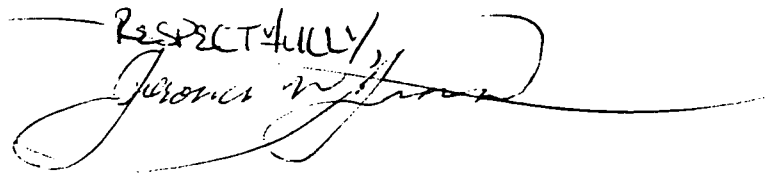
IN LATE 2012 WHILE RESEARCHING
MY CASE I VIEWED THE STATUTE (16-3-630)
AND DISCOVERED THAT MR. WELLS WRONGLY INFORMED
THE COURTS. SO, I IMMEDIATELY FILED A
PCR APPLICATION. BECAUSE UPON READING THE
STATUTE DISCOVERY WAS MADE THAT IN MY
CIRCUMSTANCES THE REQUIREMENT FOR CONSECUTIVE
SERVING OF SENTENCES IN 16-3-630 DIDN'T APPLY
TO ME, BECAUSE I WAS NOT SERVING A
SENTENCE AT THAT TIME. I WAS SENTENCED

FOR ALL CHARGES ON OCT. 31ST, 2002, SO THEREFORE
CANCELLING OUT THE CONSECUTIVE REQUIREMENT OF
16-3-630.

THEREFORE, INVALIDATING MY SENTENCE
DUE TO SEVERAL REASONS: MISCARriage OF JUSTICE,
PLAIN ERROR AND MISINTERPRETATION OF THE LAW. DUE TO
THE FACT THIS DID AFFECT MY SUBSTANTIAL RIGHTS
AND SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY
OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.
ALL THIS IS REFLECTED IN THE RECORD; TRANSCRIPT
SENTENCING SHEETS AND 16-3-630.

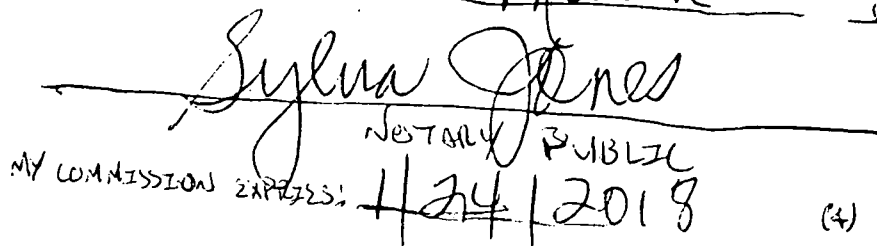
I DECLARE UNDER THE PENALTY OF
PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

MAR. 13TH, 2013

RESPECTFULLY,


SWORN OR AFFIRMED TO AND SUBSCRIBED BEFORE ME THIS

7th DAY OF March 2013


NOTARY PUBLIC
MY COMMISSION EXPIRES: 11/24/2018 (4)

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

LIZBON W. LAMBS, 285382,
APPLICANT,
V.

STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEA

2012-CP-21-3233

MOTION TO AMEND PCR APPLICATION
AND REPLY TO MOTION TO DISMISS

FILED
2013 MAR 14 PM 2:30
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

APPLICANT BRING FORTH THE FOLLOWING MOTION,
MOTION TO AMEND PCR APPLICATION AND REPLY TO ANY MOTION TO
DISMISS.

THE MATTER IS BEING BROUGHT BEFORE THE
COURT TO WHETHER APPLICANT'S PCR APPLICATION IS
SUCCESSIVE OR WHETHER APPLICANT IS ENTITLED TO
BE HEARD AS A MATTER OF LAW. APPLICANT WOULD
SHOW THE COURT THAT THE FOLLOWING GROUNDS (ISSUES)
GIVES THE PCR APPLICATION MERITS TO HOLD A
NECESSITARY HEARING.

THE FOREGOING IS AS STATED:

CERTIFIED: A TRUE COPY
Givine Y. J. Syre
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

GROUND (ISSUE) I

HERE, APPLICANT ADDRESSED THE CLAIM ABOUT ISSUES (GROUNDS) PREVIOUSLY RAISED. AS A MATTER OF LAW, THOSE ~~ISSUES (GROUNDS) PREVIOUSLY HEARD~~ ~~IS~~ ~~BARRED~~ FROM BEING SUBSEQUENTLY HEARD. WHEREAS, *open* S.C.C. ANN. §17-21-80 STATES: "THE COURT SHALL MAKE SPECIFIC FINDINGS OF FACT, AND STATE EXPRESSLY ITS CONCLUSION OF LAW, RELATING TO EACH ISSUE PRESENTED." HERE, THE COURT FAILED TO MEET THE STANDARD PREVIOUSLY ADMITTED BY THE RESPONDENTS (SEE EXHIBIT A RESPONDENTS PRIOR SUMMARY EVIDENCE) PG. 10, 11, 13, 15-16, 18). AS YOU WILL SEE NEITHER ISSUE (GROUND) WAS DECIDED ON, ON ITS MERITS (STRICT LEGAL RIGHTS, FACTUAL CONTENT OF A MATTER), THEREFORE GIVING GROUNDS TO BE SUBSEQUENTLY HEARD. PEARSON V. HARRISON, (C.A.4 (S.C.) 2001) 9 420. APPX. 85. AND §17-21-80; MCCRAY V. STATE, (S.C. 1991) 305 S.C. 329, 408 S.E.2D

241.

ALSO, RESPONDENTS NOT ONLY STATED THE ISSUES (GROUNDS) WASN'T RULED ON ON THE MERITS, BUT THEY ALSO STATED THAT THEY WASN'T SPECIFICALLY RULED ON BY THE PCR COURT (EXHIBIT A PG. 11). THEREFORE, THERE IS MATERIAL FACTS, AS CAN BE SEEN BY PROPERLY REVIEWING THE RECORD. ALSO BY REVIEWING THE PCR ORDER OF DISMISSAL YOU WILL SEE THAT NONE OF THE ISSUES (GROUNDS) WERE RULED ON PURSUANT TO § 17-27-80.

FURTHERMORE, SUPREME COURT RULE 50 (2) NOR SC. CODE ANN. § 17-27-90 ACTS TO BAR, AS SUCCESSIVE, APPLICANT'S CURRENT PETITION. THESE RULES, WHILE BARRING SUBSEQUENT PETITIONS ON GROUNDS AVAILABLE TO OR WAIVED BY AN APPLICANT IN A PRIOR ACTION OR PETITION, CONTEMPLATE AND ADJUDICATION

(3)

ON THE MERITS OF THE ORIGINAL PETITION, ONE BITT
AT THE APPEAL AS IT WERE. GAMBLE V. STATE, (S.C. 1987)
298 S.C. 116, 379 S.E. 2D 118.

THUS, APPLICANT'S PETITION WASNT
ADJUDICATED ON THE MERITS THEREFORE NOT BARRING
A SUBSEQUENT APPLICATION.

GROUND (ISSUE) II / PLAIN ERROR

APPEAL

ISSUE

THE PLAIN ERROR STANDARD IS MET WHEN
THERE IS AN 'ERROR' THAT IS 'PLAIN' AND THAT 'AFFECTS
SUBSTANTIAL RIGHTS' FED. RULES CRIM. P. RULE 52(b) 18 U.S.C. 4;
U.S. V. OLANO, 504 U.S. 725, 132, 113 S.Ct. 1770, 1177, 123 L.ED.
2D. 508 (1993); TRUCKS, 41 F.3D AT 897.

HERE, MR. WELLS, ASSISTANT SOLICITOR, INFORMED
THE COURT, APPLICANT AND APPLICANT'S COUNSEL, THAT PURSUANT
TO 16-3-G30, THAT THE CHARGES IN INDICTMENT

02-CR-21-1622 WAS REQUIRED TO BE SERVED CONSECUTIVE.

"IN FACT, IN RESEARCHING THAT STATUTE THIS
MORNING ON ASSAULT ON A CORRECTIONAL OFFICER,
I FOUND OUT THAT IT'S REQUIRED TO BE A CONSECUTIVE
SENTENCE." PLA TRANS. PG. 3, LINE 17-20.

WHICH, SUBSTANTIATES APPLICANT'S AFFIDAVIT AS
TO PLA WAS CHANGED FROM THE INITIAL NEGOTIATION.

ALSO, COUNSEL DARYL CORBIN, STATES:

"YESTERDAY, WE ATTEMPTED TO HAVE MR. JAMES PLEAD
IN FRONT OF JUDGE HANVELL. PER. TRANS. PG. 30 LINE 24-25.

WHEN REVIEWING 16-3-630 IT IS STATED:

"A SENTENCE UNDER THIS PROVISION MUST BE SERVED
CONSECUTIVELY TO ANY OTHER SENTENCES THE PERSON IS
"SERVING", "

SERVING WHICH MEANS CURRENTLY OR PRESENTLY
DOING SOMETHING. APPLICANT WASNT SERVING A SENTENCE
AT THAT TIME SO THAT PART OF THE STATUTE DIDNT
APPLY TO APPLICANT. THEREFORE, THE WORKING LAW THE
ASSISTANT SOLICITOR, A HIGHLY TRAINED ATTORNEY, TO

MISINTERPRET THE STATUTE, OR UNLESS IT WAS DONE OUT OF VINDICTIVE REASONS. SO, DUE TO MR. WELLS MIS-INTERPRETATION OR ERROR, CAUSED MR. WELLS TO MISLEAD THE COURT, MR. CORBIN AND APPLICANT. THIS ERROR DID SERIOUSLY AFFECT THE APPLICANT'S SUBSTANTIAL RIGHTS. AN ERROR IS DEEMED TO HAVE "AFFECTED SUBSTANTIAL RIGHTS", IF IT WAS PREJUDICIAL IN THAT IT AFFECTED THE OUTCOME OF THE COURT PROCEEDINGS. OLANO, 507 U.S. AT 733, 113 S.Ct. AT 1718, 123 L.ED. 2N 508; TRUCKS, 41 U.S.D AT 897. FED RULES CRIM.P. RULE 52(B), 18 USC.A.

