

The Supreme Court of South Carolina

Paul A. Smith, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2014-002211

ORDER

The request for an extension to serve and file the 243 (c) Explanation is granted and extended until November 21, 2014. Pursuant to the order of the Supreme Court of South Carolina dated March 18, 2009 (www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2009-03-18-01), any further extension request must be based on a showing of good cause.

FOR THE COURT

BY *Brenda J. Stealy*
Chief Deputy CLERK

Columbia, South Carolina

November 13, 2014

cc: Paul A. Smith, 119472
John Walter Whitmire, Esquire

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S.C. SUPREME COURT

The Supreme Court of South Carolina

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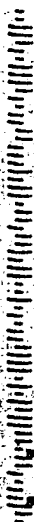
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S.C. SUPREME COURT



Paul A. Smith

11-19-14

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appellate Case No.: 2014-002211

Paul A. Smith #119472,.....Petitioner,

v.

State of South Carolina.....Respondent.

EXPLANATION REQUIRED PURSUANT
TO RULE 243(c) SCACR

The Petitioner had moved before the Court of common pleas pursuant to an application for post conviction relief on the 12th day of January 2012. (Exhibit Q) which the post conviction action concerns the Petitioner's initial post conviction action which was filed before the court of common pleas on the 14th day of September 2004. C/A No.: 2004-cp-32-3343.

The Petitioner had also supplemented and attached a motion titled: MOTION TO SUPPLEMENT POST CONVICTION RELIEF APPLICATION PURSUANT TO RULE 9(c) SCRCR and did so submit both the motion and the form 5 application for post conviction relief before the court of common pleas on the 12th day of January 2012 (Exhibit Q).

However, upon the Respondent's submission of its return and motion to dismiss on that 12th day of July 2012 (see

Exhibit J), as well as the Respondent's conditional order of dismissal that was filed on the 20th day of July 2012 (see Exhibit J), and therein the conditional order, the Petitioner was instructed to "[p]rovide specific reason, factual or legally, why the application should not be dismissed and grant the Petitioner twenty days from the date of service to provide the Court why the order should not become final pursuant to S.C. Code Ann. §17-27-70 (b).

As the Petitioner argues above, with regards to the Respondent's Return and Motion to Dismiss as well as the Conditional Order (Exhibit J); But prior to the State submitting its motion; the Petitioner initiated the civil action on that 12th day of January 2012, and upon filing a form 5 application for post conviction relief with the pro se attachment, that which is titled: MOTION TO SUPPLEMENT POST CONVICTION APPLICATION PURSUANT TO RULE 9(c) SCRPC, and therein this motion, the Petitioner asserts that the P.C.R. Counsel Esq. Rita Metts, had failed to amend a specific component with respect to an integral issue concerning the mutual combat charge to the jury. See (Exhibit Q), see second page) This specific component was raised within the Petitioner's original P.C.R. application and supplemented well in accordance as proscribed per S.C. Code Ann. §17-27-90.

The Petitioner had resubmitted a Form 5 application for post conviction relief, for purposes only to provide the Court with the facts that, (1) The Applicant had exhausted

his state remedies, (2) To provide the Court with also that the Petitioner was not attempting to raise a new P.C.R. claim, and (3) The attached Motion to Supplement (See Exhibit Q) does provide before the Court that this action, case no.: 2012-CP-32-0117, is conjunct to the Petitioner's original post conviction action: 2004-cp-32-3343 (Exhibit B.1), and lastly (4) Providing the Court with merit that the Petitioner's original P.C.R. application, 2004-cp-32-3343, has not been fully adjudicated, as pleaded therein the Petitioner's Motion to Supplement post conviction relief application pursuant to Rule 9(c) SCRCP, See (Exhibit Q).

I

**THE PETITIONER'S MERIT FOR INTERLOCUTORY APPEAL PURSUANT TO
S.C. CODE 14-3-330 DUE TO CAUSE OF PROCEDURAL DEFAULT
IMPLICATED PER THE RESPONDENT**

When the Respondent (The State) filed its Return and Motion to Dismiss (Exhibit J), the Respondent had exercised fraudulent methods upon making its response.

As stated within the Respondent's RETURN AND MOTION TO DISMISS. (Exhibit J, page 3 of 7...)

"[I]n his current application for post conviction relief, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
 - a. Applicant's trial counsel ineffective in not presenting a defense of self-defense at trial
 - b. Failure to request the law of immunity from a duty of retreat.

c. Trial counsel ineffective in not contemporaneously objecting to the circuit court charging voluntary manslaughter when such charge was not requested by defense.

2. Ineffective Assistance of P.C.R. Counsel

Applicant's P.C.R. counsel ineffective in:

a. Failure to present issue of mutual combat jury charge in the amended application for P.C.R. and to the P.C.R. court."

And however, with regards to the Respondent's Return and Motion to Dismiss, with respect to "issue 2.., "[I]neffective Assistance of P.C.R. counsel, (a) failure to present issue of mutual combat jury charge in the amended application for P.C.R. and to the P.C.R. court," (See Exhibit J, page 3 of 7) the Respondent had implicated falsely that the Petitioner had raised this claim within the Petitioner's January 12th 2012 Form 5 application for post conviction, which was moved by the Petitioner before the court of common pleas. The Petitioner had then issued pro se response, titled: OBJECTION TO THE RETURN AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(5) & (c) on the 7th day of August 2012 (See Exhibit 7), for reason being that (1) to refute Respondent's assertion that the Petitioner raised the alleged stated issue that was raised by the respondent for such to operate as a trap for the unwary. See Gamble v. State, S.C. (1989) 298 S.C. 175, 379 S.E.2d 118. (2) That issue 2. Ineffective Assistance of P.C.R. Counsel, was not and could not,

have said by the Respondent to have been raised by the Petitioner prior to the fact that the record does not hold reference that issue 2; that which is alleged in the Respondent's RETURN AND MOTION TO DISMISS (Exhibit J, page 3 out of 7) had been raised by the Petitioner at any time. See OBJECTION TO THE RETURN AND MOTION TO DISMISS PURSUANT TO RULE 12(b)(5) and (c). (Exhibit 7)

**AS PLEAD BEFORE THE COURT OF COMMON PLEAS
UPON OBJECTION TO THE RETURN AND MOTION TO DISMISS
PURSUANT TO RULE 12(b)(5) & (c) SCRCP C/A NO.: 2012-CP-32-0117**

The Respondent had submitted a MOTION TO DISMISS on the 12th day of July 2012. See (Exhibit J) The Petitioner had then filed an objection to the Respondent's Motion to Dismiss on the 7th day of August 2012. See (Exhibit 7); in which the Petitioner set forth his reasons for objection; As read verbatim within the Petitioner's Objection. See Exhibit 7 pages 2 - 7, columns II - IV:

II

The Applicant hereby moves in opposition before this Honorable Court, pursuant to Rule 12(b)(5) & (c), SCRCP for means of objectionable basis for the necessity of refutation regarding the accusations set forth within the State's argument within the State's Return and Motion to Dismiss (Exhibit J, pg. 3 of 7). However, the State asserts within its Motion to Dismiss that the Applicant is attempting to raise a new issue that consist of, "[I]neffective Assistance of PCR Counsel" (a) Failure to present issue of Mutual Combat in the amended application for PCR and the PCR court (Exhibit J, pg. 3 of 7).

This specific issue concerning Ineffective Assistance of PCR Counsel is not contained within previous nor current records before this Court (i.e. within any PCR Application filed by the Applicant), by this implication of a non factual assertion, which was implemented by the State, within its Return and Motion to Dismiss (Exhibit J, pg. 3 of 7), narrowly tailors and serve a compelling interest. See Gluksburg, 117 S.Ct. at 2268, Quoting Rehoa v. Flores, U.S. 792, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993), and provides a natural tendency which influences the decision making body in which it is addressed. See U.S. v. Sarihfard, 155 F.3d 301.

The Motion to Supplement Post-Conviction Relief application pursuant to Rule 9(c), SCRPC (Exhibit Q) was submitted by the Applicant on January 12, 2012, which established before this Honorable Court that the Applicant is indeed exonerated of attempts to raise new issues but however did so provide to this Honorable Court the significant indication of this breach of the Fourteenth Amendment due process concerning the PCR Court to fully comply to the statutory mandate pursuant to S.C. Code ann. §17-27-80. The Applicant did so properly amend this issue of the trial court Mutual combat Jury Charge on January 10, 2005 (Exhibit B, pg. 10) prior to the evidentiary hearing that convened on April 10, 2002. However, the record does not hold any reference of the Applicant specifically raising Ineffective Assistance of PCR Counsel, that which is alleged within the State's Return and Motion to Dismiss (Exhibit J, pg. 3 of 7).

III

The burden of proof is on the Applicant in Post-Conviction proceedings to prove the allegations in his application. See Butler v. State, (S.C. 1985) S.C. 441, 334 S.E.2d 813 certiorari denied 106 S.Ct. 869, 474 U.S. 1094, 88 L.Ed.2d 908. As pleaded before this Honorable Court within the Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRPC (Exhibit Q) regarding the PCR counsel for the Applicant, submission of the amended Post-Conviction Relief Application on July 17, 2006 (Exhibit A) in which the PCR Counsel failed to amend this vital issue of the trial Court Mutual Combat Jury Charge that was submitted per the Applicant by Motion to Supplement on January 10, 2005 (Exhibit B, pg. 10).

S.C. Code Ann. §17-27-80 provides that it is the obligation of the PCR counsel to closely examine such substantive claims to see if they might be converted to components of a sixth Amendment claim and must be raised in the context of an application. See McCray v. State, (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241. "Not only does such failure deprive the parties of the issue raised, but it makes review by the appellate court more difficult and thus counsel preparing orders should be meticulous in doing so." See Pruitt v. State, (S.C. 1992) 310 S.C. 254, 423 S.E.2d 127.

The Applicant is entitled to a just and fair amending process of the Applicant's original application pursuant to the Sixth and Fourteenth Amendment, as well as annotated of South Carolina Constitution Article 1, §3. These provisions are set forth by

S.C. Code Ann. § 17-27-80, therefore negating a means of destruction or elimination of the original. See Greenville Common H. Corp. v. Alexander Smith Inc., 95 S.E.2d 262. The Applicant's Motion to Supplement (Exhibit B, pg. 10) served to fully inform the PCR counsel as well as the court the nature of the Cause of Action. See Alamance Industries v. Chesterfield Hosiery Mill, 122 S.E.2d 648.

The primary standard of a PCR hearing weighs on the Applicant whereas the burden is on the Applicant in a Post-Conviction proceeding to prove the allegations. See Cooper v. Moore, 569 S.E.2d 300 (S.C. 2002); Matthews v. State, 569 S.E. 2d 766, 350 S.C. 272.

IV

The Respondent contends within its Return and Motion to Dismiss that the Applicant's current application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedure of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to 160, S.C. Code Ann. §17-27-45(a).

