

**RECEIVED**

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

NOV 26 2014

**S.C. SUPREME COURT**

Appellate Case No.: 2014-002211

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

v.

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

**MOTION TO SUPPLEMENT**

Pursuant to Rule 212(b) S.C.A.C.R., Petitioner, Paul A. Smith, hereby moves to supplement the following documents to the Set Out of Evidence (Exhibit 1) which was submitted in support of his November 18, 2014 Explanation Pursuant to Rule 243(c): The State's Conditional Order of Dismissal (Exhibit J), the Return and Motion to Dismiss (Exhibit J), the State's Return submitted on April 29, 2005 (Exhibit 2), and Dismissal from 2004, case #2004-CP-32-3343 (Exhibit Z).



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

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**S.C. SUPREME COURT**

Appellate Case No.: 2014-002211

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

v.

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

**CERTIFICATE OF SERVICE**

I, Paul A. Smith, hereby certify that I have filed the MOTION TO SUPPLEMENT pursuant to Rule 212(b) S.C.A.C.R., in the supreme Court of the State of South Carolina, addressed to the Clerk, Daniel E. Shearouse, Post Office Box 11330, Columbia, S.C. 29211, this 24 day of November 2014, from the B.R.C.I.'s mail room.

Paul A. Smith

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

SWORN TO AND SUBSCRIBED TO BEFORE ME  
THIS 24th DAY OF November 2014

Susan H. Frye  
NOTARY PUBLIC FOR SOUTH CAROLINA

MY COMMISSION EXPIRES: My Commission Expires  
March 5, 2018

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
 )  
 )  
Paul Smith, 119472, )  
 )  
Applicant, )  
 )  
v. )  
 )  
State of South Carolina, )  
 )  
Respondent. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

04-CP-32-3343

RETURN

(Exhibit 2.)

The Respondent, making its Return to the application for post conviction relief (PCR) filed September 14, 2004, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the April 2002 term of the Lexington County Court of General Sessions for murder (02-GS-32-1212). He was represented by Kenneth M. Matthews, Esquire. The Applicant proceeded to trial on October 21, 2002, at the conclusion of which he was found guilty of voluntary manslaughter. The Applicant was sentenced by the Honorable James R. Barber, III, to confinement for life without parole pursuant to S.C. Code Ann. § 17-25-45.

The Applicant appealed. The South Carolina Court of Appeals dismissed the appeal after a full review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2004-UP-401 (S.C. Ct. App. filed June 22, 2004). The Applicant submitted a letter dated July 14, 2004, to the court of appeals which the court construed as the Applicant's request for the court to consider



ALAN WILSON  
ATTORNEY GENERAL

July 17, 2012

The Honorable Beth Carrigg  
Lexington County Clerk of Court  
205 East Main Street, Suite 146  
Lexington, SC 29072

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

Dear Ms. Carrigg:

Enclosed please find the original Return and Motion to Dismiss of the Respondent in the above-captioned case for filing in your office.

Sincerely,

Kaelon E. May  
Assistant Attorney General

KEM/lp

**Enclosure**

Lexington County Clerk's Records  
SCDC Records  
Trial Transcript  
Records from Applicant's Direct Appeal, Prior PCR and PCR Appeal

cc: Paul A. Smith, #119472

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

Case No.: 2012-CP-32-0117

Paul A. Smith, #119472, )

Applicant, )

**RETURN AND MOTION  
TO DISMISS**

v. )

State of South Carolina, )

Respondent. )

Respondent, making its Return to the application for Post-Conviction Relief filed January 12, 2012, would respectfully show this Court:

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, at the conclusion of which he was found guilty of voluntary manslaughter. The Applicant was sentenced by the Honorable James R. Barber, III, to life without parole pursuant to S.C. Code Ann. § 17-25-45.

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 that 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 South 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), asserting ineffective assistance of counsel in the following instances: failure to properly advise Applicant about nature and elements of the charges, including lesser-included offenses; not properly advising Applicant about the applicability of Life Without Parole; not properly objecting to the LWOP notice; not properly objecting to the charges given by the trial judge on voluntary manslaughter and self-defense. Respondent made its Return on April 29, 2005. An evidentiary hearing into the matter was convened on April 10, 2007, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Rita Metts, Esquire. The Respondent was represented by Daniel E. Grigg of the South Carolina Attorney General's Office. The Honorable William P. Keesley issued an Order denying and dismissing the Application on May 18, 2007.