THIS ERROR DID AFFECT THE OUTCOME BE-CAUSE APPLICANT WAS GIVEN AN ADDITIONAL TEN(10) YEAR SENTENCE • TO SERVE CONSECUTIVELY/ TO THE OTHER PART OF THE NEGOTIATED SENTENCE. THEREFORE, HAD NOT THIS OCCURRED APPLICANT WOULD HAVE ONLY BEEN SERVING A SENTENCE OF TEN(10) YEARS.

CONCLUSION

AS, YOU CAN SEE BY REVIEWING THE RECORD, THAT AT NO POINT ~~IN THE APPLICANT'S CASE WAS~~ THE LAW UPHELD. THE ISSUES (GROUND) WAS NEVER RULED ON AS REQUIRED BY LAW. AT SOME POINT JUSTICE HAS TO PROCEED EVERYTHING ELSE. SO, FAR IT LOOKS AS IF THE APPLICANT'S CASE WENT THROUGH THE COURT SYSTEM IN RUSSIA. FROM THE LOOKS OF IT THIS IS BECOMING A GROSS MISFEASANCE OF JUSTICE.

BUT, AS YOU CAN SEE THERE IS PLENTY OF MATERIAL FACTS, ALSO APPLICANT IS ENTITLED TO LAW/FULL REVIEW (17-21-80). THEREFORE, THE APPLICANT REQUESTS THAT THE PCR APPLICATION BE GRANTED AND AN EVIDENTIARY HEARING BE HELD.

MARCH 10, 2013

RESPECTFULLY,

Jerome W. James
Jerome W. James #288382

(7)

STATE of SOUTH CAROLINA
COUNTY of FLORENCE

WILSON W. JAMES, JR.,
APPLICANT,

V.

STATE of SOUTH CAROLINA,
RESPONDENT.

In the Court of Common Pleas

2012-CP-21-3233

FILED
2013 MAR 14 PM 2:30
CONNIE REEL-SHEARIN
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

CERTIFICATE OF SERVICE

I CERTIFY THAT ON 03/12/13 A COPY OF
APPLICANT'S MOTION TO AMEND AND REPLY TO COURT'S
CONDITIONAL ORDER, WAS SERVED UPON THE COURTS
BY MAILING THE SAID IN THE U.S. POSTAL BOX
ADDRESSED AS FOLLOWS:

CONNIE REEL-SHEARIN
CLERK OF COURT
CITY COUNTY COMPLEX
180 N. IRBY ST. MSC-2
FLORENCE, S.C. 29501

CERTIFIED: A TRUE COPY
Jerome W. James
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

RESPECTFULLY,

Jerome W. James

WILSON W. JAMES # 288382

§ 16-3-625

CRIMES AND OFFENSES

sentenced be eligible for parole until after service of six months. No person sentenced under this section for a second or subsequent offense shall have the sentence suspended to less than two years nor shall the person be eligible for parole until after service of two years.

As used in this section "deadly weapon" means any instrument which can be used to inflict deadly force.

This section does not affect or replace the common law crime of assault and battery with intent to kill nor does it apply if the sentencing judge, in his discretion, elects to sentence an eligible defendant under the provisions of the "Youthful Offenders Act".

HISTORY: 1980 Act No. 511, § 1; 1995 Act No. 83, § 11.

Cross References—

Classification of offense specified in this section as Class E felony, see § 16-1-30(E).

Persons convicted of Title 16, Chapter 3 crimes prohibited from appointment as guardian ad litem for child in abuse or neglect proceeding, see § 20-7-123. Foster care placement with certain persons prohibited, see § 20-7-1642. Fingerprint review of any person applying to operate or seek employment at a child day care or group day care home to determine prior conviction of the crime referred to in this section, see § 20-7-2800.

As to denial of renewal for child day care or group day care home where the person applying for approval, the operator of the facility, or an employee or caregiver has been convicted of the crime referred to in this section, see § 20-7-2810.

As to denial of registration as an operator of a child day care or group day care home where the applicant, an employee, or caregiver has been convicted of the crime referred to in this section, see § 20-7-2850.

No license or registration will be issued to any religious establishment to operate a child day care or group day care home where the operator, an employee, or caregiver has been convicted of the crime referred to in this section, see § 20-7-2900.

Commission of this crime within specified radius of child day care center as separate offense, see § 20-7-3095.

No person may be employed by the Department of Social Services in its day care licensing or child protective services divisions who has been convicted of the crime referred to in this section, see § 20-7-3097.

Post conviction check prior to initial employment of teachers, see § 59-26-40. Arrests generally, see chapter 13 of Title 17.

Research and Practice References—

Obstructing Justice § 3, 21.

WESTLAW Topic No. 282.

5 Am Jur 2d, Arrest § 105 et seq.

6 Am Jur 2d, Assault and Battery § 10 et seq. 63, 68.

C.J.S. Obstructing Justice or Governmental Administration § 10 to 19, 21, 35.

Annotations—

Excessive force: right to resist excessive force used in accomplishing lawful arrest, 77 ALR3d 281.

Fact that gun was unloaded as affecting criminal responsibility, 68 ALR4th 190.

responsibility under weapons statute, 81 ALR4th 745.

16-3-630

§ 16-3-630

OFFENSES AGAINST THE PERSON

§ 16-3-635

What constitutes obstructing or resisting officer, in absence of actual force, 66 ALR5th 397.

CASE NOTES

Deadly weapon 1
Questions for jury 2

1. Deadly weapon

A hand or fist may be a deadly weapon or object pursuant to § 16-3-625, depending on the manner and means of its use, the wounds inflicted, and other relevant facts, since there is no reason to distinguish injuries caused by an instrumentality from similar injuries inflicted by a hand or fist. State v. Davis (S.C. 1992) 309 S.C. 326, 422 S.E.2d 133, rehearing denied, certiorari denied 113 S.Ct. 2355, 508 U.S. 915, 124 L.Ed.2d 963.

In prosecution for resisting arrest with a deadly weapon, a jury question was presented as to whether underlying arrest for disorderly conduct was lawful himself in a grossly intoxicated and disorderly manner in a public place, in light of evidence that defendant was acting in a loud and boisterous manner and cursing at police, that his language was loud enough to disturb the neighborhood, and that at some point during the incident, there was a car load of teenagers on the cul-de-sac across the street. State v. McCowan (S.C. 2001) 347 S.C. 618, 557 S.E.2d 657.

§ 16-3-630. Conviction of assault upon state or local correctional facility employee; penalty.

A person convicted of assault upon an employee of a state or local correctional facility performing job-related duties must serve a mandatory minimum sentence of not less than six months nor more than five years.

A sentence under this provision must be served consecutively to any other sentence the person is serving.

HISTORY: 1997 Act No. 136, § 5.

Cross References—

Classification of offense specified in this section as Class F felony, see § 16-1-90(E).

Research and Practice References—

Assault and Battery § 47, 100.

Sentencing Guidelines § 350H637.

WESTLAW Topic Nos. 37.

C.J.S. Assault and Battery § 62, 130.

§ 16-3-635. Assault and battery upon emergency medical service provider, firefighter or home healthcare worker.

(A) As used in this section:

(1) "Emergency medical service provider" means an individual or employee of a health care provider who provides medical or health care services in the course of his employment or training which includes, but is not limited to, emergency physicians, nurses, emergency medical technicians, paramedics, members of rescue squads, and anyone directly assisting or indirectly assisting individuals.

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Jerome W. James

APPLICANT

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
THE TWELFTH JUDICIAL CIRCUIT

5 APR 24
CASE NO. 2012-CP-21-03233

MOTION TO AMEND PCR
APPLICATION

CERTIFIED
Clerk of Court
FLORENCE COUNTY, S.C.

APPLICANT MOVES THE COURT TO
BRING FORTH THE FOLLOWING MOTION:

ISSUE 1

" SEE MOTION TO ALTER OR AMEND
JUDGMENT ARGUMENT 1 AND DECLARATION
OF APPLICANT. "

4B. 22ND, 2014

RESPECTFULLY SUBMITTED
Jerome W. James
Jerome W. James

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

WALTON W. JAMES,
APPLICANT,

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
IN THE TWELFTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-21-03233

MOTION TO ALTER OR AMEND
JUDGMENT

APPLICANT MOVES THIS COURT PURSUANT
TO F.R.C.P. 59 (2) TO ALTER OR AMEND THE JUDGMENT
RENDERED BY THIS COURT ON THE RESPONDENT'S PROPOSED ORDER,
WHICH JUDGMENT WAS ENTERED BY THIS COURT ON FEB.
17TH, 2014. THE APPLICANT RESPECTFULLY REQUESTS THAT
THIS COURT RECONSIDER ITS ENTIRE RULING, FOR
THE FOLLOWING REASONS:

1) RESPONDENT LOST ALL RIGHT AND
JURISDICTION TO FILE ANY MOTIONS WHEN THEY FAILED
TO MEET STATUTE OF LIMITATION PURSUANT TO §17-27
70 (A) S.C. CODES OF LAW. ON DEC. 5TH, 2012 APPLICANT'S
PCR APPLICATION WAS FILED WITH THE COURT AND
RESPONDENT FILED THEIR RETURN AND MOTION TO

(1)