The Applicant's current application (Exhibit Q) that is supported by the Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRCP (Exhibit Q) provides before this Honorable Court concerning the trial court Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) which was not addressed by the PCR Judge in the Evidentiary Hearing which was convened on April 10, 2007. See (Exhibit Z) However, specific finding which the PCR Court is required to set forth

with conclusions of law. See McCray v. State, (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241. Except however this specific finding and the conclusion of law regarding this issue of the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) is not concluded within the Order of Dismissal on May 18, 2007 (Exhibit Z). The issue of the trial court's Mutual Combat Jury Charge was not addressed by the PCR Court prior to this issue not properly amended from the Applicant's original application. Wherefore the PCR Court did not fully adjudicate on the issues set forth by the Applicant's case, Case No.: 2004-CP-32-3343. See Whitehead v. State, 426 S.E.2d 315.

The Applicant did so comply with S.C. Code Ann. § 17-27-90 (2010) which states:

All grounds for relief available to an applicant under this chapter [must be raised in his original supplemental or amended application.] Any grounds 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 that applicant has taken to secure relief may not be 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 original application.

Again, the issue regarding the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) substantiates before this Honorable Court in which the record reflects that the Applicant moved by Motion to supplement on January 10, 2005 (Exhibit B, pg. 10) prior to the Evidentiary Hearing which had convened on April 10, 2007. This validates that the Applicant did so comply with S.C. Code Ann. §17-27-90 (2010). As stated in part...

"[A]ll grounds for relief available to an applicant under this chapter must be raised in his original supplemental application..."

However, the Respondent has not provided this Honorable Court with records to establish if the Applicant voluntarily or intelligently waived this ground concerning the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381).

As stated of S.C. Code Ann. §17-27-90 (2010) which states in part:

"[A]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentenc[e]."

The PCR counsel abandoned a vital issue that was filed by the Applicant within the original Application which was submitted to this Honorable Court by Motion to Supplement on January 10, 2005. (Exhibit B, pg. 10)

The Applicant's current Application that which is supported by Motion to Supplement (Exhibit Q) provides before this Honorable Court the ground for relief asserted which, for sufficient reason was indeed asserted by the Applicant within his Motion to Supplement (Exhibit B, pg. 10) but however was not asserted due to the PCR counsel not amending the trial court Mutual Combat Jury Charge (Exhibit C, tr. 16-19, pg. 381) to the amended application. (Exhibit A).

By this (supra) the Applicant has provided before this Honorable Court this showing that this ground concerning the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant properly amended the trial court's Mutual combat Jury Charge that which was implemented by the Applicant by Motion to Supplement before this Honorable Court, January 10, 2005 (Exhibit B, pg. 10), prior to the Evidentiary Hearing that which had convened on April 10, 2007 and generally substantiates that the respondent's implicated erroneously before this Honorable Court that the Applicant failed to meet the Statute of Limitation pursuant to S.C. Code ann. §17-27-45(a) being as the record provides before this Honorable Court that this issue concerning the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) was timely submitted before this Honorable Court by Motion to Supplement on January 10, 2005 (Exhibit B, pg. 10) in which was not properly raised due to the fact of the PCR counsel failed to amend this issue before the PCR court, thereby negating the remedy for this issue to be concluded of law, rendered by the PCR court. This validates that res judicata does not hold any estoppel concerning this issue. The record reflects these facts before the Honorable Court. (Exhibit 1) and (Exhibit 7)

Moresoever, The Petitioner had submitted this objection before the court of common pleas that does concern the Respondent's Motion to Dismiss that was filed on the 12th day of July 2012 as well as the Respondent's Conditional Order that was submitted on the 20th day of July 2012. See: Exhibit J.

However, the Respondent intentionally misapplied within its motion that the Petitioner had asserted that the Court

erred in provisionally denying the Petitioner's PCR action pursuant to the applicable procedural bars because of a purported ineffective assistance of P.C.R. counsel issue. However, the [purported] ineffective of assistance of P.C.R. counsel that which is referred to per the Respondent as a "purportedly attempt," per the Petitioner to bring forth a new issue, is therefore fraudulently implicated upon the Respondent's creating the ineffective assistance P.C.R. counsel issue, and unlawfully applying this issue within the Respondent's Motion to Dismiss, as well as the Conditional Order of Dismissal, and the final order, which to deprive the Petitioner of cognizance pursuant to S.C. Code Ann. 17-27-70(b) upon falsifying the facts thus to unlawfully set forth prohibition proscribed in S.C. Code Ann. 17-27-90, and which the Court's integrity was undermined upon the Honorable Thomas A. Russo rendering an order of denial on the 8th day of September 2014. These facts stated above did so compel the Petitioner to seek an interlocutory remedy per this Honorable Court. (Exhibit 8)

**EXPLANATION REQUIRED PURSUANT TO RULE
243(c) / S.C. Code Ann. §17-27-70(b)**

The "Petitioner, per se," complied with procedural norms which are set forth in S.C. Code Ann. §§17-27-20 - 50, and due to the Petitioner's diligence, does so substantiate that the Petitioner's compliance holds the statutory ripener complete in regards to the above stated statutes under the Uniform Post Conviction Procedure Act; S.C. Code Ann. §17-27-

10; 15 ALR 4th 582. See: Harvey v. South Carolina (1970 DCSC) 310 F. Supp. 83; Rule 201 (a) S.C.A.C.R. And in furtherance, the Petitioner had timely and adequately executed his initial-review collateral proceeding which is [t]he first [place] a prisoner can present a challenge to his conviction." Id., at 755, 111 S.Ct. 2546. Again, because of the Petitioner's P.C.R. counsel's inadvertent representation within the P.C.R. hearing, did so establish a cause for procedural defaults in light of: In-re Exhaustion of State Remedies in Criminal and Post Conviction Relief Cases, 321 S.C. 563, 564, 471 S.E.2d 454, (1990). The inordinate representation of the P.C.R. counsel provided an unjustified delay within the State's corrective process which frustrated the rights of the Petitioner and created a circumstance as to render the process ineffective. See: Allen v. Leeke (1971 DCSC) 328 F. Supp. 292; Martinez v. Ryan, 132 S.Ct. 1309. It was held by the Supreme Court within Martinez, (Supra) that for the applicant "[t]o present a claim of ineffective assistance at trial in accordance with the state rules, then a prisoner likely needs an effective attorney." Upon the P.C.R. counsel's omission (i.e. failing to amend the integral component of mutual combat to the original application as well as failing to file a 59(e) motion) frustrated the Petitioner's right concerning full exhaustion. See: S.C. Code Ann. §§17-27-20, 50, 80, & 90; see also: Rule 71.1(d) 59(e) S.C.R.C.P. Generally, the requirement to be in compliance with these codes is, according to law, a comity, not a definition of

power. See: Hunt v. Warden Maryland Penitentiary, (4th Cir. 1964) 335 F.2d 936, 940. However, the P.C.R. counsel's representation, thus failing to comply with Uniform Post Conviction Procedural Act is what set forth the cause of procedural defaults and provided that which the fact herein contends that the Petitioner's grounds were not ripe nor cognizable under 28 U.S.C. 2254 habeas corpus.

Upon the Petitioner's P.C.R. counsel's omission, upon not amending this integral component (i.e. The mutual combat charge) and however this specific component was not brought into focus before the P.C.R. Court. The Petitioner had timely set forth this ground within the initial Application and Supplement, C/A No.: 2004-CP-32-3343. See: Exhibit B and Exhibit B1. The component (i.e. mutual combat) was raised specifically on page 27. See: Exhibit B page 10

Again, prior to the P.C.R. counsel failing to specify this vital component of mutual combat upon the P.C.R., counsel omitting this component when amending to the Petitioner's original P.C.R. application, C/A 2004-CP-32-3343. See: Exhibit A. This provided the cause of procedural default which is none fault of the Petitioner, the P.C.R. counsel's omission prevented the South Carolina Supreme Court from rendering an unreasonable decision with regards to self defense. The Petitioner is so hereby barred per South Carolina dicta to submit per se [per] the Petitioner, an amended application pursuant to 71.1(d) as well as a 59(e) motion. See: Miller v. State, 388 S.C. 347, 697 S.E.2d 527 (2010);

John v. State, 348 S.C. 13, 558 S.E.2d 517 (2002); State v. Stuckey, 333 S.C. 56, 508 S.E.2d 564 (1998); Foster v. State, 298 S.C. 306, 379 S.E.2d 907 (1989).

Generally, if mutual combat would have been considered as a component for the Jury to consider upon their deliberations; and upon consideration of the mutual combat component, would have provided an annexation to specifically tailor the self defense instruction.

As stated within the Petitioner's PETITION FOR WRIT OF CERTIORARI. See: Exhibit 10, pg. 6 - 7.

Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If; however the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984) (emphasis added).

The trial judge "should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant." State v. Day, 341 S.C.

410, 535 S.E.2d 431 (2000), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). A self-defense charge "is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant." Day, supra.

As discussed above, the evidence showed the intoxicated decedent attacked Smith at the boarding house near his bedroom and began to fight him, even after Smith told him to stay out of his room. The trial judge clearly did not explain to the jury that Smith did not have a duty to leave his premises to avoid the danger the decedent posed to him. It has long been established that there is no duty to retreat where an attack occurs in one's home or place of business. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). This is true even when the defendant acts against a cohabitant. State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953), Metropolitan Life Ins. Co. v. Fogle, 309 S.C. 64, 419 S.E.2d 825 (Ct. App. 1992). Contrary to the PCR court's finding, this instruction was clearly required by existing case law.

The PCR court also erred in finding Smith did not show how the outcome of his trial would have been different if the jury knew he did not have to leave his premises to avoid the decedent's onslaught. Smith was clearly prejudiced because the jury may well have believed that they could not find self-defense since Smith did not leave the boarding house when the decedent attacked him. The judge charged the jury that Smith had to have "no other probable means of avoiding the danger"

than to stab the decedent. Without the knowledge that Smith did not have to retreat to avoid the danger, the jury may have excluded self-defense. Clearly, if the jury knew that he did not have a duty to retreat, it would have found Smith acted in self-defense. Therefore, prejudice was properly demonstrated.

CONCLUSION

WHEREFORE THE PETITIONER Pray that this Honorable Court will find that the Petitioner has provided an explanation as required of Rule 243(c) SCACR and grant the Petitioner the opportunity to fully thus to completely execute the Petitioner's original Post Conviction Application, C/A 2004-CP-32-3343.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appellate Case No.: 2014-002211

Paul A. Smith #119472,.....Petitioner,

v.

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

PROOF OF SERVICE

I, the above Petitioner hereby certify that I have submitted the **EXPLANATION REQUIRED PURSUANT TO RULE 243(c) SCACR** and did so deposit a copy addressed to the Clerk of the South Carolina Supreme Court: DANIEL E. SHEAROUSE, POST OFFICE BOX 11330, COLUMBIA, S.C. 29211, on the 18 day of November 2014.

Paul A. Smith
Paul A. Smith #119472
B.R.C.I. Wat.
4460 Broad River Rd.
Columbia, S.C. 29210

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 18 DAY OF November 2014
Susan H. Dye
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: March 5, 2018

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appellate Case No.: 2014-002211

Paul A. Smith #119472,.....Petitioner,

v.

State of south Carolina,.....Respondent.

SET OUT OF DOCUMENTARY IN SUPPORT
OF THE EXPLANATION REQUIRED PURSUANT
TO RULE 243(c) S.C.A.C.R.