The Applicant filed a timely notice of appeal and a Petition for Writ of Certiorari on February 4, 2008. Applicant raised the following issue on appeal: 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? On November 6, 2008, the South Carolina Supreme Court issued an Order denying the Petition for a Writ of Certiorari. The remittitur was issued on November 24, 2008.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's direct appeal, prior

PCR application, and PCR appeal. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

## II.

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

1. 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 charging voluntary manslaughter when such charge was not requested by defense.
2. Ineffective Assistance of PCR counsel
  - a. Failure to present issue of mutual combat jury charge in the amended application for PCR and to the PCR court

## III.

The Respondent submits that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996).

The Applicant was convicted of the offense(s) he challenges in this Application October 24,

~~2002. The remittitur from Applicant's direct appeal was issued on September 24, 2004. This~~

Application was filed on January 12, 2012, well beyond the expiration of the one-year statutory filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Therefore, the Respondent requests that this Court summarily dismiss the application for post conviction relief for failure to file within the time mandated by the Post Conviction Procedure Act.

#### IV.

The Respondent submits that the current Application for PCR must be summarily dismissed because it is successive to Applicant’s prior application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2010) states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

*He is implying that something new is being raised*  
Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that “could not

have been raised . . . in the previous application.” [Emphasis in original]. Id., 305 S.C. at 450, 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous application, then the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243, 262 S.E.2d 735 (1980).

Respondent submits the Applicant could have raised his current claims for relief in his prior post-conviction relief application and fails to provide any reasons as to why he was unable to. The Applicant also fails show how his claims were not properly raised in his first PCR application. A successive application is one which raises grounds not raised in prior applications, grounds previously heard and determined, or grounds waived in prior proceedings. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). Accordingly, Respondent moves for a summary dismissal of the application because it is successive.

V.

Respondent submits that Applicant’s allegation of ineffective assistance of post-conviction relief counsel is not a ground for relief. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Therefore, “the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under ' 17-27-90.” Aice, 305 S.C. at 451, 409 S.E.2d at 394.

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

Austin recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. Id. Austin “is limited to its particular factual situation . . . .” Aice, 305 S.C. at 452, 409 S.E.2d at 394. Pursuant to Austin, a post-conviction relief applicant may petition the South Carolina Supreme Court for discretionary review of the dismissal of their application. Respondent submits that this exception is not applicable to the Applicant’s current Applicant because the Applicant filed an appeal of the denial of his first PCR application. Therefore, Respondent submits this allegation must be denied and dismissed.

VI.

Respondent submits the doctrine of *res judicata* bars the Applicant’s claims. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior actions bars supplement consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former actions. Id.

The Applicant had a full opportunity to litigate all allegations of ineffective assistance of counsel in the state court. The Applicant continues to raise the same meritless claims by repeated collateral attacks on his conviction. The public interest in finality of judgments requires that litigation must eventually come to an end. Pursuant to Rule 12(b)(6), SCRPC, Respondent submits that the application for PCR is barred by *res judicata*.

VII.

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

VII.

WHEREFORE, Respondent moves to summarily dismiss the application because it is successive and was filed after the statute of limitations had expired.

Respectfully submitted,

ALAN WILSON  
Attorney General

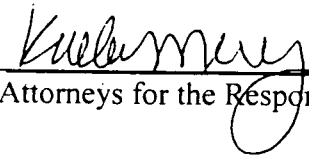
JOHN W. McINTOSH  
Chief Deputy Attorney General

SALLEY ELLIOTT  
Senior Assistant Deputy Attorney General

KAELON E. MAY  
Assistant Attorney General

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

By:

  
Attorneys for the Respondent

July 12, 2012

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

PAUL A. SMITH, #119472,

Applicant.

vs

STATE OF SOUTH CAROLINA,

Respondent.

IN THE COURT OF COMMON PLEAS

2012-CP-32-0117

AFFIDAVIT OF SERVICE BY MAIL

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

**Paul A. Smith, #119472**  
**Broad River Correctional Institution**  
**4460 Broad River Rd.**  
**Columbia, SC 29210**

DATED this 17<sup>th</sup> day of July, 2011

*Lena Pelishenko*

Lena Pelishenko, Legal Assistant  
For Respondent

**SOUTH CAROLINA DEPARTMENT OF CORRECTIONS**

Post Office Box 21787 - Columbia, South Carolina 29221

Pursuant to Code Section 15-9-500, Code of Laws of South Carolina, 1976, the Director of the South Carolina Department of Corrections has designated T. M. Gorman (Server) as his duly authorized agent for the purpose of making service of the signed Conditional Order of Dismissal on the below named individual.