DISMISS ON FEB. 22ND, 2013. § 17-27-70(A) S.C. CODES OF LAW
ALLOWS RESPONDENT 30 DAYS TO FILE ITS RETURN AFTER
THE DOCKETING OF THE APPLICATION (SEE § 17-27-70(A)). NO
EXTENSION WAS FILED WITH THE COURT NOR DID THE
COURT EXTEND THE TIME, SO ANY AND ALL MOTIONS
FILED BY RESPONDENT AFTER THE 30 DAY DEADLINE
HAS "NO" JURISDICTION IN THIS COURT OR LEGAL
STANDING. THEREFORE, I'M MOVING THE COURT TO
STRIKE ALL MOTIONS FILED BY RESPONDENT AFTER
JAN. 10TH, 2013, NOT LIMITED TO BUT INCLUDING
RESPONDENT'S PROPOSED ORDER FILED ON JAN. 24TH, 2014
AS A MATTER OF LAW. (SEE ALSO PETITIONER'S DECLARATION)

A COURT MAY GRANT A MOTION TO ALTER
OR AMEND A FINAL JUDGEMENT UNDER FED. R. CIV. P.
59(E) IF MOVANT POINTS TO EVIDENCE IN THE
RECORD WHICH CLEARLY ESTABLISHES MANIFEST
ERROR OF LAW OR FACT, OR TO PREVENT MANIFEST

INJUSTICE. HENDY'S INTERNATIONAL, INC. v

NU-CAP2 CONSTRUCTION, INC., 169 F.R.D. 680, 686

(M.D. FLA. 1996)

2.) HERE PROPOSED ORDER FAILED TO ADDRESS CLEARLY ESTABLISHED LAW. APPLICANT RAISES SEVERAL STATUTES IN HIS INITIAL MOTION; 1.) 917-21-80 STATES, "THE COURT SHALL MAKE SPECIFIC FINDINGS OF FACT, AND STATE EXPRESSLY ITS CONCLUSION OF LAW, RELATING TO EACH ISSUE PRESENTED." AND, IT HAS BEEN ESTABLISHED THAT NONE OF THE ISSUES WERE DECIDED ON THEIR MERITS (SEE MOTION TO AMEND PER APPLICATION AND REPLY TO MOTION TO DISMISS) THEREFORE THE LAW REQUIRES THE COURT TO SUBSEQUENTLY UPLIFT THE GROUNDS EXPRESSED IN

P.C.R. APPLICATION. PEARSON V. HARRISON, (CA. 4(S.C.)2001)
942D, APPX. 85. AND §17-27-80, MCLRAY V. STATE, (S.C. 1991)
305 S.C. 329, 408 S.E. 2D 241.

2.) SUPREME COURT RULE 50(3) NOR S.C.
CODE ANN. §17-27-90 ACTS TO BAR AS SUCCESSIVE,
APPLICANT'S CURRENT PETITION. THESE RULES, WHILE
BARRING SUBSEQUENT PETITIONS ON GROUNDS AVAILABLE
TO OR WAIVED BY AN APPLICANT IN A PRIOR
ACTION OR PETITION, CONTEMPLATE AN ADJUDICATION
ON THE MERITS OF THE ORIGINAL PETITION, ON 2
DATE AT THE APPEL AS IT WERE. GAMBLE V. STATE
(S.C. 1989) 298 S.C. 176, 379 S.E. 2D 118. (ALSO SEE
APPLICANT'S ATTACHED DECLARATION)

A COURT MAY GRANT A MOTION TO
ALTER OR AMEND A FINAL JUDGMENT UNDER 72D. P. CIV.

P. 59(2) IT MOVANT POINTS TO EVIDENCE IN THE RECORD WHICH CLEARLY ESTABLISHES MANIFEST ERROR OF LAW OR FACT, OR TO PREVENT MANIFEST INJUSTICE. WENDY'S INTERNATIONAL, INC. V. NU-LAB CONSTRUCTION, INC., 169 F.R.D. 680, 686 (M.D. FLA. 1996)

CONCLUSION

THAT THE FINAL ORDER OF DISMISSAL BE REVERSED AND AN EVIDENTIAL HEARING BE HELD, AS A MATTER OF LAW.

FEB. 22ND, 2014

RESPECTFULLY SUBMITTED,
Jerome W. James
JEROME W. JAMES

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

JEROME W. JAMES,

APPLICANT,

v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-21-03273

DECLARATION OF APPLICANT IN
SUPPORT OF MOTION TO ALTER OR AMEND

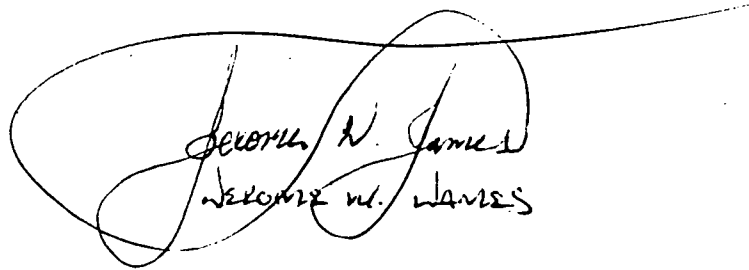
I JEROME W. JAMES FILED A PCR APPLICATION, WHICH WAS FILED WITH THE COURT ON DEC. 5TH, 2012, AND ON FEB. 12TH, 2013 RESPONDENT MADE ITS RETURN AND MOTION TO DISMISS, WHICH WAS UNTIMELY AND IN VIOLATION OF § 17-21-70 S.C. CODES OF LAW, BECAUSE THEY HAD (30) DAYS TO FILE THE RETURN AFTER APPLICATION WAS FILED. AT THIS TIME THE COURT SHOULD HAVE DISMISSED RESPONDENT'S MOTIONS AND GRANTED ME AN EVIDENTIAL HEARING. DUE TO THE FACT RESPONDENTS FAIL TO MEET STATUTE OF LIMITATION, HAD IT BEEN ME I WOULD HAVE LOST ALL RIGHTS TO CONTINUE TO BE HEARD. ALSO RESPONDENT IS ADDRESSING A STATUTE OF LIMITATION ISSUE, WHICH THE COURT GRANTED THEIR PROPOSED ORDER ON THE MATTER.

SO WHEN AM I ALLOWED TO HAVE EQUAL PROTECTION OF THE LAW? FURTHERMORE ON MAR. 6TH, 2013 THE COURT VIOLATED MY RIGHTS BY ISSUING A CONDITIONAL ORDER OF DISMISSAL PREPARED BY RESPONDENT. I THEN FILED A MOTION TO AMEND PCK APPLICATION AND REPLY TO MOTION TO DISMISS ON MAR. 14TH, 2013 (SEE THE RECORD). THE JUDGE FAILED TO MAKE ANY LEGAL DECISION ON THE MATTER. SO, THEREFORE A NEW JUDGE TOOK THE BENCH, AND ON JAN. 24TH, 2014 RESPONDENT FILES ANOTHER PROPOSED ORDER WITHOUT THE AUTHORIZATION OF THE COURT. UNLESS THE COURT COMMUNICATED WITH THE RESPONDENT IN PRIVATE, WHICH FURTHER VIOLATED MY RIGHTS, THIS DENIED ME THE EQUAL OPPORTUNITY TO FILE A PROPOSED ORDER OR CHANCE TO RESPOND TO RESPONDENT'S, BECAUSE AS YOU CAN SEE BY REVIEWING THE FINAL ORDER OF DISMISSAL JUDGE WILLIAM H. SEALS, JR. SIGNED AND DATED RESPONDENT'S PROPOSED ORDER ON JAN. 24TH, 2014, THE SAME DAY RESPONDENT FILED THE SAID MOTION. THIS CLEARLY DISRESPECT MY RIGHTS AS A PEOPLE, AND IT IS REQUIRED

THAT THE JUDGEMENT THAT WAS ENTERED ON FEB. 17th, 2014
BE ALTERED OR AMENDED. FURTHERMORE, EVERY ISSUE I RAISED
WAS BACKED / SUPPORTED BY STATUTE, RIGHTS AND LAW,
WHEREAS RESPONDENT HAS NO MERIT OR JURISDICTION.
ALSO, EVERYTHING IN MY MOTION TO ALTER OR AMEND IS TRUE AND
CORRECT.

I DECLARE UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE UNITED STATES OF AMERICA THAT THE
FOLLOWS IS TRUE AND CORRECT.

EXECUTED ON FEB. 22ND, 2014.


JEROME N. JAMES
JEROME N. JAMES

STATE OF SOUTH-CAROLINA
COUNTY OF FLORENCE.

WELONE W. JAMES,
APPLICANT,
v.

THE STATE OF SOUTH CAROLINA,
RESPONDENT.

IN THE COURT OF COMMON PLEAS
THE TWELFTH JUDICIAL CIRCUIT

CASE NO. 2012-CP-21-03233

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF
APPLICANT'S MOTION TO ALTER OR AMEND AND
MOTION TO AMEND PCR APPLICATION WAS
SERVED UPON THE COURTS BY MAILING THE
SAID ON 02-26-14.

Respectfully
James W. James
JAMES W. JAMES

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS

HEROME W. JAMES, 298382

APPLICANT,

V.

STATE OF SOUTH CAROLINA,
RESPONDENT.

C/A NO. 2012-CP-21-3233

OBJECTION AND REPLY TO
RESPONDENT'S RETURN IN RESPONSE
TO RULE 59(b) MOTION

CERTIFIED: A TRUE COPY
Cynthia R. Spivey
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.
2014 APR -9 PM 12:44

FILED

CLERK
FLORENCE COUNTY, S.C.

APPLICANT MOVES THE COURT AS TO
THE FOLLOWING MATTERS OF LAW.

I.

HERE, RESPONDENT ASK THE COURT NOT TO CONSIDER
THE MATTER BECAUSE IT WASN'T PROPERLY SERVED ON
RESPONDENT. NOT ONCE IN THE CURRENT PROCEEDINGS
HAS APPLICANT DIRECTLY SERVED RESPONDENT. ALL MOTIONS
HAS BEEN FILED WITH THE FLORENCE COUNTY CLERK
OF COURT AND THE CLERK'S OFFICE SERVES RESPONDENT.
THEREFORE, APPLICANT WAS UNDER THE PRESUMPTION
RESPONDENT WOULD BE IMMEDIATELY SERVED.