I, the above stated Petitioner, hereby certify that the below listed documents are thereby certified as EVIDENCE that are in support of the EXPLANATION REQUIRED PURSUANT TO RULE 243(c) S.C.A.C.R.

(Exhibit 1): Set out of evidence in support of the objection pursuant to Rule 12(b)(5),(c) S.C.R.C.P. Filed August 6, 2012.

(Exhibit 8): The Final Order Rendered on the 8th day of September 2014.

(Exhibit 7): The objection to the Return and Motion to dismiss pursuant to Rule 12(b)(5) & (c) S.C.R.C.P. Filed August 7, 2012.

(Exhibit 10): THE Petition For Writ of Certiorari filed before the S.C. Supreme Court on the 4th day of February 2008.

SWORN TO AND SUBSCRIBED BEFORE ME
THIS 18th DAY OF November 2014

Susan H. J. Jre

Notary Public For South Carolina
MY COMMISSION EXPIRES

Commission Expires
March 5, 2018

Paul A. Smith
Paul A. Smith #119472
B.R.C.I. Wat. 242
4460 Broad River Rd.
Columbia, S.C. 29210

Please see appendix p. 458-
459, Page 27 of the Petitioner's
supplement to the Post
Conviction application is
omitted from the Appendix
See: (Exhibit, B1)

VOLUME 1 OF 2

STATE OF SOUTH CAROLINA

Exhibit 10

IN THE SUPREME COURT

Appeal from Lexington County

William P. Keesley, Circuit Court Judge

PAUL SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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ATTORNEYS FOR RESPONDENT

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STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

PAUL SMITH,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR PETITIONER.

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ISSUE PRESENTED

Whether the post-conviction relief court erred in finding counsel was not ineffective where counsel failed to object to the trial judge's self-defense charge, which omitted the statement that a defendant had no duty to retreat in his own home, where the evidence showed that petitioner was attacked by the decedent on his own premises?

STATEMENT

Petitioner Paul A. Smith was indicted by the Lexington County grand jury for murder in April 2002. App. p. 410. He went to trial before the Honorable James R. Barber and a jury on October 21, 2002. Ken Matthews represented petitioner at trial. App. p. 1.

Petitioner was found guilty of voluntary manslaughter and Judge Barber sentenced him to life in prison without parole based on his prior armed robbery conviction. App. p. 414. Robert Dudek of the Division of Appellate Defense represented him in his direct appeal. After the submission of a brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967), the Court of Appeals dismissed his appeal on June 22, 2004. App. pp. 417-435.

Petitioner filed an application for post-conviction relief on September 14, 2004 alleging *inter alia* that counsel was ineffective for failing to request that a person has no duty to retreat from his own home in order to prevail on a self defense claim. App. p. 437; pp. 442-459. The state filed its return on April 29, 2005 and requested an evidentiary hearing. App. pp. 470-473. Petitioner, represented by M. Rita Metts, filed an amended application on July 18, 2006. App. pp. 474-475.

The Honorable William P. Keesley presided over an evidentiary hearing on April 10, 2007. Metts represented petitioner and Daniel E. Grigg represented the state. App. p. 477.

Judge Keesley issued a written order denying relief on May 18, 2007. App. pp. 516-522. This petition follows.

ARGUMENT

The post-conviction relief court erred in finding counsel was not ineffective where counsel failed to object to the trial judge's self-defense charge, which omitted the statement that a defendant had no duty to retreat in his own home, where the evidence showed that petitioner was attacked by the decedent in his own premises at a boarding house.

Smith lived in a boarding house in West Columbia with several other men. He was charged with the stabbing death of one of the men, Arnold Heyward (decedent). One boarder testified he heard Smith tell Heyward, “[d]on’t come in my room no more either.” App. p. 142, lines. 2-14. He stated he then “heard a lot [of] slapping.” App. p. 142, lines. 21-25. The decedent had a blood alcohol content of .0189 in his blood and .25 in his urine. He also had a significant amount of cocaine in his system. App. p. 199, line 22 – 204, line 24.

Smith testified that he refused to lend the decedent any money that evening. The decedent was very strong when he was on crack cocaine. Smith testified the decedent tried to sneak up on him as Smith started to leave his room and punched him in the face, knocking him to the floor with his second punch. App. p. 232, l. 19 – 235, l. 7.

Smith told the jury he tried to get up, but that the decedent was choking him, and “I was about to lose consciousness...[and] I grabbed the knife that I had laying on the sink.” App. p. 236, lines 1-10. Smith stabbed the decedent, but he said he did not realize he had wounded the decedent that badly. “All I was doing was defending myself. I mean, he was basically going to choke me to death...” App. p. 237, lines 2-24. Smith called the police after the accident and told them he was defending himself. The police acknowledged Smith had a bloody lip and a ripped shirt when they arrived on the scene. App. p. 126, line 21 – 130, line 3.

The trial judge charged the jury the law of self-defense. However, the judge instructed the jury that an element of self-defense was that the defendant had “no other probable way to avoid the danger of death or serious bodily injury other than to act as the defendant did in this particular instance.” App. p. 384, lines 2-5. The judge did not instruct the jury that if a defendant was on his own premises he had no duty to retreat before acting in self-defense.

Trial counsel did not object to the erroneous charge. At the PCR hearing, Smith argued trial counsel was ineffective for failing to request the instruction that he had no duty to retreat to prevail on a claim of self-defense. Trial counsel testified that he believed the charge given by the judge was an accurate statement of the law at the time of trial. App. p. 503, lines 13-14; p. 504, line 24 – p. 505, line 2. The post-conviction relief court agreed with counsel and found he was not ineffective. The court stated counsel “properly handled the duty to retreat issue pursuant to the applicable law at the time of this trial” and that “no prejudice has been proved related to the jury charge.” App. p. 521. This was error.

To prove ineffective assistance of counsel, petitioner must show that trial counsel's performance was not reasonable under prevailing professional norms. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, petitioner must demonstrate that he was prejudiced by trial counsel's deficient performance. *Id.*

The law to be charged must be determined from the evidence presented at trial. State v. Cole, 338 S.C. 79, 525 S.E.2d 511 (2000). Where the issue of self-defense is raised, as it was in Smith's case, the judge must charge the jury accordingly.

Under case law existing at the time of Smith's 2002 trial, self-defense is comprised of four elements:

Self-defense is a complete defense. If established, you must find the defendant not guilty. There are four elements required by law to establish self-defense in this case. First, the defendant must be without fault in bringing on the difficulty. Second, the defendant must have actually believed he was in imminent danger of losing his life or sustaining serious bodily injury, or he actually was in such imminent danger. Third, if his defense is based upon his belief of imminent danger, a reasonably prudent man of ordinary firmness and courage would have entertained the same belief. If the defendant actually was in imminent danger, the circumstances were such as would warrant a man of ordinary prudence, firmness and courage to strike the fatal blow in order to save himself from serious bodily harm or losing his own life. Fourth, the defendant had no other probable means of avoiding the danger of losing his own life or sustaining serious bodily injury than to act as he did in this particular instance. If, however, the defendant was on his own premises he had no duty to retreat before acting in self-defense. These are the elements of self-defense.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984) (emphasis added).

The trial judge “should specifically tailor the self-defense instruction to adequately reflect the facts and theories presented by the defendant.” State v. Day, 341 S.C. 410, 535 S.E.2d 431 (2000), State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989). A self-defense charge “is erroneous where the trial court fails to charge on elements of the defense which were applicable to the issues raised by the defendant.” Day, supra.

As discussed above, the evidence showed the intoxicated decedent attacked Smith at the boarding house near his bedroom and began to fight him, even after Smith told him to stay out of his room. The trial judge clearly did not explain to the jury that Smith did not have a duty to leave his premises to avoid the danger the decedent posed to him. It has long been established that there is no duty to retreat where an attack occurs in one's home or place of business. State v. Wiggins, 330 S.C. 538, 500 S.E.2d 489 (1998). This is true even when the defendant acts against a co-


habitant. State v. Grantham, 224 S.C. 41, 77 S.E.2d 291 (1953), Metropolitan Life Ins. Co. v. Fogle, 309 S.C. 64, 419 S.E.2d 825 (Ct. App. 1992). Contrary to the PCR court's finding, this instruction was clearly required by existing case law.

The PCR court also erred in finding Smith did not show how the outcome of his trial would have been different if the jury knew he did not have to leave his premises to avoid the decedent's onslaught. Smith was clearly prejudiced because the jury may well have believed that they could not find self-defense since Smith did not leave the boarding house when the decedent attacked him. The judge charged the jury that Smith had to have "no other probable means of avoiding the danger" than to stab the decedent. Without the knowledge that Smith did not have to retreat to avoid the danger, the jury may have excluded self-defense. Clearly, if the jury knew that he did not have a duty to retreat, it would have found Smith acted in self-defense. Therefore, prejudice was properly demonstrated.

CONCLUSION

Based on the foregoing, the petition should be granted and petitioner allowed to brief this issue more fully.

Respectfully submitted,



Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR PETITIONER.

This 4th day of February, 2008.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO LEXINGTON COUNTY
WILLIAM P. KEESLEY, CIRCUIT COURT JUDGE

PAUL SMITH,

PETITIONER,

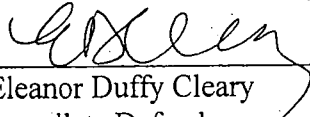
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari and a copy of the appendix in this case have been served on Dean Grigg, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201 and Paul Smith, #119472, Broad River Correctional Institution, this 4th day of February, 2008.


Eleanor Duffy Cleary
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 4th day
of February, 2008.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017.

STATE OF SOUTH CAROLINA

County of Lexington

Paul A. Smith #119472,

Applicant,

V.

State of South Carolina,

Respondent.

SCANNED

COURT OF COMMON PLEAS

Case No.: 2012-CP-32-0117

SET OUT OF EVIDENCE IN SUPPORT
OF THE OBJECTION PURSUANT TO
RULE 12(b)(5), (c), SCRCP

(Exhibit 1)

The Applicant hereby certifies the below listed documents as evidence to which support the objection pursuant to Rule 12(b)(5), (c), SCRCP and is depositing it into the U.S. Mail on August 2, 2012, addressed to Beth A. Carrigg, Clerk of Court, 205 E. Main Street, Suite 128/wh, Lexington, S.C. 29072, and certify that the below listed parties has been served with the same.

Office of the Attorney General
Mr. Kaelon E. May
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211-1549

2012 AUG 06 PM 2:45
OFFICE OF THE CLERK
COURT OF COMMON PLEAS
LEXINGTON SC

FILED

- 1) Exhibit 2: The State's Return submitted on April 29, 2005;
- 2) Exhibit J: Return and Motion to Dismiss submitted on July 17, 2012;
- 3) Exhibit J: Conditional Order of Dismissal;
- 4) Exhibit Z: Order of Dismissal within Case No.: 2004-CP-32-3343 on May 18, 2007;
- 5) Exhibit Q: Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRCP; January 12, 2012;
- 6) Exhibit A: Amended Post-Conviction Relief Application: within Case No.: 2004-CP-32-3343, submitted July 17, 2006;
- 7) Exhibit B: Motion to Supplement Post-Conviction Relief Application, Case No.:

2004-CP-32-3343, filed January 10, 2005;

8) Exhibit B.1: Application for Post-Conviction Relief, Case No.: 2004-CP-32-3343, filed September 14, 2004;

9) Exhibit C: Initial Trial Transcript of General Session, Case No.: 2002-GS-32-1212, Pg. 381, Tr. 16-19.