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON ) AFFIDAVIT OF PERSONAL SERVICE

On this 10<sup>th</sup> day of August, 2012, I served the signed Conditional Order of Dismissal on Inmate Paul A. Smith, SCDC Inmate No. 119472, by delivering personally and leaving a copy of the same at 446<sup>o</sup> Broad River Rd Correctional Institution, Columbia, South Carolina. Deponent is not a party to this action.

s/ T. M. Gorman  
SCDC Server

SWORN TO AND SUBSCRIBED BEFORE ME

this 10<sup>th</sup> day of August, 2012,  
Sacaula Murrell (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/15/16

ADMISSION OF SERVICE

Service of a copy of the signed Conditional Order of Dismissal is admitted at the S.C. Department of Corrections, Brimley Correctional Institution, Columbia, Highland County, South Carolina, this 10<sup>th</sup> day of August, 2012.

s/ Paul A. Smith  
Inmate Signature  
SCDC No. 119472

(2)

FILED

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

Paul A. Smith, # 119472 )

Applicant, )

vs. )

State of South Carolina, )

Respondent. )

IN THE COURT OF COMMON PLEAS

2012-CP-32-0117

ORIGINAL

CONDITIONAL ORDER OF DISMISSAL

CLOCK IN ERROR

This matter comes before this Court by way of an application for post-conviction relief filed (PCR) January 12, 2012. Respondent made its Amended Return and Motion to Dismiss on July 12, 2012.

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, at the conclusion of which he was found guilty of voluntary manslaughter. The Applicant was sentenced by the Honorable James R. Barber, III, to life without parole pursuant to S.C. Code Ann. § 17-25-45.

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 that 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 South 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), asserting ineffective assistance of counsel in the following instances: failure to properly advise Applicant about nature and elements of the charges, including lesser-included offenses; not properly advising Applicant about the applicability of Life Without Parole; not properly objecting to the LWOP notice; not properly objecting to the charges given by the trial judge on voluntary manslaughter and self-defense. Respondent made its Return on April 29, 2005. An evidentiary hearing into the matter was convened on April 10, 2007, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Rita Metts, Esquire. The Respondent was represented by Daniel E. Grigg of the South Carolina Attorney General's Office. The Honorable William P. Keesley issued an Order denying and dismissing the Application on May 18, 2007.

The Applicant filed a timely notice of appeal and a Petition for Writ of Certiorari on February 4, 2008. Applicant raised the following issue on appeal: 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? On November 6, 2008, the South Carolina Supreme Court issued an Order denying the Petition for a Writ of Certiorari. The remittitur was issued on November 24, 2008.

In 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 charging voluntary manslaughter when such charge was not requested by defense.
2. Ineffective Assistance of PCR counsel
  - a. Failure to present issue of mutual combat jury charge in the amended application for PCR and to the PCR court

### III.

Before this Court are the records of the Lexington County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, the records from Applicant's prior direct appeal, PCR application, and PCR appeal.

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act. S.C. Code Ann. §17-27-10 to -160. S.C. Code Ann. §17-27-45(a) reads as follows:

An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The Applicant was convicted of the offense(s) he challenges in this Application on October 24, 2002. The remittitur from Applicant's direct appeal was issued on September 24, 2004. This Application was filed on January 12, 2012, well beyond the expiration of the one-year statutory

filing period.

A motion for summary judgment may properly be used to raise the defense of statute of limitations. McDonnell v. Consolidated School District of Aiken, 315 S.C. 487, 445 S.E.2d 638 (1994). In addition, S.C. Code Ann. § 17-27-70(c) (1985) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that this application for post conviction relief must be summarily dismissed for failure to file within the time mandated by the Post Conviction Procedure Act.

#### IV.

This Court finds that the current Application for PCR must be summarily dismissed because it is successive to Applicant's prior application for post-conviction relief. Successive applications for post-conviction relief are disfavored. Land v. State, 274 S.C. 243, 262 S.E.2d 735 (1980). S.C. Code Ann. § 17-27-90 (2010) states:


All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental or amended application.