FURTHERMORE, NO ORDER WAS ISSUED AND NOW
RESPONDENT HAS HAD THE OPPORTUNITY TO RESPOND
THEREBY RENDERING RESPONDENT'S ARGUMENT moot.

II.

HERE AS TO WHETHER APPLICANT'S PCR
APPLICATION HAS MERIT. ON DEC. 5TH 2012 APPLICANT'S
PCR APPLICATION WAS FILED RAISING SEVERAL GROUNDS:

1. DUE PROCESS VIOLATION
2. INEFFECTIVE ASSISTANCE OF COUNSEL
3. LACK OF SUBJECT MATTER JURISDICTION
4. MISINTERPRETATION OF LAW
5. INVOLUNTARY GUILTY PLEA
6. NEWLY DISCOVERED EVIDENCE

AND, AS TO RELIEF APPLICANT ASKED THAT AN

EVIDENTIAL ISSUES BE HELD. APPLICANT RAISE THE FACT THAT THESE ISSUES HAS PREVIOUSLY BEEN RAISED EXCEPT NEWLY DISCOVERED EVIDENCE. IN APPLICANT'S PRIOR FINAL ORDER (2005) OF DISMISSAL NEITHER ISSUE WERE ADJUDICATED ON THE MERITS AS REQUIRED BY LAWS. §17-27-80. THE SUPREME COURT HAS HELD THAT WHEN A FINAL ORDER OF DISMISSAL IS ISSUED AND IT FAILS TO MEET LEGAL STANDARDS OF §17-27-80 A NEW PCR HEARING IS REQUIRED SO THAT THE ISSUES CAN BE PRESERVED FOR APPELLATE REVIEW. MCCRAY V. STATE, 305 S.C., 408 S.E.2D 241; PHILLIP V. STATE, 310 S.C. 254, 423 S.E.2D 127 (1992); GARNER V. STATE, 371 S.C. 1, 626 S.E.2D 860 (2006); MARLAR V. STATE, 375 S.C. 407, 653 S.E.2D 266 (2007).

AND THERE IS NO ISSUE AS TO WHETHER APPLICANT'S ORIGINAL ISSUES WERE ADJUDICATE ON THE MERITS. BECAUSE BY REVIEWING EXHIBIT-A

PAGE 10, 11, 15/16 AND 18 YOU WILL SEE RESPONDENT ADMIT TO THIS FACT. THEREFORE MATERIAL FACT EXIST IN THE MATTER, WHICH REQUIRE HEARING. HERE JUDGE WILLIAM H. SEALS, JR. HAS A LEGAL STANDARD TO UPHOLD, BECAUSE THE SUPREME COURT HELD THAT A ORDER FROM THE PER COURT, WHICH DID NOT CONTAIN FINDINGS OF FACT AND CONCLUSIONS OF LAW ON EVERY ISSUE RAISED, DOES NOT CONSTITUTE A FINAL ORDER OR JUDGEMENT UNDER THE UNIFORM POST-CONVICTION RELIEF ACT AND THEREFORE NOT PRESERVING ISSUES FOR APPELLATE REVIEW. U.S.C.A. CONST. AMEND. 6, §17-27-80; APPELLATE COURT RULE 221(A); MCCRAY V. STATE, 305 S.C. 329, 408 S.E.2D 241, (1991); KLUFT V. STATE, 310 S.C. 254, 423 S.E.2D 121 (1992); GARNER V. STATE, 341 S.C. 1, 626 S.E.2D 860 (2006); MARLAR V. STATE, 345 S.C. 401, 653 S.E.2D 266 (2007).

THEREFORE APPLICANT HASN'T RECEIVED A

(4)

LAWFUL FINAL ORDER IN THE MATTER AND APPLICANT
RETAINS THE RIGHT TO HAVE EVERY ISSUE ADJUDICATED
ON THE MERITS, AND TO HAVE ISSUES PRESERVED FOR
APPELLATE REVIEW. RESPONDENT HASN'T PRODUCED ONE
PIECE OF EVIDENCE TO REFUTE THESE CLAIMS. THEY
ONLY STATE UNTIMELY AND SUCCESSIVE AS A DEFENSE,
BUT FAIL TO PRODUCE EVIDENCE OR PROVE THE SUPREME
COURT ERRORED IN ESTABLISHING GROUNDS TO § 17-
27-80 STANDARD IN MCCLEARY, PRUITT, MARLAR AND GARNER.
THE STATUTE OF LIMITATION AND SUCCESSIVENESS DON'T
APPLY.

III.

ALSO, AS TO THE MATTER OF NEWLY DISCOVERED
EVIDENCE STATUTE OF LIMITATION AND SUCCESSIVENESS DON'T
APPLY. § 17-27-45 (c) ALLOWS AN APPLICANT TO RAISE AN
ISSUE OF NEWLY DISCOVERED EVIDENCE ON PCR.

AS LONG AS THE MATTER IS BROUGHT BEFORE THE COURT IN
A REASONABLE TIME AFTER THE EVIDENCE IS DISCOVERED.

APPLICANT HAS PRODUCED EVIDENCE AND AN AFFIDAVIT AS TO
WHEN THE EVIDENCE WAS DISCOVERED. APPLICANT'S WORD IS
CONSIDERED TRUE AND CORRECT UNTIL PROVEN OTHERWISE. IN LATE
2012 APPLICANT DISCOVERED THE EVIDENCE AND IMMEDIATELY
AFTER FILE A PER APPLICATION, WHICH WAS FILED ON DEC.
5TH, 2012. (SEE EXHIBIT-D APPLICANT'S AFFIDAVIT) RESPONDENT HASN'T
PRODUCED ANY AFFIDAVITS, SWORN STATEMENTS OR HEARINGS NOR ANY
EVIDENCE TO REBUT APPLICANT'S AFFIDAVIT OR EVIDENCE.

NOR DO RESPONDENT PRESENT ANY LEGAL REASON AS TO WHY
THE ISSUE WOULD BE BARRED, NEITHER DO THE FINAL
ORDER SIGNED AND ISSUED BY JUDGE WILLIAM H. SEALS, JR.
ON FEB. 24TH 2014 ESTABLISH CLEAR LAW AS TO THIS ISSUE
OR ISSUES RAISED BY APPLICANT IN HIS ^{ORIGINAL} ~~ORIGINAL~~

APPLICATION AND AMENDMENTS MADE BY APPLICANT. THEREFORE
NOT PRESERVING APPLICANT'S ISSUES FOR APPELLATE REVIEW.

317-27-80; MURRAY V. STATE, 305 SC. 529, 408 S.E.2D 241 (1991); PRUITT

V. STATE, 310 S.C. 254, 423 S.E.2D 121 (1992); GARNER V. STATE, 311 S.C. 1, 653 S.E.2D 860 (2006); MARLAR V. STATE, 315 S.C. 404, 653 S.E.2D 266 (2007).

CONCLUSION

PURSUANT TO THE STANDARDS OF THE WCC WHICH COINCIDE WITH COMMON LAW, ONLY A SWORN STATEMENT CAN REBUT ANOTHER STATEMENT. APPLICANT IS THE ONLY ONE TO PRODUCE SUCH STATEMENT (SEE EXHIBIT-B APPLICANT'S AFFIDAVIT). SO, THEREFORE NOTHING APPLICANT HAS STATED IN THIS AFFIDAVIT HAS BEEN CONTESTED. NOW APPLICANT DEMANDS AN EVIDENTIARY HEARING BE HELD AS TO ALLOW RESPONDENT THE OPPORTUNITY TO GIVE SWORN TESTIMONY, SO THAT THE ISSUES COULD BE ADJUDICATED ON THE MERITS. ALSO, ALLOWING ISSUES TO BE PRESERVED FOR APPELLATE REVIEW. OR THAT APPLICANT'S CONVICTION BE VACATED!

APRIL 6th, 2014.

RESPECTFULLY SUBMITTED,

James W. James

JAMES W. JAMES

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

Jerome W. James, 288382,

APPLICANT,

v.

THE STATE OF SOUTH CAROLINA
RESPONDENT.

IN THE COURT OF COMMON PLEAS

C/A NO. 2012-CP-21-3233

CERTIFICATE OF SERVICE

I CERTIFY THAT A COPY OF APPLICANT'S
MOTION "OBJECTION AND REPLY TO RESPONDENT'S RETURN
IN RESPONSE TO RULE 59(2) MOTION, WAS SERVED THIS
6th DAY OF APRIL 2014 BY PLACING THE SAID IN
THE U.S. MAIL.

APRIL 6th, 2014

RESPECTFULLY,

Jerome W. James

Jerome W. James

FILED

CLERK - 3 PM 12:43
JUN 11 2014
CLERK OF COURT
FLORENCE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

WILSON W. WALKER, 288382
APPLICANT,
V.

STATE OF SOUTH CAROLINA,
RESPONDENT.