Paul A. Smith

Paul A. Smith #119472

B.R.C.I. CO-149

4460 Broad River Road

Columbia, S.C. 29210

Sworn to and Subscribed before me

this 31st day of July, 2012.

Susan H. Dyer (L.S.)

Notary Public for South Carolina

My Commission Expires

My Commission Expires: March 5, 2018

2012 AUG 06 AM 9:25
PAUL A. SMITH
CLERK OF COURT
OF LEXINGTON SC

FILED

Exhibit C

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

COURT OF GENERAL SESSIONS
02-GS-32-1212

THE STATE,)

VS.)

PAUL SMITH,)

DEFENDANT)

TRANSCRIPT OF RECORD

OCTOBER 21ST - 24TH, 2002
LEXINGTON, SOUTH CAROLINA

BEFORE:

THE HONORABLE JAMES R. BARBER, JUDGE; AND A JURY.

APPEARANCES:

DAYTON RIDDLE, ASSISTANT SOLICITOR
SHAWN GRAHAM, ASSISTANT SOLICITOR
ATTORNEYS FOR THE STATE

KEN MATHEWS, ESQ.
ATTORNEY FOR THE DEFENDANT

KAREN TRACY
OFFICIAL COURT REPORTER

1 THE DEFENDANT NOT GUILTY.

2 ON THE OTHER HAND, IF YOU HAVE NO REASONABLE
3 DOUBT OF THE DEFENDANT'S GUILT AFTER CONSIDERING ALL OF
4 THE EVIDENCE, INCLUDING THE EVIDENCE OF SELF-DEFENSE, THEN
5 YOU MUST FIND THE DEFENDANT GUILTY OF THE CHARGE WITH
6 WHICH YOU BELIEVE THE DEFENDANT TO BE GUILTY.

7 LADIES AND GENTLEMEN, THE FOLLOWING ELEMENTS ARE
8 REQUIRED TO ESTABLISH SELF-DEFENSE: FIRST, THE DEFENDANT
9 MUST BE WITHOUT FAULT IN BRINGING ON THE DIFFICULTY.

10 IF THE DEFENDANT'S CONDUCT WAS THE TYPE WHICH
11 WAS REASONABLY CALCULATED TO OR DID PROVOKE A DEADLY
12 ASSAULT, THE DEFENDANT WOULD BE AT FAULT IN BRINGING ON
13 THE DIFFICULTY AND WOULD NOT BE ENTITLED TO AN ACQUITTAL
14 BASED ON SELF-DEFENSE.

15 IF THE DEFENDANT VOLUNTARILY PARTICIPATED IN
16 MUTUAL COMBAT FOR PURPOSES OTHER THAN PROTECTION, THE
17 KILLING OF THE VICTIM WOULD NOT BE SELF-DEFENSE. THIS IS
18 TRUE IF EVEN DURING THE COMBAT, THE DEFENDANT FEARED DEATH
19 OR SERIOUS BODILY INJURY.

20 HOWEVER, IF BEFORE THE KILLING IS COMMITTED, THE
21 DEFENDANT WITHDRAWS AND TRIES IN GOOD FAITH TO AVOID
22 FURTHER CONFLICT, NEITHER BY WORD OR ACT, MAKES THAT FACT
23 KNOWN TO THE VICTIM, HE WOULD BE WITHOUT FAULT IN BRINGING
24 ON THE DIFFICULTY.

25 FOR MUTUAL COMBAT, THERE MUST BE A MUTUAL INTENT

1 AND WILLINGNESS TO FIGHT. INTENT MAY BE SHOWN BY THE ACTS
2 AND CONDUCT OF THE PARTIES AND THE CIRCUMSTANCES
3 SURROUNDING THE COMBAT.

4 LADIES AND GENTLEMEN, THE SECOND ELEMENT OF
5 SELF-DEFENSE IS THE DEFENDANT WAS ACTUALLY IN IMMINENT
6 DANGER OF DEATH OR SERIOUS BODILY INJURY OR THAT THE
7 DEFENDANT ACTUALLY BELIEVED THAT HE WAS IN IMMINENT DANGER
8 OF SERIOUS BODILY INJURY OR DEATH.

9 IF THE DEFENDANT WAS ACTUALLY IN IMMINENT
10 DANGER, IT MUST BE SHOWN THAT THE CIRCUMSTANCES WOULD HAVE
11 WARRANTED A PERSON OF ORDINARY FIRMNESS AND COURAGE TO
12 STRIKE THE FATAL BLOW TO PREVENT DEATH OR SERIOUS BODILY
13 INJURY.

14 IF THE DEFENDANT BELIEVED HE WAS IN IMMINENT
15 DANGER OF DEATH OR SERIOUS BODILY INJURY, IT MUST BE SHOWN
16 THAT A REASONABLY PRUDENT PERSON OF ORDINARY FIRMNESS AND
17 COURAGE WOULD HAVE HAD THE SAME BELIEF.

18 IN DECIDING IF THE DEFENDANT ACTUALLY WAS OR
19 ~~BELIEVED HE WAS IN IMMINENT DANGER OF DEATH OR SERIOUS~~
20 BODILY INJURY, YOU SHOULD CONSIDER ALL THE FACTS AND
21 CIRCUMSTANCES SURROUNDING THE CRIME, INCLUDING THE
22 PHYSICAL CONDITION AND CHARACTERISTICS OF THE DEFENDANT
23 AND THE VICTIM.

24 THE DEFENDANT DOES NOT HAVE TO SHOW THAT HE WAS
25 ACTUALLY IN DANGER. IT'S ENOUGH IF THE DEFENDANT BELIEVED

ORIGINAL

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of LEXINGTON)

PAUL A. SMITH, 119472)

Full name and prison number, if any, of applicant.)

v.)

WILLIAM M. WHITE, WARDEN)

Name of Respondent)

STATE OF SOUTH CAROLINA)

APPLICATION FOR

POST-CONVICTION RELIEF

2004-CP32-3343

A TRUE COPY
Lex. Co. C.C.P. GS
2004 SEP 14 A 8:28
FILED
THOMAS H. CONOVER, JR.
CLERK OF COURT
LEXINGTON SC

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention BROAD RIVER CORRECTIONAL INSTITUTION - 4460 BROAD RIVER ROAD, COLUMBIA, SOUTH CAROLINA - 29210.

2. Name and location of Court which imposed sentence COURT OF GENERAL SESSION - FOR THE COUNTY OF (LEXINGTON), SOUTH CAROLINA - 29072.

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

(a) 2002 - GS - 32 - 1212 (MURDER)

(b) _____

(c) _____

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

(a) OCTOBER 24, 2002 (LIFE WITHOUT PAROLE)

(b) _____

(c) _____

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
- (b) after a plea of not guilty XX _____
- (c) after a plea of nolo contendere _____

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

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

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

- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____

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

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

(c) the date of each such result:

- i. JUNE 22, 2004.
- ii. _____
- iii. _____

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

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

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

- (a) N/A
- (b) _____
- (c) _____

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

- (a) APPLICANT'S TRIAL COUNSEL INEFFECTIVE IN NOT PRESENTING A
- (b) DEFENSE OF SELF-DEFENSE AT TRIAL OF THE APPLICANT - WHICH
- (c) WAS WARRANTED ; TRIAL COUNSEL FAILED TO REQUEST THE LAW OF
IMMUNITY FROM A DUTY TO RETREAT:

10. State concisely and in the same order the facts which support each of the grounds set out in
(a) TRIAL COUNSEL WAS INEFFECTIVE IN NOT PRESENTING A DEFENSE OF SELF - DEFENSE AT APPLICANT'S TRIAL ; TRIAL COUNSEL INEFFECTIVE
(b) IN NOT CONTEMPORANEOUSLY OBJECTING TO THE CIRCUIT CHARGING VOLUNTARY MANSLAUGHTER WHEN SUCH CHARGE WAS NOT REQUESTED BY THE
(c) DEFENSE.

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

(a) any petition in a State Court under South Carolina Law ?

NO

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7) NO

(d) any other petitions, motions or applications in this or any other Court?

NO

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

(a) the specific nature thereof:

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

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

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

(c) the disposition thereof:

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

(d) the date of each such disposition:

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

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

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

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? NO

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

(a) which grounds have been presented:

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

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

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

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

- (a) AN APPLICANT IS PROHIBITED FROM RAISING THE ISSUE OF
- (b) INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL : PCR
- (c) AFFORDS APPLICANT THE CHANCE TO RAISE INEFFECTIVE ASSISTANCE OF COI

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

- (a) your arraignment and plea? _____
- (b) your trial, if any? YES
- (c) your sentencing? YES
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence?
YES

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

"CURRENT LAW REQUIRES THE STATE TO DISPROVE SELF-DEFENSE, ONCE RAISED BY THE DEFENDANT, BEYOND A REASONABLE DOUBT". WIGGINS, SUPRA.,

THE APPLICANT ASSERTS TRIAL COUNSEL'S REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS; HAD IT NOT BEEN FOR TRIAL COUNSEL'S ERROR'S AND INEFFECTIVENESS, THERE IS A REASONABLE PROBABILITY THE RESULT OF APPLICANT'S TRIAL WOULD HAVE BEEN DIFFERENT STRICKLAND V. WASHINGTON, 104 S.CT. 2052 (1984); MARTINEZ V. STATE, 403 S.E.2D 113 (1991). THERE WAS ABSOLUTELY NO MUTUAL COMBAT INVOLVED, AND APPLICANT'S TRIAL RECORD DOES NOT REFLECT SUCH; A VOLUNTARY MANSLAUGHTER CHARGE WAS UNWARRANTED AND PREJUDICIAL TO THE APPLICANT. STATE V. GRAHAM, 196 S.E.2D 495 (1973).

THE APPLICANT ASKS THIS COURT TO REVERSE AND REMAND; IN THE ALTERNATIVE, GRANT THE APPLICANT A NEW TRIAL.

*State v.
Graham*

SO SHALL THE APPLICANT PRAY,

*S/ Paul A Smith

PAUL A. SMITH, #119472
BROAD RIVER CORR., INSTI.,
4460 BROAD RIVER ROAD
COLUMBIA, SO., CAR., 29210

SWORN TO AND SUBSCRIBED BEFORE ME

ON THIS 31st DAY OF Aug. ~~SEPTEMBER~~ - 2004

Dorise G. Hinson (L.S.)
NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES: 3-16-06

A TRUE COPY
Richard K. ...
Lex. Co. C.C.C.P., G.S. & F.C.