Under this statute, successive post-conviction relief applications are forbidden unless an applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." [Emphasis in original]. Id., 305 S.C. at 450,

The Applicant shall file any reasons he may have with the Lexington County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Kaelon E. May, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

AND IT IS SO ORDERED this 20 day of July, 2012

  
\_\_\_\_\_  
R. Knox McMahon  
Chief Administrative Judge  
Eleventh Judicial Circuit

Resipts, South Carolina

FILED

MF

Exhibit - Z

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

)  
) IN THE COURT OF COMMON PLEAS  
)

2004-CP-32-3343

Paul Smith, # 119472,  
Applicant,

v.

State of South Carolina,  
Respondent.

ORDER OF DISMISSAL

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

1 2007 JUN -7 10 1:02

FILED

**PROCEDURAL HISTORY**

This matter comes before the Court by way of an Application for Post-Conviction Relief filed September 14, 2004. Respondent made its Return on April 29, 2005. An evidentiary hearing into the matter was convened on April 10, 2007, at the Lexington County Courthouse. Applicant was present at the hearing and was represented by Rita Metts, Esquire. Respondent was represented by Daniel E. Grigg of the South Carolina Attorney General's Office.

At the hearing, Applicant testified on his own behalf. Ken Matthews, Esquire (Mr. Matthews), testified at the hearing as well. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against Applicant, Applicant's records from the South Carolina Department of Corrections, the appellate court brief, the appellate court opinion, the pro se request for rehearing, the order denying rehearing, and the appellate court's letter remitting the case.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. Applicant was indicted at the April 2002 term of the Lexington County Court of General Sessions for murder (02-GS-32-1212). Mr. Matthews represented him. Applicant

WPK  
#1

proceeded to trial on October 21, 2002, at the conclusion of which he was found guilty of voluntary manslaughter. Applicant was sentenced by the Honorable James R. Barber, III, to confinement for life without parole pursuant to S.C. Code Ann. § 17-25-45.

Applicant filed a timely notice of appeal. The South Carolina Court of Appeals dismissed the appeal after a full review pursuant to Anders v. California, 386 U.S. 738 (1967). State v. Smith, Op. No. 2004-UP-401 (S.C. Ct. App. filed June 22, 2004). Applicant submitted a letter dated July 14, 2004, to the court of appeals, which the court construed as Applicant's request for the court to consider his pro se brief as a petition for rehearing. The pro se petition for rehearing was denied by order of the court dated August 28, 2004. The remittitur was issued on September 24, 2004.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

*WPK #2* This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Applicant testified that initially he was arrested for murder and subsequently convicted of voluntary manslaughter. He testified that he was living at a boarding home in West Columbia at the time of the incident. Applicant testified that he was attacked by the victim, who also lived at the home, and was simply defending himself. Applicant stated that he never intended to take the victim's life.

Applicant testified that he went to trial in October 2002, at which time Mr. Matthews represented him. He stated that at the close of his trial the trial judge charged the jury on murder, voluntary manslaughter, involuntary manslaughter and self-defense. Applicant testified that the jury

was improperly charged on self- defense. He argued that there should have been a charge given on the fact that he had no duty to retreat. Applicant testified that Mr. Matthews should have requested that the judge explain the four elements of self- defense.

Applicant stated that he was sentenced to life without parole (LWOP). He testified that trial counsel did not properly explain to him the LWOP statute. He stated that he would have considered the six (6) year plea offer if he had fully understood LWOP. He stated that he never received an LWOP letter. Applicant testified that he was taken to court on August 8, 2002, for a motion hearing regarding LWOP. He stated that he did not know what he was being taken to court for until after he arrived. Applicant testified that trial counsel objected that the notice of LWOP was improper.

Applicant testified that Mr. Matthews failed to explain to the jury that the victim was drunk. Applicant stated that Mr. Matthews had a copy of the toxicology report but failed to provide that to the jury. Applicant testified that the involuntary and voluntary manslaughter charges were improperly given. He stated that Mr. Matthews should have objected.