"EXHIBIT-B"

IN THE COURT OF COMMON PLEAS

2012-CP-21-3232

AFFIDAVIT of WILSON W. WALKER

2013 MAR 14 PM 2:30

CORPUS REUS-SHEARIN
AND ASSOCIATES
FLORENCE COUNTY, SC

FILED

FILED

2013 APR -9 PM 12:43

CLERK OF COURT
FLORENCE COUNTY, SC

I WILSON W. WALKER, DECLARE THAT ON
OCT. 30th, 2002, THAT I ALONG WITH, DARYL CORBIN,
ATTORNEY AND ROBERT WELLS, ASSISTANT SOLICITOR WELD
ON THAT DAY NEGOTIATE A SENTENCE FOR THE
FOLLOWING INDICTMENTS 02-GS-21-331, 02-
GS-21-341, 02-GS-21-364, 02-GS-21-363 AND 02-
GS-21-1622. 02-GS-21-341 CONSISTED OF A ONE (1)
YEAR SENTENCE FOR ONE (1) COUNT OF ~~THE~~ RESISTING
ARREST AND A THREE (3) YEAR SENTENCE FOR ONE (1)
COUNT OF FAILURE TO STOP FOR BLUE LIGHT, 02-GS-
21-331 CONSISTED OF A TEN (10) YEAR SENTENCE FOR
ONE (1) COUNT OF 2ND DEGREE BURGLARY AND A TEN
(10) YEAR SENTENCE FOR ONE (1) COUNT OF ARMED ROBBERY,

(1)

CERTIFIED: A TRUE COPY

Signature of Clerk

CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

02-GS-21-363 CONSISTED OF A TEN (10) YEAR
SENTENCE FOR TWO (2) COUNTS OF ARMED ROBBERY,
02-GS-21-364 CONSISTED OF A TEN (10) YEAR
SENTENCE FOR ONE (1) COUNT OF ARMED ROBBERY,
AND 02-GS-21-1622 CONSISTED OF THREE (3)
COUNTS OF ASSAULT ON STATE OR LOCAL CORRECTIONAL
FACILITY EMPLOYEES WITH A FIVE (5) YEAR SENTENCE
FOR EACH COUNT AND ONE (1) COUNT OF ASSAULT
AND BATTERY OF A HIGH AND AGGRAVATED NATURE
CARRYING A FIVE (5) YEAR SENTENCE. EVERYTHING
WAS TO BE SERVED CONCURRENT. ALL THE PAPER-
WORK WAS DONE, THEN LATER THAT EVENING THE
CASE WAS PRESENTED BEFORE JUDGE HARVEY, WHICH
HE REFUSE TO ACCEPT THE PSEA DUE TO FAMILY
TIES WITH MY FAMILY AND HIS. SO, DUE TO THE
FACT IT WAS SO LATE IN THE DAY AND THERE
WASN'T TIME TO GO BEFORE ANOTHER JUDGE, IT
WAS POSTPONED UNTIL THE FOLLOWING DAY.

THEREFORE, ON OCT. 31ST, 2002 I WAS
(2)

TAKEN BEFORE JUDGE ~~LEE S. ALFORD~~ WHO ACCEPTED
THE PLEA, AND IMPOSED AN ADDITIONAL SENTENCE
FOR INDICTMENT 02-GS-21-1622. THIS WAS DUE
TO THE FACT ROBERT WELLS, ASSISTANT PROSECUTOR,
INFORMED THE COURTS THAT, ANY SENTENCE THAT
WAS IMPOSED FOR THE OTHER INDICTMENTS, THAT
02-GS-21-1622 HAD TO BE CONSECUTIVE AS MANDATED
BY LAW. THE LAW MR. WELLS WAS REFERRING TO WAS
§16-3-630 OF S.C. CODES OF LAW.

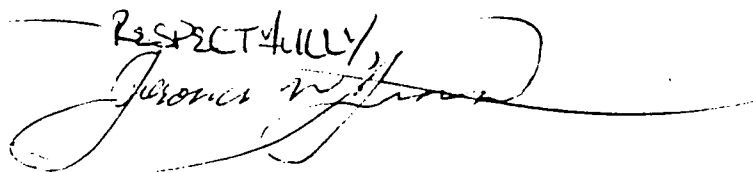
IN LATE 2012 WHILE RESEARCHING
MY CASE I VIEWED THE STATUTE (16-3-630)
AND DISCOVERED THAT MR. WELLS WRONGFULLY INFORMED
THE COURTS. SO, I IMMEDIATELY FILED A
PCR APPLICATION. BECAUSE UPON READING THE
STATUTE DISCOVERY WAS MADE THAT IN MY
CIRCUMSTANCES THE REQUIREMENT FOR CONSECUTIVE
SERVING OF SENTENCES IN 16-3-630 DIDN'T APPLY
TO ME, BECAUSE I WAS NOT SERVING A
SENTENCE AT THAT TIME. I WAS SENTENCED

FOR ALL CHARGES ON OCT. 31ST, 2002, SO THEREFORE
CANCELLING OUT THE CONSECUTIVE REQUIREMENT OF
16-3-630.

THEREFORE, INVALIDATING MY SENTENCE
DUE TO SEVERAL REASONS: MISCARriage OF JUSTICE,
PLAIN ERROR AND MISINTERPRETATION OF THE LAW. DUE TO
THE FACT THIS DID AFFECT MY SUBSTANTIAL RIGHTS
AND SERIOUSLY AFFECTS THE FAIRNESS, INTEGRITY
OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS.
ALL THIS IS REFLECTED IN THE RECORD; TRANSCRIPT
SENTENCING SHEETS AND 16-3-630.

I DECLARE UNDER THE PENALTY OF
PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

MAR. 1ST, 2013

RESPECTFULLY,


SWORN OR AFFIRMED TO AND SUBSCRIBED BEFORE ME THIS

7th DAY OF March 2013.

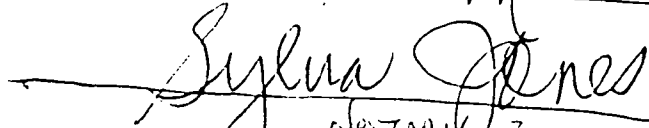

NOTARY PUBLIC
MY COMMISSION EXPIRES: 11/24/2018 (4)

EXHIBIT - 4 " FILED

2014 APR -9 PM 12:43
UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE COUNTY, SC

Jerome James, #288382,

Petitioner,

vs.

South Carolina Department of Corrections;
Warden, Lee Correctional Institution,

Respondent.

C/A No.0:08-4079-DCN-PJG

RETURN AND MEMORANDUM OF
LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

Respondent, above-named, hereby makes a Return to the Order filed by United States Magistrate Judge Paige J. Gossett dated January 14th, 2009, in the matter of the *pro se* Petition for Writ of Habeas Corpus filed by Jerome James ("Petitioner"), on December 18th, 2008. Respondent would respectfully show the following.

I.

Procedural History

Petitioner is presently confined to Lee Correctional Institution pursuant to Orders of Commitment from the Clerk of Court from Florence County. At the March 2002 term, the Florence County Grand Jury issued **five** separate multi-count indictments of Petitioner. The first was a four-count indictment of Petitioner for first degree burglary, armed robbery, assault and battery of a high and aggravated nature ("ABHAN"), and possession of a firearm during commission of a violent crime (02-GS-21-331). {PCR App. 112-13}. The second indictment was a four-count indictment of Petitioner for failure to stop for a blue light, possession of a stolen vehicle, resisting arrest, and second degree burglary (02-GS-21-341). {PCR App. 114-15}. The third was a three-count indictment of Petitioner for two charges of armed robbery and one charge of possession of a firearm during commission

of a violent crime (02-GS-21-363). {PCR App. 116}. The fourth was a five-count indictment of Petitioner for two charges of armed robbery, one charge of possession of a firearm during commission of a violent crime, grand larceny, and arson (02-GS-21-364). {PCR App. 117-19}. The final indictment issued at the same March 2002 term was a four-count indictment of Petitioner for breaking and entering into a motor vehicle, malicious injury to personal property, grand larceny, and resisting arrest (02-GS-21-365). {PCR App. 120-21}.

At the October 2002 term, the Florence County Grand Jury issued a seven-count indictment of Petitioner for escape or attempting escape, lynching, assault and battery with intent to kill ("ABIK"), and four counts of assault on a state or local correctional office employee (02-GS-21-1622).

Petitioner was represented at the trial level by Daryl Corbin, Esquire. On October 31st, 2002, Petitioner pled guilty before the Honorable J. Michael Baxley pursuant to a negotiated plea with the State. Pursuant to the plea, Petitioner was to receive a total active sentence of ten (10) years on the indictments issued in March 2002, and for the judge to determine a consecutive sentence on the indictments from October 2002. {PCR App. 3-5; 8; 15}. Pursuant to the plea agreement, Petitioner pled and was sentenced as follows:

- (1) on -331, as to count one for burglary first he pled to a lesser included of burglary second violent, for which he received ten (10) years; and to count two for armed robbery he pled to the charge and received ten (10) years;
- (2) on -341, he pled to count one for failure to stop for a blue light, and received three (3) years; and pled to count three for resisting arrest, and received one (1) year;
- (3) on -363, he pled to counts one and two for armed robbery, and received ten (10) years apiece;
- (4) on -364, he pled to count one for armed robbery, and received ten (10) years consecutive to counts five, six, and seven of 02-GS-21-1622;

(5) on -1622, as to count three for ABIK he pled to the lesser included offense of ABHAN, and received five (5) years consecutive; and on counts five, six and seven for assault on a correctional officer he received five (5) years on each, consecutive to count three.

The charges on -365 were nolle prossed. Thus, Petitioner received a total active sentence of twenty (20) years. {PCR App. 36-38}.

Petitioner did not file a direct appeal from his convictions and sentences.

Petitioner next filed a *pro se* Application for Post-Conviction Relief ("APCR") on July 15th, 2003 (03-CP-21-1303), in which he asserted the following issues:

- A. Ineffective Assistance of Counsel;
- B. Deprivation of Due process of law, lack of subject matter jurisdiction.

{PCR App. 40}. The State filed a Return dated April 16th, 2004. {PCR App. 52}.