COUNTY OF LEXINGTON
A. CARRIGG, CLERK OF COURT
LEXINGTON COUNTY JUDICIAL CENTER
205 EAST MAIN ST.
LEXINGTON, SC 29072-3494

Exhibit B

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

FILED NKT

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL COURT

JAN 10 2 14 PM '05

Paul A. Smith, #119472,)

C/A No. 2004-CP-32-3343

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

**MOTION TO SUPPLEMENT AND SUPPLEMENT
TO POST-CONVICTION RELIEF APPLICATION**

The Applicant in this matter, Paul A. Smith, would respectfully move this Honorable court to permit Applicant to Supplement his Application for Post-Conviction Relief (PCR) to include the grounds that the Applicant was denied his Sixth Amendment right to the effective assistance of trial counsel wherein counsel failed to object to the Applicant being sentenced to a term of life wherein the Court lacked jurisdiction to render such a sentence and counsel was ineffective in failing to request that the trial judge tailor the jury instructions on self-defense to include the fact that the Applicant did not have a duty to retreat from his own home.

The Applicant, in support of this Supplement, would respectfully show this Honorable court the following:

I. PROCEDURAL HISTORY

Applicant was indicted by the Lexington County Grand Jury at the April 2002 term of Court for murder. See Indictment No. 2002-GS-32-1212. Ken Mathews, Esq. was appointed to represent Applicant at trial. Applicant proceeded to trial by jury on October 21, 2002, before the Honorable James R. Barber, III, Circuit Court Judge. The jury found Applicant guilty of

voluntary manslaughter on October 24, 2002. Judge Barber sentenced Applicant to a term of life without parole pursuant to S.C. Code Ann. § 17-25-45.

Timely notice of appeal was filed on Applicant's behalf and Robert M. Dudek, Assistant Appellate Defender, was appointed to represent Applicant on direct appeal. Mr. Dudek filed an Anders Brief, dated November 20, 2004, in which he raised the sole issue of:

"Whether the judge erred by instructing the jury, over Appellant's objection, on voluntary manslaughter where appellant's testimony showed he was acting in self-defense, and there was no evidence appellant killed the decedent in a heat of passion upon a sufficient legal provocation?"

Initial Anders Brief of Appellant, p. 3.

II. GROUND AND SUPPORTING FACTS

In supplementing his Application for Post-Conviction Relief, the Applicant raises two (2) grounds. He alleges that:

A) Applicant was denied his Sixth Amendment right to the Effective Assistance of Trial Counsel wherein counsel failed to object and preserve for appeal, the issue that the trial court lacked jurisdiction to sentence Applicant to Life imprisonment without parole under S.C. Code Ann. § 17-25-45 where the Applicant never received written notice of the Solicitor's intent to seek a life sentence under that statute and said written notice to defense counsel and the defendant is mandatory.

(1) Applicant submits the following facts to support this ineffective Assistance of Counsel claim:

Applicant had a prior record which included armed robbery. Because of this incident, Applicant was charged and indicted for murder at the April 2002 term of Court. Applicant's trial was held from October 21-24, 2002. The Solicitor, or one of his agents, had six (6) months to obtain a copy of Applicant's prior record and serve Applicant with the State's intent to seek a life sentence without parole. S.C. Code Ann. § 17-25-45 mandates

that the defendant receive written notice of the State's intent to seek a life sentence without parole, ten (10) days prior to trial. The Applicant in this matter never received the written notice as required by law.

ARGUMENT

In a PCR proceeding, the burden of proof is on the applicant to prove the allegations in his application. Brown v. State, 340 S.C. 590, 533 S.E.2d 308 (2000); Rule 71.1(e), SCRPC. For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must demonstrate: (1) his counsel failed to render reasonably effective assistance under prevailing professional norms; and (2) he was prejudiced by his counsel's ineffectiveness. Id. (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). In order to prove prejudice, an applicant must demonstrate that but for counsel's errors, there is a reasonable probability the result of the trial would have been different. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id.

Applicant asserts that counsel knew that Applicant had not received written notice of the solicitor's intent to seek life without parole and that the Applicant did not have an understanding of the law as it relates to sentencing. Counsel also recognized, or should have recognized, that Applicant was more concerned as to why he was found guilty of voluntary manslaughter when he persistently and consistently asserted that he was acting in self-defense at the time of the incident.

He further argues that counsel failed to render reasonably effective

assistance where counsel failed to know the law regarding South Carolina's Two-Strike Law, i.e., S.C. Code Ann. § 17-25-45 and where counsel failed to make any objection, even after being prompted by the trial judge on more than one occasion.

South Carolina Code Ann. § 17-25-45(A) provides in pertinent part:

Notwithstanding any other provision of law, except in cases in which the death penalty is imposed, upon a conviction for a most serious offense as defined by this section, a person must be sentenced to a term of imprisonment for life without parole if that person has one or more prior convictions for:

(1) a most serious offense;...

S.C. Code Ann. § 17-25-45(A) (Supp. 2000).

Paragraph (C) of the statute includes armed robbery as a "most serious offense." See S.C. Code Ann. § 17-25-45(C)(1) (Supp. 2001).

The sentencing provisions of § 17-25-45(G) are mandatory. Regarding the notice provision of the statute, the statute provides:

Where the solicitor is required to seek or determines to seek sentencing of a defendant under this section, written notice must be given by the solicitor to the defendant and defendant's counsel not less than ten days before trial.

Id. § 17-25-45(H) (Emphasis Added).

Prior to, and in preparation for sentencing, the following takes place:

THE COURT: PRIOR TO IT GOING TO THE JURY. ALL RIGHT. ANYTHING FURTHER?

MR. MATHEWS: NOT UNLESS — WHENEVER YOU'RE READY TO SENTENCE, I'LL HAVE SOMETHING.

THE COURT: ALL RIGHT. ARE YOU READY TO GO RIGHT NOW? MY UNDERSTANDING IS THAT I DON'T HAVE MUCH LATITUDE IN THIS MATTER.

MR. MATHEWS: IF THE SOLICITOR IS STILL LEAVING THAT OUT THERE, I GUESS THAT'S THE CASE.

THE COURT: PARDON ME?

MR. MATHEWS: IF THE SOLICITOR IS STILL LEAVING THAT OUT THERE,
I GUESS THAT'S THE CASE.

THE COURT: WELL, I HAVE NOT SEEN ANY NOTICE. I ASSUME THE
NOTICE WAS MADE. YOU HAVE NOT RAISED ANY OBJECTION AS TO NOTICE
OF SEEKING LIFE WITHOUT PAROLE. WHAT IS THE STATUTE ON THAT? IS
THERE A SENTENCE PURSUANT TO THAT STATUTE? (EMPHASIS ADDED)!

MR. GRAHAM: I THINK IT'S ON THE SENTENCING SHEET. IT'S
17-25-45, I BELIEVE.

THE COURT: WELL, THERE'S NOTHING ON THE SENTENCING SHEET.

MR. GRAHAM: I THINK IT'S -- ACTUALLY IT'S THE MOST --

THE COURT: YOU MAY WANT TO COMPLETE THIS SENTENCING SHEET.

MR. GRAHAM: I'VE GOT ONE FOR YOU, YOUR HONOR. IT'S 17-25-45.

THE COURT: IS THAT WRITTEN ON HERE, 1725?

MR. GRAHAM: YES. IT'S NEXT TO THE MOST SERIOUS. THERE'S A
BOX, YOUR HONOR.

THE COURT: OH, I'M SORRY.

MR. GRAHAM: I WOULD -- I HAVE A CERTIFIED TRUE COPY OF HIS
ARMED ROBBERY INDICTMENT, YOUR HONOR, AND ASK TO MAKE THAT A COURT'S
EXHIBIT FOR THE RECORD.

Tr. p. 405, l. 1 through p. 406, l. 9.

The trial judge prompted defense counsel here, several times, going
so far as to state that he had not seen any notice and he assumed that notice
was made. He also nudged defense counsel to object, however, counsel did
not know the law in this area and, as shown below, objected only on grounds
of the statute being unconstitutional as applied here because of the
remoteness of the armed robbery conviction.

During actual sentencing, the following took place:

THE COURT: ALL RIGHT. ANYTHING ANYBODY WANTS TO TELL ME?
(EMPHASIS ADDED)! ANYTHING FROM THE STATE?

MR. GRAHAM: NO, YOUR HONOR.

MR. MATHEWS: JUDGE, I OBJECT TO THE NOTICE AND SENTENCING UNDER THIS. I'LL PUT THAT ON THE RECORD, THAT IT'S UNCONSTITUTIONAL BASED UPON SPECIFICALLY THE FACT THAT THE RECORD IS -- THAT THEY'RE RELYING ON IS (sic) A 1984 CONVICTION, AND IT CAN'T BE USED UNDER THE RULES FOR IMPEACHMENT PURPOSES. THEREFORE, I THINK IT'S TOO REMOTE IN TIME TO BE USED.

THE STATUTE IS UNCONSTITUTIONAL ON THAT BASIS AND SHOULD NOT BE -- IT (sic) SHOULD NOT BE SENTENCED UNDER THAT DUE TO THE FACT THAT IT'S SO REMOTE IN TIME.

THE COURT: ALL RIGHT. YOUR OBJECTION IS NOTED.
ALL RIGHT. IS THERE ANYTHING ELSE YOU WANT TO TELL ME, MR. MATTHEWS? (EMPHASIS ADDED)!

MR. MATTHEWS: NO, SIR.

THE COURT: ANYTHING YOUR CLIENT WISHES TO TELL ME?

THE DEFENDANT: YES SIR, I'D LIKE TO SPEAK, YOUR HONOR. I FEEL THAT IT'S UNFAIR. OF COURSE, THE REASON I FEEL THAT WAY, THE SYSTEM IS JUST -- IT'S JUST NOT FAIR.

I MEAN, THE EVIDENCE PROVES THAT IT HAPPENED THE WAY I SAID IT HAPPENED. I DON'T SEE HOW, YOU KNOW, THEY CAN COME WITH ANY OTHER WAY.

I JUST DON'T ACCEPT IT, IT'S JUST NOT RIGHT. IT'S JUST NOT FAIR.

THE COURT: ALL RIGHT.

THE DEFENDANT: I WISH, IF IT'S GOD'S WILL, THAT YOU WILL IMPOSE A SENTENCE THAT'S MUCH LIGHTER. I MEAN, MY GOD, I DID WHAT ANY HUMAN BEING WOULD DO BY PRESERVING HIMSELF. MY INTENTIONS WERE NOT FOR HIM TO DIE.

THE WAY THINGS WORKED OUT FOR THE FAMILY MEMBERS, YOU KNOW, I UNDERSTAND THAT THIS MAN IS DEAD, I JUST HAVE VERY WELL COULD HAVE BEEN ALSO DEAD, TOO. I DID JUST WHAT, YOU KNOW, I COULD DO.

THE COURT: WELL, MR. SMITH, WHETHER I AGREE WITH THE STATUTE OR DISAGREE WITH THE STATUTE, I'M BOUND BY IT TO FOLLOW THE LAWS OF SOUTH CAROLINA.

THE READING OF THE STATUTE IS YOU HAVE A PRIOR ARMED ROBBERY, MOST SERIOUS OFFENSE.

THE DEFENDANT: YES, SIR.

THE COURT: IT COULD BE CONSIDERED A MOST SERIOUS OFFENSE,

VIOLENT. THE STATUTE SAYS WHEN YOU GET TWO OF THEM, YOU GET SENTENCED TO LIFE WITHOUT PAROLE.

THE DEFENDANT: I KNOW. THAT'S OVER 20 YEARS AGO.