Mr. Matthews testified that he represented Applicant during his murder trial. He testified that he hired a private investigator to assist with his investigation. Mr. Matthews stated that he received and reviewed discovery in the case. He testified that the solicitor made a plea offer and he discussed that offer with his client. Mr. Matthews further testified that he and Applicant discussed the charges and the case the solicitor had against him. Mr. Matthews testified that they discussed the possibility of going to trial and the likelihood of success. He stated that he discussed LWOP with his client and is confident that Applicant understood the LWOP statute.

Mr. Matthews testified that the victim was very intoxicated and perhaps on drugs at the time of this incident. He stated that Dr. Sexton testified about the victim's state at trial. Mr. Matthews testified that he was not sure why the trial judge did not include the duty to retreat in the jury charge.

He testified that the law surrounding the duty to retreat has evolved since Applicant's trial and that he feels the charge given at Applicant's trial was correct under the law at that time. Mr. Matthews testified that he examined Dr. Sexton extensively on victim's toxicology report. He stated that the report was introduced along with numerous other exhibits.

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

WPL  
#4

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

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

As discussed above, Applicant has failed to carry his burden in this action. Therefore, this Court

finds that the application must be denied and dismissed.

This Court finds that Applicant's testimony is not credible. This Court does, however, find Mr. Matthew's testimony to be extremely credible. This Court finds that Applicant has not met his burden of proof in showing that Mr. Matthew's representation fell below the reasonable professional standards of defense attorneys in this state, and therefore, is not entitled to post-conviction relief.

This Court finds that Applicant failed to prove his assertion that Mr. Matthews did not properly advise him about the nature and elements of the charges against him, including the lesser-included offenses. Mr. Matthews testified that he did, in fact, discuss with his client the charges against Applicant. He further testified that he hired an investigator, conducted an investigation into the case, received and reviewed discovery, entered into plea negotiations on Applicant's behalf and discussed all of this with his client. He testified that Applicant not only knew the elements of the charges he was facing but that they also discussed voluntary manslaughter, involuntary manslaughter and self-defense.

*WPK  
#12*

This Court further finds that Applicant was properly advised of the LWOP statute. Mr. Matthews testified that they discussed LWOP and the possible outcomes if Applicant went to trial versus pleading guilty. The trial court held a motions hearing on the issue of LWOP, at which the solicitor verbally and in writing informed the court, Applicant and Applicant's counsel that the state was seeking life without parole. Mr. Matthews stated that he felt Applicant understood LWOP. Mr. Matthews further testified that he objected that the LWOP notice given was unconstitutional, but to no avail. This Court finds that Applicant understood LWOP and was given proper notice. There is nothing more Mr. Matthews could have done with regard to this issue.

This Court further finds that the trial court properly charged the jury given the applicable law

at the time of Applicant's trial. The jury was charged with voluntary manslaughter, involuntary manslaughter, murder and self-defense. This Court further finds that the trial court properly handled the duty to retreat issue pursuant to the applicable law at the time of this trial. Mr. Matthews was in no way ineffective for not objecting to the charges presented to the jury. <sup>WMA</sup> NO PREJUDICE HAS

BEEN PROVEN RELATED TO THE JURY CHARGE AND NO SHOWING OF HOW THE ISSUE OF RETREAT WOULD LIKELY HAVE COME OUT THE OUT <sup>WMA</sup>  
Finally, this Court finds that Mr. Matthews' examination of Dr. Sexton regarding the victim's toxicology report was sufficient. He employed a valid trial strategy and represented Applicant well with in the acceptable norms for defense attorneys in this state. Applicant is not entitled to the relief requested.

**CONCLUSION**

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

<sup>CAUTIONS WMA</sup>  
This Court advises Applicant that he must file and serve a notice of intent to appeal within thirty (30) days from the receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. His attention is also directed to South Carolina Appellate Court Rule 227 for appropriate procedures after notice has been timely filed.

WMA #6

**IT IS THEREFORE ORDERED:**

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

AND IT IS SO ORDERED this 18<sup>th</sup> day of May, 2007.

William P. Keesley  
William P. Keesley  
Presiding Judge  
Eleventh Judicial Circuit

Edgefield, South Carolina.

#7

PAUL A. SMITH #119472  
B.R.C.I. WAT. 242  
4460 BROAD RIVER RD.  
COLUMBIA, S.C. 29201

THE SUPREME COURT OF SOUTH CAROLINA  
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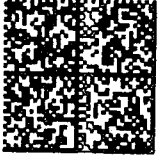
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