Attorney James M. Saleeby, Jr., Esquire, represented Petitioner at the PCR trial level. On January 18th, 2005, Saleeby filed a "Brief in Support of and Amendment to Application for Post-Conviction Relief, in which he asserted the following issues:

- 1. Here, counsel was ineffective as he failed to have the charges dismissed because the indictment was void.
- 2. Brady disclosures are grounded in the defendant's fundamental right to a fair trial mandated by the due process clause of the Fifth and Fourteenth Amendments.
- 3. Counsel failed to inform the Applicant of the nature of the case and that the court had 180 days to prosecute Applicant.
- 4. The Applicant contends that the plea at issue in this case was both involuntary and defective pursuant to *Pitman v. State*, 337 S.C. 597, 524 S.E.2d 623 (1999) in that the judge never informed the Applicant of the mandatory minimum sentence and was not made aware of crucial elements of the charged offenses.

An evidentiary hearing in Petitioner's PCR was held before the Honorable John L. Breeden on February 14th, 2005. {PCR App. 57}. Petitioner was present and represented by Saleeby. Petitioner called himself to testify at the hearing; the State called trial counsel. Following submission of proposed orders by both sides, on August 10th, 2005, Judge Breeden issued an Order of Dismissal with Prejudice, in which he rejected Petitioner's claims for relief. {PCR App. 101}.

A PCR appeal was filed with the state supreme court. Deputy Chief Appellate Defender Wanda H. Carter, of the South Carolina Office of Appellate Defense, was appointed to represent Petitioner in his APCR appeal. On May 15th, 2006, Carter filed a "no merit" Johnson¹ Petition for Writ of Certiorari and Petition to be Relieved as Counsel in which she raised the following issue on behalf of Petitioner:

Trial counsel was ineffective in failing to explain fully sentencing consequences in the case.

The State filed a letter Return to the Johnson Petition on May 22nd, 2006.

By Order dated December 17th, 2007, the case was transferred to the South Carolina Court of Appeals. On December 17th, 2007, the state court of appeals issued an order in which it denied the Johnson petition. The Remittitur was sent down on January 3rd, 2008.

Attached herewith and incorporated herein by reference are the following documents from the state court record:

1. Appendix including: Index; Guilty Plea Transcript; Application for Post-Conviction Relief; Application for Post-Conviction Relief (2003-CP-21-1303); Return; Post-Conviction Relief Hearing Transcript; Order of Dismissal with Prejudice; Indictments;

¹ Johnson v. State, 364 S.E.2d 201 (S.C. 1988).

- | | | |
|----|-------------------|--|
| 2. | October 2002 | Indictments; |
| 3. | January 18, 2005 | Brief in Support of and
Amendment to Application for
Post-Conviction Relief; |
| 4. | June 2005 | Proposed Order Granting
Application for Post-Conviction
Relief; |
| 5. | May 15, 2006 | Johnson Petition for Writ of
Certiorari; |
| 6. | May 22, 2006 | Letter from Assistant Attorney
General (in lieu of formal
return); |
| 7. | June 26, 2006 | Pro-Se Response to Appellate
Attorney Petition; |
| 8. | December 17, 2007 | Order (denying Petition for Writ
of Certiorari); |
| 9. | January 3, 2008 | Remittitur. |

II.

Applicability of AEDPA

The present habeas corpus petition is dated December 12th, 2008. Accordingly, the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA) apply to this case. Lindh v. Murphy, 521 U.S. 320 (1997). Under the AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of" clearly established federal law as decided by the United States Supreme Court, or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption

by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.

Petitioner has generally exhausted his state remedies with the expiration of time for filing the direct appeal, and the disposition of the PCR appeal by the South Carolina Court of Appeals. See generally S.C. Code Ann. § 17-27-100 (1985); Drayton v. Evatt, 312 S.C. 4, 430 S.E.2d 517 (1993). This statement does not constitute a waiver of any procedural bar or bypass arguments from Petitioner's failure to properly preserve or present issues to the state courts.

IV.

Period of Limitations

The AEDPA's amendments to Title 28 provide for a one-year period of limitation on the filing of a federal habeas corpus petition. See 28 U.S.C. § 2244(d). Subsection (d)(1)(A) of section 2244 provides that the limitations period shall run from the date when the judgment of conviction became final at the conclusion of direct review. Subsection (d)(2) of section 2244 provides that the limitations period tolls while state post-conviction or collateral attack actions are pending.

Since Petitioner did not file a direct appeal, his conviction was finalized by the conclusion of direct review on November 11th, 2002, or ten (10) days after his sentence was given by Judge Baxley on October 31st, 2002.² Rule 203(b)(2), SCACR. Because Petitioner did not file a direct appeal, the ninety (90) day period for seeking certiorari from the United States Supreme Court is not included. See, e.g. Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) (direct review concludes at expiration of time for seeking certiorari from United States Supreme Court); 28 U.S.C. § 1257 (United States Supreme Court can only

² November 10th, 2002, was a Sunday.

review on certiorari the final judgments of "highest court of a state"); U.S. Sup. Ct. R. 10(b) (certiorari considered where "state court of last resort" has decided important federal question); U.S. Sup. Ct. R. 13 (time period for petition for writ of certiorari is 90 days from decision or judgment of state court of last resort); Rule 203(b)(2), SCACR (10 day requirement for filing of Notice of Appeal from criminal conviction). Petitioner thus had until November 11th, 2003 to file his federal habeas corpus action, unless the period was at any time tolled. See, e.g. Hernandez v. Caldwell, 225 F.3d 435 (4th Cir. 2000); Harris, supra; Brown v. Angelone, 150 F.3d 370 (4th Cir. 1998).

Petitioner did not file his APCR until July 15th, 2003, so two hundred and forty six (246) days of non-tolled time ran since the period of limitations began on November 11th, 2002. The period of limitations was tolled during the pendency of the APCR until no later than January 3rd, 2008, when the South Carolina Supreme Court issued the Remittitur following its Order denying certiorari review on the APCR Order of Dismissal. See, e.g. Ott v. Johnson, 192 F.3d 510 (5th Cir. 1999) (tolling does not include 90 days for United States Supreme Court certiorari petition from final denial by state's highest court of collateral action); Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000) (running clock from when state appellate court denied leave to appeal denial of state post-conviction petition).

With regard to the rule in Houston v. Lack, 487 U.S. 266 (1988), the delivery date of this habeas petition is December 16th, 2008. Therefore, a further total of three hundred and forty-eight (348) days of non-tolled time between the South Carolina Court of Appeals' disposition of the APCR appeal and the filing of this habeas petition. Aggregating the two periods on either side of the pendency of the APCR action equals exactly five hundred and ninety-four (246 + 348 = 594) days, which is in excess of one year. Therefore, the present Petition for Writ of Habeas Corpus is time-barred and should be denied and dismissed.

V.

Substantive Discussion

In the event this Court disagrees on the preceding limitations analysis, Petitioner's claims are still insufficient for relief. Petitioner raises various claims of ineffective assistance of counsel. To receive relief in federal habeas on an issue that was litigated on the merits in state court, Petitioner must show that the state court decision was either: (1) an unreasonable application of clearly established federal law, as determined by the United States Supreme Court, or (2) based on an unreasonable determination of the facts in light of the evidence presented at the state court hearing. 28 U.S.C. § 2254(d)(1) & (d)(2).

In explaining these statutory standards, the United States Supreme Court has noted that the State court must be more than just wrong:

[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be [objectively] unreasonable.

Williams v. Taylor, 120 S.Ct. 1495, 1522 (2000) (construing the standard of review in 28 U.S.C. § 2254(d)(1)).

As to claims of ineffective assistance, a defendant who pleads guilty upon the advice of counsel can only attack the voluntary or intelligent character of his plea by showing ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52 (1985) (cited in Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993)).

Petitioner first must show that counsel's representation fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 668 (1985). Judicial scrutiny of counsel's performance is highly deferential and not subject to the distorting effects of hindsight. Strickland, 466 U.S. at 689; Burket v. Angelone, 208 F.3d 172 (4th Cir.

2000). In the context of a guilty plea, Petitioner also must establish prejudice by proving that "counsel's constitutionally ineffective performance affected the outcome of the plea process." Hill v. Lockhart, 474 U.S. 52, 59 (1985). The defendant must show that "there is a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." Id.

As will be seen, Petitioner's claims are insufficient for relief.

A. Ground One

Petitioner's first ground for relief is as follows:

Ineffective Assistance of Counsel / Lack of
subject Matter Jurisdiction.

Petitioner first contends his counsel was ineffective for failing to assert the circuit court lacked subject matter jurisdiction because Petitioner was not tried within 180 days as required by an Order of former South Carolina Chief Justice Ernest Finney, dated March 5th, 1999. A copy of the order ("180 day order") is attached to the habeas petition.

This issue was raised in the amended petition, and at the PCR hearing Petitioner testified he believed his charges should have been dismissed based on the 180 day order. {PCR App. 69-70}. The issue was not specifically addressed in the PCR order of dismissal, although the PCR court did generally find that the trial court had subject matter jurisdiction. {PCR App. 109-10}. The issue was not addressed by the appellate defender in the Johnson petition, but Petitioner did raise it in his *pro se* petition. The state court of appeals denied certiorari after Johnson review.

As an initial matter, the issue is procedurally barred. To exhaust state remedies, a habeas petitioner must present the substance of his claims to the state's highest court. See, e.g. Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997). Claims not presented to a state's highest court may be treated as exhausted if it is clear that the claims would be

procedurally defaulted under state law if the petitioner attempted to raise them now. George v. Angelone, 100 F.3d 353, 363 (4th Cir. 1996). However, a claim is procedurally barred from federal habeas corpus review if the state court to which the Petitioner would be required to present the claim would now find it procedurally defaulted. (Williams v. Taylor, 163 F.3d 860, 872 (4th Cir. 1998) (quoting Coleman v. Thompson, 501 U.S. 722 (1991))).