THE COURT: I DON'T WRITE THE STATUTE MR. SMITH.

THE DEFENDANT: I UNDERSTAND THAT BUT --

THE COURT: I'M NOT TELLING YOU I AGREE WITH THAT. IT'S --
- I HAVE VERY LIMITED AUTHORITY TO DO ANYTHING OTHER THAN TO IMPOSE
THE SENTENCE PURSUANT TO THE STATUTE OF THE STATE OF SOUTH CAROLINA.
THE STATUTE IS VERY CLEAR. AS A RESULT, IT'S THE SENTENCE
OF THIS COURT THAT YOU BE COMMITTED TO THE DEPARTMENT OF CORRECTIONS
FOR A TERM OF LIFE WITHOUT PAROLE.

Tr. P. 406, l. 11 through p. 408, l. 19.

Counsel should reasonably have known, between the trial judge's urging and inquiries into whether or not anyone had anything to say, that something was amiss. Counsel's failure to research the law or to simply read the statute, i.e., § 17-25-45, amounts to ineffective assistance of counsel and the Applicant was prejudiced in that but for counsel's errors, the Applicant could not have been sentenced to life without parole.

When a statute is penal in nature, it must be construed strictly against the State and in favor of the defendant. State v. Blackmon, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991); accord Kerr v. State, 345 S.C. 183, 547 S.E.2d 494 (2001). Moreover, the clear and unambiguous words of the statute establishes the clear intent of the General Assembly and the General Assembly obtains the sole legislative power in this State, from the South Carolina Constitution, Art. III, § 1.

In this case, the evidence conclusively establishes that, at the time of sentencing, counsel failed to object to the fact that the Solicitor had not served written notice upon the Defendant and upon counsel, and allowed

Petitioner to be sentenced to a life sentence wherein the Court lacked the jurisdiction to hand down such a sentence and Petitioner was not served with written notice of the State's intent to seek the life without parole sentence under S.C. Code Ann. § 17-25-45. The trial Judge admitted that no evidence was before him concerning the written notice, no one asked Applicant if he received written notice, and he had not, therefore, relief must be granted, the sentence vacated and the case remanded for resentencing.

B) Counsel provided ineffective assistance when counsel failed to request that the trial judge, TAILORED his instructions in giving the instruction on self-defense, so as to also inform the jury that the defendant had no duty to retreat because he was on his own premises.

(1) Applicant rented a room from the owner of the boarding house wherein he paid rent weekly.

(2) Applicant was provided access to the rest of the house and shared the kitchen, the bathroom and other general living areas, with others who also rented a room.

(3) Applicant had no duty to retreat when he was walking out of his room and was attacked, or at any time, as long as the Applicant met the other three (3) elements of self-defense, and the home where he was attacked was also his home and he had a right to be there.

(4) In providing the jury with the self-defense charge and in failing to inform the jury that the Applicant did not have a duty to retreat, the jury became confused and believed that they had a duty to find the Applicant guilty of the lesser-included offense of voluntary manslaughter where the Applicant did not attempt to retreat.

ARGUMENT

The evidence presented at trial determines the law to be charged..

State v. Goodson, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994). If there is any evidence in the record to support self-defense, the issue should be submitted to the jury. State v. Burkhardt, 350 S.C. 252, 261, 565 S.E.2d 298, 302 (2002); State v. Hill, 315 S.C. 260, 261, 433 S.E.2d 848, 849 (1993). A trial judge's failure to do so is reversible error. State v. Day, 341 S.C. 410, 416, 535 S.E.2d 431, 434 (2000).

In this case, the trial judge did charge self-defense. See App. pp. 380-384. However, the problem with the charge stems from the trial judge's explanation concerning the fourth element of self-defense. See App. p. 384. There, the trial judge explained that:

"THE FINAL ELEMENT OF SELF-DEFENSE IS THAT THE DEFENDANT HAD NO OTHER PROBABLE WAY TO AVOID THE DANGER OF DEATH OR SERIOUS BODILY INJURY OTHER THAN TO ACT AS THE DEFENDANT DID IN THIS PARTICULAR INSTANCE."

Id. at 384, lines 2-5.

The charge on self-defense must be tailored to the circumstances. State v. Nichols, 325 S.C. 111, 117, 481 S.E.2d 118, 121 (1996) (Basic charge in State v. Davis, 282 S.C. 45, 317 S.E.2d 52 (1984), "was not intended to be the exclusive charge for self-defense."); State v. Fuller, 297 S.C. 440, 377 S.E.2d 328 (1989).

The circumstances here included the fact that the Applicant was renting a room at the residence where the incident began. The victim also lived at that residence. App. p. 109, ll. 17-24. However, defense counsel failed to request the trial judge to tailor the self defense charge to include the fact that the Applicant did not have a duty to retreat where he was in his own home.

Where a person is in his own home, yard, or property, he is not required

to retreat even if the aggressor is also an owner or occupant of the home, yard, or property or some other person who has a right to be there.

State v. Davis, 282 S.C. 45, 317 S.E.2d 452 (1984); State v. Davis, 214 S.C. 34, 37, 51 S.E.2d 86 (1948); State v. Osborne, 202 S.C. 473, 25 S.E.2d 561 (1943); State v. Brooks, 79 S.C. 144, 60 S.E. 518 (1908); State v. Long, 325 S.C. 59, 480 S.E.2d 62 (1997).

Thus, the jury was led to believe, based on the charge given by the trial judge, that the Applicant was able to avoid the danger of death or serious bodily injury, i.e., retreat, and that the Applicant simply chose to stay and fight and not to retreat. (See Mutual Combat Charge).

Because counsel failed to request that the trial judge tailor the self-defense charge to the circumstances of this case and failed to request that the trial judge charge the jury that the Applicant had no duty to retreat and because the trial judge's instructions to the jury on the fourth element of self-defense could easily lead a rational trier of fact to conclude that the Applicant had a duty to retreat, counsel rendered ineffective assistance and the Applicant was prejudiced to the extent that the verdict cannot be relied on as having produced a just result. This court should vacate the judgment of conviction and remand this case for a new trial.

Respectfully Submitted,

Paul A. Smith

Paul Smith, #119472
Broad River C.I., MU-124
4460 Broad River Rd.
Columbia, SC 29210

COPY

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Paul A. Smith,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

AMENDED POST CONVICTION
RELIEF APPLICATION
C/A No. 2004-CP-32-3343

2006 JUL 18 PM 3:09
Paul A. Smith
State of South Carolina
Lexington Court
Exhibits 100

FILED
NKE

GROUND FOR RELIEF AND SUPPORTING DOCUMENTATION

1. Trial counsel was ineffective in failing to assure that the Solicitor's office provide written proof to both trial counsel and Defendant of the Solicitor's intent to seek life without parole, pursuant to SC Code Section 17-25-45. Trial counsel further failed to object in any way to the State's failure to provide proper notice. Pursuant to State v. James, 2006 S.C. (4099), "[b]y its works in the recidivist statute, the General Assembly has mandated that the solicitor "must" notify the defendant and the defendant's counsel in writing if the solicitor intends to seek a life sentence without the possibility of parole. For this Court to dismiss the clear and unambiguous language of the statute and merely require the defendant's counsel to have actual notice of the solicitor's intent to seek life without parole would have the effect of amending the statute. In our view actual notice under section 17-25-45(H) is insufficient unless and until the General Assembly decides otherwise and amends the statute itself." Applicant has a prior record which included armed robbery. Applicant was charged and indicted with murder during the April 2002 term of court. Applicant's trial was held in October, 2002. The State had sufficient time to obtain a copy of Applicant's criminal record and give proper notice of intent to seek life without parole.

It is clear from the transcript that there was no evidence of notice of intent to seek life without parole. (transcript pages 405-406)

2. Trial counsel was ineffective in presenting the defense of self defense at trial, and in failing to argue and/or request that the court charge jury regarding the elements of self defense, including the Applicant's immunity from a duty to retreat in his own home.

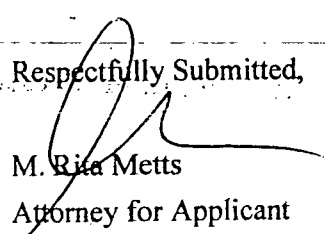
The history of this case and the record reflects prior conflicts between the applicant and the victim and a physical altercation initiated by the victim prior to the altercation in question. There was evidence of the victim's high alcohol and/or drug levels on the night in question which severely affected the victim's ability to behave rationally or to allow applicant to control the victim's violent behavior. Trial counsel failed to raise these issues at trial. Applicant advised trial counsel that he was acting in self defense and trial counsel failed to present the defense of self defense at applicant's trial.

The altercation between applicant and victim occurred in victim's room at the boarding

house in which he was living. This room is considered applicant's premises or residence. As applicant had retreated to his room when the altercation took place, he was under no obligation to retreat when he was attacked by the victim. Trial counsel failed to argue the applicant's had no duty to retreat.

3. Trial counsel was ineffective in not objecting to the trial court charging voluntary manslaughter.

Respectfully Submitted,



M. Rita Metts

Attorney for Applicant

METTS LAW FIRM, LLC

PO Box 21023

Columbia, SC 29221

803-929-0577

COPY

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

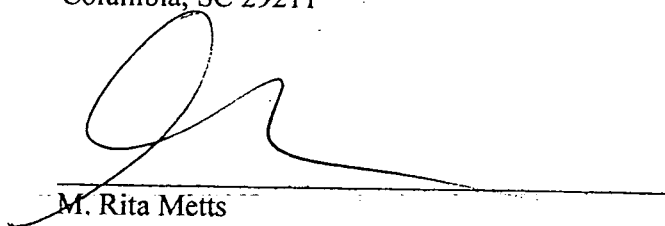
STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)
Paul A. Smith,)
Applicant,)
v.)
State of South Carolina,)
Respondent.)
_____)

PROOF OF SERVICE

C/A No. 2004-CP-32-3343

I, M. Rita Metts, court appointed attorney for Paul A. Smith, do hereby certify that on July 17, 2006, I mailed a copy of the Amended Post Conviction Relief Application by placing the same in the United State Mail with postage prepaid to the following:

Sabrina Todd, Esquire
Assistant Attorney General
South Carolina Attorney General's Office
PO Box 11549
Columbia, SC 29211



M. Rita Metts
Attorney for Applicant
METTS LAW FIRM, LLC
PO Box 21023
Columbia, SC 29221
803-929-0577

Paul A. Smith
Clerk of Court
Lexington, SC

2006 JUL 18 PM 3:09

Filed

Columbia, South Carolina
July 17, 2006

FILED FORM 5

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF Lexington)

2012 JAN 12 A 8:59

IN THE COURT OF COMMON PLEAS

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

Paul A. Smith, #119472,)

v.)

State of South Carolina)

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SO

(Exhibit 0)

APPLICATION FOR

POST-CONVICTION RELIEF

2012 CP 3200117

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Broad River Correctional Institution
2. Name and location of Court which imposed sentence General Sessions of 11th Circuit Lexington County, S.C. 29072
3. Name(s) of co-defendant(s) (if any) None

4. ~~The indictment number or numbers (if known) upon which and the offenses for which~~
sentence was imposed: 2002-GS-32-1212

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

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

- (a) October 24, 2002 LWOP
- (b) _____

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BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty XXX
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
Yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Affirmed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. June 22, 2004
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. N/A
- ii. _____
- iii. _____
-
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Applicant's trial counsel ineffective in not presenting a defense of Self-Defense at trial of the Applicant - which was warranted: Trial Counsel failed to request the law of immunity from a duty to retreat.

- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Trial Counsel was ineffective in not presenting a defense of Self-Defense at Applicant's trial: Trial Counsel ineffective in not
- (b) contemporaneously objecting to the circuit charging voluntary manslaughter when such charge was not requested by the defense.
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? Yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? Yes
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? Yes
- (d) any other petitions, motions or applications in this or any other Court? Yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Writ of Cert with the State
- ii. Appeal to Distict Court on Federal Habeas 28 2254
- iii. 4th Circuit Court of Appeals
- iv. Writ of Cert to U.S. Supreme Court
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Supreme Court
- ii. Distict Court of South Carolina
- iii. 4th Circuit Court of Appeals i n Virginia
- iv. United States Supreme Court
- (c) the disposition thereof:
- i. Denied
- ii. Denied
- iii. Denied
- iv. Denied
- (d) the date of each such disposition:

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

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- i. S.C. Supreme Court denied Writ of Certiorari 11-6-2008
- ii. U.S. District Court denied 3-23-2010
- iii. Fourth Circuit Court of Appeals dismissed 2-11-2011
- iv. United States Supreme Court dismissed 6-13-2011
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
 - i. N/A
 - ii. N/A
 - iii. N/A
 - iv. N/A

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

N/A

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

(a) which grounds have been presented:

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

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

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

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not

previously been presented:

- (a) An Applicant is prohibited from raising the issue of ineffective
- (b) assistance of counsel on Direct Appeal; PCR affords Applicant the
- (c) chance to raise ineffective assistance of counsel.

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

- (a) -- your arraignment and plea? N/A
- (b) your trial, if any? Yes
- (c) your sentencing? Yes

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 LEXINGTON SC

- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? N/A

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

- (a) the name and address of each attorney who represented you:
- i. Attorney - Ken Matthews, Post Office Box 7335,
Columbia, S.C. 29202. Attorney - Robert M. Dudek,
S.C. Office of App. Defense - Cola, S.C. 29202
 - ii. _____
 - iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Attorney - Matthews (Trial)
 - ii. Attorney - Dudek (Direct Appeal)
 - iii. _____

19. State clearly the relief you seek in filing this application:
Sentence Vacated and Conviction Reversed.

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

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2012 JAN 12 A 8:59
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

2012CP3200117

STATE OF SOUTH CAROLINA)

VERIFICATION

County of Lexington)

I, Paul A. Smith, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Paul A. Smith

SWORN to and subscribed before me this 9th day of January, 2012.

Judith H. Frye (L.S.)
Notary Public

My Commission Expires March 5, 2018

My Commission Expires: _____

FILED
2012 JAN 12 A 8:59
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

2012CP3200117

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

Paul A. Smith
I, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Paul A. Smith
Applicant

SWORN or affirmed to and subscribed before me this
9th day of January, 2012.

Susan H. Frye
Notary Public

My Commission Expires
March 5, 2018

My Commission Expires: _____

FILED
2012 JAN 12 A 8:59
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA
County of LEXINGTON

FILED)

IN THE COURT OF COMMON PLEAS
Eleventh Judicial Circuit

C/A No.: 2004-CP-32-3343

Paul A. Smith, #119472,

2012 JAN 12 A 8:59)

Applicant A. CARRIGE
CLERK OF COURT
LEXINGTON SC)

vs.)

Motion to Supplement

Post Conviction Relief Application

State of South Carolina,)

Pursuant to Rule 9(c) S.C.R.C.P.

Respondent)

2012CP3200117

I.

The Applicant in the above captioned matter hereby moves this court pursuant to Rule 71.1 S.C.R.C.P. and respectfully prays that this Honorable Court grant the Applicant's application for Post-Conviction Relief. The Applicant did not fully adjudicate the issues that were setforth within the Applicant's original application (Exh. B) prior to the PCR. Counsel's failure to amend a specific issue that was setforth within the Applicant's original application (Exh. A).

The PCR Judge must make specific findings of fact and state expressly the conclusions of law relating to each issue presented. The failure to specifically rule on the issue precludes appellate review of the issues. See, Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127 (1992).

PCR counsel for the Applicant, Ms. Rita Metts, Esq., submitted the Amended Post-Conviction Relief application on July 17, 2006 (Exh. A). However, in regards to the amended Post-Conviction application, that which was submitted on behalf of the Applicant.

The PCR counsel abandoned a vital issue that was filed by the Applicant within the original application, which was submitted to this Honorable Court by Motion to Supplement on January 10, 2005, (Exh. B). The Applicant indeed did assert to this Honorable Court upon the supplementary motion regarding the

STATE OF SOUTH CAROLINA)

County of LEXINGTON)

Paul A. Smith, #119472,)

Applicant,)

vs.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

Eleventh Judicial Circuit

C/A No.: 2004-CP-32-3343

CERTIFICATE OF SERVICE

2012CP3200117

I, Paul A. Smith, #119472, do hereby certify that I have served the Post-Conviction Relief Application with Attachment that consist of a Motion to Supplement Post-Conviction Relief Application Pursuant to Rule 9(c) S.C.R.C.P. on the 10 day of JANUARY, 2012. To the Honorable Court of Common Pleas, addressed to Lexington County Clerk of Court, 205 East Main Street, Lexington, S.C. 29072.

Paul A. Smith

Paul A. Smith, #119472
B.R.C.I. Congaree 149
4460 Broad River Road
Columbia, S.C. 29210

Sworn to and subscribed before me

this 9th day of January 2012.

Susan H. Frye (L.S.)

Notary Public for South Carolina

My Commission Expires: _____ My Commission Expires
March 5, 2018

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON S.C.

2012 JAN 12 A 8:59

FILED

STATE OF SOUTH CAROLINA)

County of Lexington)

Paul A. Smith, #119472,)

Applicant,)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2012-CP-32-0117

OBJECTION TO THE RETURN AND

MOTION TO DISMISS

Pursuant to Rule 12(b)(5)&(c), SCRPC

SCRPC

2012 AUG 7 PM 9:24
CLERK OF COURT
LEXINGTON COUNTY
SOUTH CAROLINA
201208071609

FILED

Applicant hereby moves to object to the RETURN AND MOTION TO DISMISS, pursuant to Rule 12(b)(5)&(c), SCRPC.

I

The Applicant is presently confined in the South Carolina Department of Corrections, pursuant to Order of Commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2002 term of the Lexington County Grand Jury for murder (2002-GS-32-1212). He was represented by Kenneth M. Mathews, Esquire. The Applicant proceeded to trial on October 21-24, 2002. He was found guilty of voluntary manslaughter by a jury of his peers and sentenced to Life Without Parole pursuant to S.C. Code Ann. §17-25-45 by the Honorable James R. Barber, III.

The Applicant filed a timely Notice of Appeal and an Anders brief raising the following issue: "Whether the trial judge erred by instructing the jury on voluntary manslaughter when Applicant's testimony showed he was acting in self defense and there was no evidence the Applicant killed the decedent in the heat of passion upon a sufficient legal provocation." The South Carolina Court of Appeals dismissed the appeal after a full review pursuant to Anders

v. California. State v. Smith Op. No. 2004-UP-401 (S.C. Ct. App. Filed June 22, 2004). The Applicant filed a Petition for Rehearing which was denied by the S.C. Court of Appeals by Order dated August 28, 2004. The Remittitur was issued on September 24, 2004.

The Applicant filed an Application for Post-Conviction Relief on September 14, 2004 (2004-CP-32-3343)(Exhibit B1, pg. 27). The Applicant moved by motion to supplement on January 10, 2005 (Exhibit B), in which the Applicant amended before this Honorable Court the issue concerning the trial court Mutual Combat Jury Charge (Exhibit B, pg. 10). PCR counsel for Applicant, Ms. Rita Metts, Esquire, submitted the amended Post-Conviction Relief Application on July 17, 2006 (Exhibit A). The PCR counsel abandoned the vital issue which was filed by the Applicant within the original Application which was submitted before this Honorable Court by Motion to Supplement (Exhibit B, pg. 10).

II

~~The Applicant hereby moves in opposition before this Honorable Court,~~
pursuant to Rule 12(b)(5) & (c), SCRPC for means of objectionable basis for the necessity of refutation regarding the accusations set forth within the State's argument within the State's Return and Motion to Dismiss (Exhibit J, pg. 3 of 7). However, the State asserts within its Motion to Dismiss that the Applicant is attempting to raise a new issue that consist of, "[I]neffective Assistance of PCR Counsel" (a) Failure to present issue of Mutual Combat in the amended application for PCR and the PCR court (Exhibit J, pg. 3 of 7).

This specific issue concerning Ineffective Assistance of PCR Counsel is not contained within previous nor current records before this Court (i.e. within any PCR Application filed by the Applicant), by this imprecation of a non-factual assertion, which was implemented by the State, within its Return and

Motion to Dismiss (Exhibit J, pg. 3 of 7), narrowly tailors and serve a compelling interest. See Glucksburg 117 S.Ct. at 2268, quoting Reno v. Flores, U.S. 792, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993), and provides a natural tendency which influences the decision making body in which it is addressed.

See U.S. v. Sarihfard, 155 F.3d 301.

The Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRPC (Exhibit Q) was submitted by the Applicant on January 12, 2012, which established before this Honorable Court that the Applicant is indeed exonerated of attempts to raise new issues but however did so provide to this Honorable Court the significant indication of this breach of the Fourteenth Amendment due process concerning the PCR Court to fully comply to the statutory mandate pursuant to S.C. Code Ann. §17-27-80. The Applicant did so properly amend this issue of the trial court Mutual Combat Jury Charge on January 10, 2005 (Exhibit B, pg. 10) prior to the evidentiary hearing that convened on April 10, 2002. However, the record does not hold any reference of the Applicant specifically raising Ineffective Assistance of PCR Counsel, that which is alleged within the State's Return and Motion to Dismiss (Exhibit J, pg. 3 of 7).

III

The burden of proof is on the Applicant in Post-Conviction proceedings to prove the allegations in his application. See Butler v. State, (S.C. 1985) S.C. 441, 334 S.E.2d 813 certiorari denied 106 S.Ct. 869, 474 U.S. 1094, 88 L.Ed.2d 908. As pleaded before this Honorable Court within the Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRPC (Exhibit Q) regarding the PCR counsel for the Applicant, submission of the amended Post-Conviction Relief Application on July 17, 2006 (Exhibit A) in

which the PCR Counsel failed to amend this vital issue of the trial court Mutual Combat Jury Charge that was submitted per the Applicant by Motion to Supplement on January 10, 2005 (Exhibit B, pg. 10).

S.C. Code Ann. §17-27-80 provides that it is the obligation of the PCR counsel to closely examine such substantive claims to see if they might be converted to components of a Sixth Amendment claim and must be raised in the context of an application. See McCray v. State, (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241. "Not only does such failure deprive the parties of the issue raised, but it makes review by the appellate court more difficult and thus counsel preparing orders should be meticulous in doing so." See Pruitt v. State, (S.C. 1992) 310 S.C. 254, 423 S.E.2d 127.