* The South Carolina Supreme Court has stated that the dismissal of an appeal filed pursuant to the "no merit" procedure set forth in Anders v. California, 386 U.S. 738 (1967), does not constitute a decision on the merits but rather that the "court was unable to ascertain a non-frivolous issue requiring further briefing." State v. Lyles, __ S.E.2d __, 2009 W.L. 427239 (S.C. 2009). The same "no merit" procedure set forth in Anders was mandated for PCR appeals by Johnson v. State, 364 S.E.2d 201 (S.C. 1988), and that procedure was followed here. Since the dismissal of the PCR appeal did not result in a decision on the merits by the state supreme court, then the state appellate court in this case "declined to consider the claim's merits on the basis of an adequate and independent state procedural rule." See Fisher v. Angelone, 163 F.3d 835, 844 (4th Cir. 1998). As such, the claim – and indeed any collateral attack claim in this case – would be procedurally barred from federal habeas corpus review. See See, e.g. Coleman v. Thompson, 501 U.S. 722 (1991) (issue not properly raised to the state's highest court, and procedurally impossible to raise there now, is procedurally barred from review in federal habeas). Cf. also Kornahrens v. Evatt, 66 F.3d 1350, 1362-63 (4th Cir. 1995) (discussing Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988), for the proposition that the prospect of *in favorem vitae* review in a capital case did not mean a habeas petition had preserved every direct appeal claim for federal review where they were not specifically

raised to the state court on direct appeal)).

* Regardless of the preceding argument, this specific claim is procedurally defaulted as it was not specifically ruled upon by the PCR court. As such, it would not have been preserved for review on PCR appeal by the appellate court. Plyler v. State, 309 S.C. 408, 424 S.E.2d 777 (1992) (issue must be both raised to and ruled upon by PCR judge to be preserved for appellate review); Rule 59(e), SCRPC (providing avenue for any party to move to alter or amend a judgment). Since Petitioner did not present this claim to the South Carolina Supreme Court for review in a procedurally viable manner, and the South Carolina state courts would find it procedurally defaulted if Petitioner attempted to raise it now, then the claim is procedurally barred in federal habeas corpus. See, e.g. Coleman v. Thompson, 501 U.S. 722 (1991).

In any event, the claim fails substantively. Claims of subject matter jurisdiction are not cognizable in federal habeas corpus, so the freestanding claim is barred. See Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) (citing Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir.1976), which held that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary"). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions.").

Regardless, there is no subject matter jurisdiction issue. The 180 day Order itself is purely administrative and specifically notes it does not "create or define a right of a defendant to a speedy trial". The Order expressly cites as its basis Chief Justice Finney's state constitutional authority as the chief administrator of the courts (S.C. Const. Art V. § 4). And, the state supreme court has expressly held that the provision in Rule 3, SCRCrimP, requiring solicitors to take action on arrest warrants within a certain time

period, to be purely administrative and nonjurisdictional, and to provide no benefit to a criminal defendant from its violation. State v. Culbreath, 316 S.E.2d 681 (S.C. 1984) (discussing the predecessor to Rule 3(c), SCRCrimP). Similarly, under Culbreath and the express language of the 180 day order, Petitioner's claim of a lack of subject matter jurisdiction fails as well.

Finally, the South Carolina Supreme Court has abandoned the view that a defective or insufficient indictment was a question of subject matter jurisdiction that could be raised at any time regardless of whether the issue was properly preserved. State v. Gentry, 610 S.E.2d 494 (S.C. 2005). Gentry noted a difference between the issue of a court's general power to try the class of case on which the defendant was convicted – which could be raised for the first time on appeal – and the insufficiency or defective nature of the indictment itself, which required a contemporaneous objection to be preserved on appeal. Id. – and counsel could not have been deficient nor Petitioner prejudiced from a failure to object. Here, the circuit court sitting in general sessions clearly had subject matter jurisdiction to resolve felony criminal charges against Petitioner. There is no subject matter jurisdiction issue and counsel could not have been deficient nor Petitioner prejudiced from a failure to object.

The issue should be dismissed or denied.

B. Ground Two

Petitioner's second ground for relief is as follows:

Ineffective Assistance of Counsel / Brady Violation

Petitioner contends his counsel was ineffective in failing to disclose to him the state's evidence.

Petitioner raised a Brady claim in his amended petition. At PCR, he claimed his

counsel did not have the file when they first met, only met for 20 to 30 minutes a second time, and the third time was on the day he pled. {PCR App. 67-68}.

Counsel testified they met and extensively discussed the facts. {PCR App. 78; 84; 86}. Counsel noted that when he would go to the jail to see Petitioner, he would take whatever documents he had been provided from the State. He recalled going over those documents with Petitioner during their meetings. He did not recall if he provided copies to Petitioner, but remembered that Petitioner did have some documents of his own. {PCR App. 91-92}.

The PCR court credited trial counsel's testimony that he and Petitioner met for extended periods of time and discussed the charges. Thus, the court rejected any claim of ineffectiveness. {PCR App. 109-10}. Petitioner asserted the issue of ineffectiveness for failure to disclose the evidence in his *pro se* petition on PCR appeal. The state court of appeals denied certiorari after Johnson review.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate court does not constitute a decision on the merits. See V(A), *supra*.

Regardless, the claim fails on the merits. Counsel's testimony, detailed above, provides sufficient support in the record to sustain the state court's decision that counsel fully discussed the facts and the state's evidence with Petitioner. And, Petitioner at the plea hearing stated he was satisfied with counsel and had not been pushed or forced into pleading guilty by his lawyer. Counsel also stated at the plea hearing he had long discussions with Petitioner as to the charges. {PCR App. 7; 16-17}.

In any event, Petitioner has not shown prejudice, as he has not identified one specific bit of evidence that would have caused him to insist on trial. This failure of the

burden of proof is even more persuasive given that Petitioner was able to resolve multiple charges totaling over 200 potential years for a negotiated plea that resulted in a sentence of only twenty years. See Savino v. Murray, 82 F.3d 593, 599 (4th Cir. 1996) (if there exists no reasonable probability that a possible defense would have succeeded at trial, the alleged error in failing to disclose or pursue it cannot be prejudicial); Lockhart v. McCotter, 782 F.2d 1275 (5th Cir. 1986) (habeas corpus petitioner did not establish prejudice because he failed to allege what exculpatory evidence would have been produced had counsel made a Brady motion); Cf. United States v. Robinson, 585 F.2d 274, 281 (7th Cir. 1978) ("It is simply impossible for a court to rule on an alleged Brady violation unless a defendant identifies with reasonable particularity the evidence to be considered.").

The issue should be dismissed or denied.

C. Ground Three

Petitioner's third ground for relief is as follows:

Ineffective Assistance of Counsel / Involuntary Guilty Plea

Petitioner contends he was not made aware of the mandatory minimum sentence or his parole eligibility.

This issue was mentioned in the amended application, at least with regard to the mandatory minimums.

At PCR, Petitioner testified counsel never told him about the mandatory minimum sentence as to armed robbery, and stated that he could not remember if counsel discussed parole because counsel was going so fast. {PCR App. 65-66}. On cross, Petitioner admitted he knew it was a negotiated plea, and also admitted counsel mentioned he was facing over 200 years. {PCR App. 70-71}. On examination by the PCR court, Petitioner claimed his counsel did not explain what a negotiated plea was, but admitted his counsel

told him he would get the 10 years if the judge accepted the plea. However, Petitioner continued to state his counsel did not tell him that was a mandatory minimum. Petitioner admitted he understood the charges regarding the incident at the jail would be handled above the ten year deal on the other charges. However, Petitioner claimed his counsel told him he could get parole after serving a portion of the initial ten year sentence. Finally, he stated Judge Baxley only mentioned the possibility of serving every day of the ten years until after the plea was accepted. {PCR App. 72-77}.

Counsel noted no one pressured Petitioner into pleading guilty, and Petitioner was very pleased that they were able to negotiate a total sentence of ten years on all the charges excluding the subsequent charges for the incident in the jail. Counsel noted they discussed the fact he was facing over 200 years, and specifically testified they discussed the potential sentence for armed robbery. {PCR App. 79-80}. Counsel stated he believed he discussed parole eligibility with Petitioner, and noted Petitioner was told he would have to do 85% of the ten years. Plus, Judge Baxley made it clear Petitioner might have to serve every day of the first ten (10) years. Counsel pointed out the statute would not allow the charges from the jail incident to be concurrent to the other charges, and Petitioner was fully aware he would have to serve whatever sentences he received on those additional charges on top of the ten years. {PCR App. 82-84}.

The PCR court credited trial counsel's testimony, and found counsel was not deficient in discussing the charges with Petitioner. {PCR App. 108-10}. The issue was raised by Petitioner and the appellate defender on PCR appeal, but the state court of appeals denied certiorari.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate

court does not constitute a decision on the merits. See V(A), supra.

Regardless, the claim fails on the merits. (A criminal defendant must be informed of the direct consequences of his plea. Misinformation as to the direct consequences of a plea renders the plea involuntary. Manley v. U.S., 588 F.2d 79 (4th Cir.1978) (erroneous statement of court as to maximum possible punishment). Neither the court nor defense counsel is obligated to advise a defendant as to the collateral consequences of a plea. Strader v. Garrison, 611 F.2d 61 (4th Cir.1979) (parole eligibility is a collateral consequence of a plea). "The distinction between 'direct' and 'collateral' consequences of a plea ... turns on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant's punishment." Cuthrell v. Director, Patuxent Institution, 475 F.2d 1364, 1366 (4th Cir.1973).