The Applicant is entitled to a just and fair amending process of the Applicant's original application pursuant to the Sixth and Fourteenth Amendment as well as annotated of South Carolina Constitution Article 1, §3. These provisions are set forth by S.C. Code Ann. § 17-27-80, therefore negating a means of destruction or elimination of the original. See Greenville Common H Corp. v. Alexander Smith Inc., 95 S.E.2d 262. The Applicant's Motion to Supplement (Exhibit B, pg. 10) served to fully inform the PCR counsel as well as the court the nature of the Cause of Action. See Alamance Industries v. Chesterfield Hosiery Mill, 122 S.E.2d 648.

The primary standard of a PCR hearing weighs on the Applicant whereas the burden is on the Applicant in a Post-Conviction proceeding to prove the allegations. See Cooper v. Moore, 569 S.E.2d 300 (S.C. 2002); Matthews v. State, 565 S.E.2d 766, 350 S.C. 272.

IV

The Respondent contends within its Return and Motion to Dismiss that the

Applicant's current application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedure of the Uniform Post-Conviction Procedure Act, S.C. Code Ann. §17-27-10 to -160, S.C. Code Ann. §17-27-45(a).

The Applicant's current application (Exhibit Q) that is supported by the Motion to Supplement Post-Conviction Relief Application pursuant to Rule 9(c), SCRPC (Exhibit Q) provides before this Honorable Court concerning the trial court Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) which was not addressed by the PCR Judge in the Evidentiary Hearing which was convened on April 10, 2007. See (Exhibit Z) However, specific finding which the PCR Court is required to set forth with conclusions of law. See McCray v. State, (S.C. 1991) 305 S.C. 329, 408 S.E.2d 241. Except however this specific finding and the conclusion of law regarding this issue of the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) is not concluded within the Order of Dismissal on May 18, 2007 (Exhibit Z). The issue of the trial court's Mutual Combat Jury Charge was not addressed by the PCR Court prior to this issue not properly amended from the Applicant's original application. Wherefore the PCR Court did not fully adjudicate on the issues set forth by the Applicant's case, Case No.: 2004-CP-32-3343. See Whitehead v. State, 426 S.E.2d 315.

The Applicant did so comply with S.C. Code Ann. §17-27-90 (2010) which states:

All grounds for relief available to an applicant under this chapter [must be raised in his original supplemental or amended application.] Any grounds 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 that applicant has taken to secure relief may not be 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 original application.

LETITIA A. CARRIGER
CLERK OF COURT
COLUMBIA, SOUTH CAROLINA

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FILED

Again, the issue regarding the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) substantiates before this Honorable Court in which the record reflects that the Applicant moved by Motion to Supplement on January 10, 2005 (Exhibit B, pg. 10) prior to the Evidentiary Hearing which had convened on April 10, 2007. This validates that the Applicant did so comply with S.C. Code Ann. §17-27-90 (2010). As stated in part...

"[A]ll grounds for relief available to an applicant under this chapter must be raised in his original supplemental application..."

However, the Respondent has not provided this Honorable Court with records to establish if the Applicant voluntarily or intelligently waived this ground concerning the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381).

As stated of S.C. Code Ann. §17-27-90 (2010) which states in part:

"[A]ny ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence[.]"

The PCR counsel abandoned a vital issue that was filed by the Applicant within the original Application which was submitted to this Honorable Court by Motion to Supplement on January 10, 2005. (Exhibit B, pg. 10)

The Applicant's current Application that which is supported by Motion to Supplement (Exhibit Q) provides before this Honorable Court the ground for relief asserted which, for sufficient reason was indeed asserted by the Applicant within his Motion to Supplement (Exhibit B, pg. 10) but however was not asserted due to the PCR counsel not amending the trial court Mutual Combat Jury Charge (Exhibit C, tr. 16-19, pg. 381) to the amended application. (Exhibit A).

By this (supra) the Applicant has provided before this Honorable Court this showing that this ground concerning the trial court's Mutual Combat Jury

Charge (Exhibit C, Tr. 16-19, pg. 381) could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

The Applicant properly amended the trial court's Mutual Combat Jury Charge that which was implemented by the Applicant by Motion to Supplement before this Honorable Court January 10, 2005 (Exhibit B, pg. 10), prior to the Evidentiary Hearing that which had convened on April 10, 2007 and generally substantiates that the Respondent's implicated erroneously before this Honorable Court that the Applicant failed to meet the Statute of Limitation pursuant to S.C. Code Ann. §17-27-45(a) being as the record provides before this Honorable Court that this issue concerning the trial court's Mutual Combat Jury Charge (Exhibit C, Tr. 16-19, pg. 381) was timely submitted before this Honorable Court by Motion to Supplement on January 10, 2005 (Exhibit B, pg. 10) in which was not properly raised due to the fact of the PCR counsel failed to amend this issue before the PCR court, thereby negating the remedy for this issue to be concluded of law, rendered by the PCR court. This validates that res judicata does not hold any estoppel concerning this issue. The record reflects these facts before this Honorable Court. (Exhibit 1)

V

WHEREFORE the Applicant prays of this Honorable Court to deny the Respondent's Summary Dismissal and grant the Applicant's request to fully adjudicate the issue of the trial court's Mutual Combat Jury Charge pursuant to S.C. Code Ann. §17-27-80. This objection is moved before this Honorable Court pursuant to Rule 12(b)(5)&(c), SCRCP.

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BETTY A. JARRING
CLERK OF COURT
COLUMBIA, SOUTH CAROLINA

FILED

Sworn to and Subscribed before me

this 31st day of July, 2012.

Susan H. Dyer (L.S.)

Notary Public for South Carolina

Paul A. Smith

Paul A. Smith #119472

B.R.C.I. CO-149

4460 Broad River Road

Columbia, S.C. 29210

My Commission Expires

My Commission Expires: March 5, 2018

FILED

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PAUL A. CARRIAGE
CLERK OF COURT
LEXINGTON SC

STATE OF SOUTH CAROLINA)

County of Lexington)

Paul A. Smith #119472,)

Applicant,)

V.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS

Case No.: 2012-CP-32-0117

CERTIFICATE OF SERVICE

The Applicant hereby certifies that the objection pursuant to Rule 12(b) (5),(c), SCRCP, to the Return and Motion to Dismiss has been served to the Court of Common Pleas regarding Case No.: 2012-CP-32-0117 and is depositing it into the U.S. Mail on August 2, 2012, addressed to: Ms. Beth A. Carrigg, Clerk of Court, 205 E. Main Street, Suite 128/wh, Lexington, S.C. 29072, and hereby certify that the below listed parties has been served with the same.

Office of the Attorney General
Mr. Kaelon E. May
Assistant Attorney General
Post Office Box 11549
Columbia, S.C. 29211-1549

Paul A. Smith

Paul A. Smith #119472
B.R.C.I. CO-149
4460 Broad River Road
Columbia, S.C. 29210

Sworn to and Subscribed before me
this 31st day of July, 2012.

Susan H. Frye (L.S.)
Notary Public for South Carolina

My Commission Expires: _____ My Commission Expires
March 5, 2018

2012 AUG -7 AM 8:35
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

FILED



ALAN WILSON
ATTORNEY GENERAL

September 3, 2014

The Honorable Thomas A. Russo
Chief Administrative Judge
Eleventh Judicial Circuit
205 E. Main Street
Lexington, SC 29072

Re: Paul A. Smith, #119472 v. State of South Carolina
2012-CP-32-0117

Dear Judge Russo:

Enclosed please find an original proposed **Final Order of Dismissal** in the above-captioned case. If this Order meets with your approval, please sign it and forward it to the Lexington County Clerk of Court for filing.

Sincerely,

J. Walt Whitmire
Assistant Attorney General

JWW/lfg
Enclosure

cc: Paul A. Smith, #119472

(Exhibit 8)

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

IN THE COURT OF COMMON PLEAS)
)
ELEVENTH JUDICIAL CIRCUIT)

2012 SEP -9 P 4: 12

Case No. 2012-CP-32-0117

Paul A. Smith,)
)
S.C.D.C. No. 119472,)
)
)
Applicant,)

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

v.)
)
State of South Carolina,)
)
)
Respondent.)

FINAL ORDER

PROCEDURAL HISTORY

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 12, 2012. The Respondent (the State) made its Return and Motion to Dismiss requesting that the Application be summarily dismissed. Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, a Conditional Order of Dismissal was issued on July 20, 2012, and filed on June 23, 2012, provisionally denying and dismissing this action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final.

Applicant issued a *pro se* response titled "Objection to the return and motion to dismiss: pursuant to Rule 12(b)(5) & (C) SCRCP" on June 31, 2012. In summary, Applicant asserts that the Court erred in provisionally denying this successive and untimely PCR action pursuant to the applicable procedural bars because of purported ineffective assistance of PCR counsel. Applicant asserts that he should be exempt from the procedural bars because his original 2004 PCR counsel's was allegedly ineffective for failing to properly present and preserve an allegation

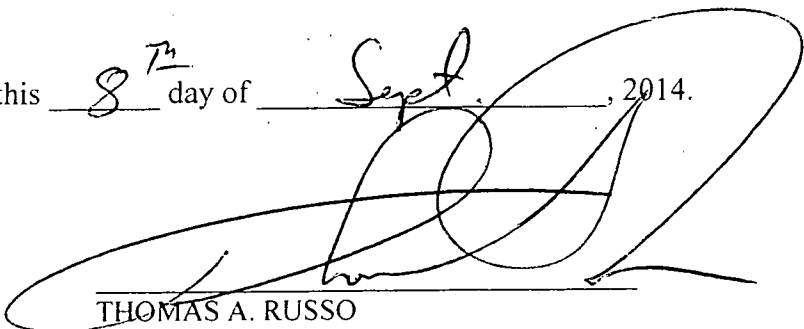
concerning his trial attorneys performance regarding the Trial Judge's global jury instruction on self-defense and mutual combat. Applicant further served a copy of collateral correspondence he sent to the Honorable Casey Manning on December 20, 2012. Applicant's response, collateral correspondence to Judge Manning, March 26, 2013 and August 4, 2014 administrative correspondence to the Clerk's Office are attached to this Final Order and are herein referenced in this Court's ruling

CONCLUSIONS OF LAW

This Court finds Applicant has failed to plead a cognizable prima facie case that would exempt this untimely and successive PCR action from the applicable procedural bars. The South Carolina Supreme Court recently held that an inmate cannot collaterally mount an ineffective assistance of PCR counsel challenge to his conviction outside the limited circumstance announced in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). See Kelly v. State, 404 S.C. 365, 745 S.E.2d 377 (2013).

IT IS THEREFORE ORDERED that, for the reasons set forth in the Court's Conditional Order of Dismissal, the Application for PCR is hereby denied and dismissed with prejudice.

AND IT IS SO ORDERED this 8th day of Sept, 2014.


THOMAS A. RUSSO
Circuit Court Judge
Eleventh Judicial Circuit

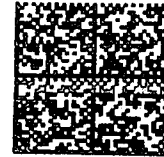
Lexington, South Carolina.

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