Under these principles, if an attorney substantially misinforms a defendant about the date he will become eligible for parole, and the defendant decides to plead guilty instead of going to trial based on the misinformation, the defendant will be entitled to relief. Strader, supra; O'Tuel v. Osborne, 706 F.2d 498 (4th Cir.1983); and Ostrander v. Green, 46 F.3d 347 (4th Cir.1995). On the other hand, a plea is involuntary if the defendant is not advised that parole ineligibility will result as a direct consequence of his plea. Cuthrell, 475 F.2d at 1365-66; Bell v. North Carolina, 576 F.2d 564, 565 (4th Cir.1978); and Chapman v. Angelone, 187 F.3d 628, 1999 WL 511062 (4th Cir.1999) (unpublished).)

In South Carolina, armed robbery is punishable by a "mandatory minimum term of not less than ten years or more than thirty years, no part of which may be suspended or probation granted. A person convicted under this subsection is not eligible for parole until the person has served at least seven years of the sentence." S.C. Code Ann. 16-11-330 (Supp. 1992). Pursuant to section 24-13-150, armed robbery is a "no parole" offense, and

one must serve 85% before the possibility of other early release.

Here, there is ample support in the record that Petitioner understood what he was facing with regard to the penalties. As noted before, Petitioner admitted and counsel testified Petitioner was advised he would get a negotiated plea of ten years on the various charges indicted in March 2002, and that any sentence for the jail incident would be consecutive to that ten years. Counsel stated he discussed the armed robbery time with Petitioner. Further, the plea record belies any claim of misunderstanding. The solicitor mentioned the range of sentencing at the plea, noting that armed robbery carries "ten to thirty", but Petitioner was receiving the negotiated sentence of ten years. {PCR App. 4}. Counsel told the judge at the hearing he had discussed the possible penalties {PCR App. 7}, and stated on the record that Petitioner was aware he was "most likely looking at serving every day of that ten years". {PCR App. 8}. Petitioner also told the judge he understood he could face an additional thirty years for the jail incident over the negotiated ten. {PCR App. 15}. The judge then told Petitioner a second time he would most likely serve every day of the negotiated ten, and then whatever sentence the judge gave on the jail charges. {PCR App. 27}.

As to parole eligibility, Petitioner was advised by the judge repeatedly he would likely have to serve every day of the ten years, and then time for the jail incident on top of that. Moreover, counsel informed Petitioner of the 85% rule.

Even if counsel did not mention the mandatory minimum, it is hard to see how that could possibly be prejudicial when Petitioner got a time certain of ten years for all the charge – which in fact would be the minimum for just one charge of armed robbery. As to both issues, Petitioner presented no credible evidence that he relied upon any misinformation on these issues in pleading guilty, especially given the extremely favorable

plea deal which resulted in the minimum possible sentence he could have received on all the charges indicted in March 2002.

The issue should be dismissed or denied.

D. Ground Four

Petitioner's fourth ground for relief is as follows:

Ineffective Assistance of Counsel / Lack of Subject Matter Jurisdiction.

Petitioner contends his counsel was ineffective and the court lacked subject matter jurisdiction because he did not receive a preliminary hearing as requested.

This issue was raised in the amended application, and Petitioner complained about it at the PCR hearing. {PCR App. 67}. Counsel noted that there was no need for a preliminary hearing once one is indicted. {PCR App. 86}.

The PCR court found that there was no constitutional right to a preliminary hearing, and that there was no need for one once the indictments were issued. {PCR App. 110}. Petitioner asserted this issue in his *pro se* petition on PCR appeal. The state court of appeals denied certiorari after Johnson review.

* As argued in the preceding ground and incorporated here, the issue is procedurally barred since only a Johnson petition was filed and the dismissal of it by the state appellate court does not constitute a decision on the merits. See V(A), *supra*.

Regardless, the issue is without merit. A defendant does not have a constitutional right to a preliminary hearing in South Carolina. State v. Keenan, 278 S.C. 361, 296 S.E.2d 676 (1982). Indictments constitute a finding of probable cause and thus eliminate the need for a preliminary hearing. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (1982). Thus, counsel could not have been deficient nor Petitioner prejudiced.

As to a claim of subject matter jurisdiction, it is not cognizable in federal habeas

corpus. Thus, the freestanding claim is barred. See Wright v. Angelone, 151 F.3d 151 (4th Cir. 1998) (citing Wills v. Egeler, 532 F.2d 1058, 1059 (6th Cir.1976), which held that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary"). See also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions.").

Regardless, as noted before, State v. Gentry, 610 S.E.2d 494 (S.C. 2005) held that subject matter jurisdiction in South Carolina refers to the court's general power to try a case. Again, the circuit court sitting in general sessions certainly had the general power to address these criminal charges set forth in the indictments.

The issue should be dismissed or denied.

VI.

CONCLUSION

Each and every allegation contained within the Petition which was not previously either expressly admitted, qualified, or explained is hereby denied.

WHEREFORE, having made Return, Respondent submits there is no genuine issue of material fact and that the State is entitled to prevail as a matter of law. Thus, Respondent respectfully requests that this Court grant its motion for summary judgment and dismiss the action.

Respectfully submitted,

HENRY D. McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

By: s/ S. Creighton Waters

April 8, 2009.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	
	)	
	)	2012-CP-21-3233
	)	
Jerome W. James, 288382	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	AND MOTION TO DISMISS
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the Application for post conviction relief (PCR) filed December 5, 2012, would respectfully show this Court:

I.

Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Florence County Clerk of Court's orders of commitment. The Florence County Grand Jury indicted the Applicant at the March 2002 term of General Sessions for first degree burglary, armed robbery, assault and battery of a high and aggravated nature, and possession of a firearm during commission of a violent crime (02-GS-21-331). Applicant was also indicted for second degree burglary, failure to stop for blue light, possession of stolen vehicle, and resisting arrest (02-GS-21-341). In addition, Applicant was indicted for two counts of armed robbery, possession of a firearm during commission of violent crime, grand larceny, and arson (02-GS-21-364). Applicant was also indicted for breaking and entering motor vehicle, malicious injury to personal property, grand larceny, and resisting arrest (02-GS-21-365). Daryl J. Corbin, Esquire

represented the Applicant.

On October 31, 2002, the Applicant pled guilty to the following charges on the following indictments: failure to stop for blue light and resisting arrest on indictment 02-GS-21-341; two counts of armed robbery on indictment 02-GS-21-363; one count of armed robbery on indictment 02-GS-21-364; another armed robbery and second degree burglary, subsection B on indictment 02-GS-21-331. The charges on indictment 02-GS-21-365 were nolle prossed. Upon information and belief, the Applicant may have pled to additional charges on this date.

The Honorable Lee S. Alford sentenced the Applicant to: three years concurrent for failure to stop for blue light and one year concurrent for resisting arrest (02-GS-21-341); ten years concurrent on the two armed robbery charges (02-GS-21-363); ten years on the armed robbery charge (02-GS-21-364); and ten years concurrent for armed robbery and second degree burglary subsection B (02-GS-21-331). The Applicant did not appeal his guilty plea or sentences.

Applicant filed his first PCR July 15, 2003. A hearing was convened on February 2006 in Florence County before the Honorable John L. Breeden. On July 15, 2005, Judge Breeden dismissed the case. Applicant appealed and his petition was denied. The remittitur was sent January 3, 2008.

Attached herewith and incorporated herein are the records of the Clerk of Court regarding the subject conviction, and if available, the transcript. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Due process violation, Ineffective Assistance of Counsel"
2. "Lack of Subject Matter Jurisdiction, Misinterpretation of law"

3. Involuntary Guilty Plea, Newly Discovered Evidence”

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel 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, 334 S.E.2d 813.

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, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance 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. With respect to guilty plea counsel, the Applicant must show that there is a reasonable probability that, but for counsel's alleged errors, he

would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed. 2d 203 (1985).

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test, in addition to being filed past the applicable statute of limitations, and in addition to being successive. Therefore, Respondent requests this Court summarily dismiss the Application with prejudice.

IV.

The statute of limitations applicable to post-conviction relief actions bars the entire application. S.C. Code Ann. § 17-27-45 (Supp. 2001) requires an inmate to file a post-conviction relief application “within one year after the entry of a judgment of conviction” This provision applies to all convictions after the July 1, 1995 effective date of the statute. *See Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (1996).

Applicant’s conviction and sentence occurred on October 31, 2002. The Applicant should have filed allegations in this application on or before October 31, 2003. Applicant filed this post-conviction relief application several years past the applicable statute of limitations expired. Accordingly, since Applicant did not present these allegations in a timely manner, this Court should dismiss the application with prejudice as barred by the statute of limitations.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law." Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

V.

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 strongly 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., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, Id.

The Applicant could have raised the new grounds for relief in his prior 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, this application should be summarily dismissed.

VI.

The State therefore requests that this Court summarily dismiss this Application as it is filed outside the statute of limitations and also seeks relief not available in PCR, pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

VII.

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

VIII.

WHEREFORE, having made its Return, the State requests that the Application be denied and the matter dismissed with prejudice.

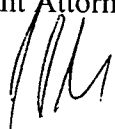
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

TYSON ANDREW JOHNSON, SR.
Assistant Attorney General

By: 
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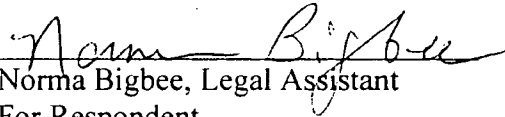
2/22, 2013.

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE	)	
	)	
	)	2012-CP-21-3233
JEROME W. JAMES, #288382	)	
	)	
Applicant,	)	
	)	
Vs	)	AFFIDAVIT F SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent.	)	

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

Jerome W. James, #288382
Lieber Corr. Inst.
P.O. Box 205
Ridgeville, SC 29472

DATED this 22nd day of February, 2013

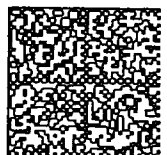

Norma Bigbee, Legal Assistant
For Respondent

Wheeler M. Adams # 288382
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The Surrens Court of South Carolina
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COLUMBIA, S.C. 29211

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