

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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Herbert Smalls . . . . .

Appellant  
**RECEIVED**

VS

MAR 04 2015

The state, . . . . .

S.C. SUPREME COURT  
Respondent

The Honorable R. Markley Dennis  
Charleston County

Post conviction Relief 2013-CP-10-5276

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Notice Written Explanation  
Pursuant to Rule 243 SCACR.

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Appellant is attention to appeal Final order of Dismissal. Pursuant to Rule 203, SCACR, the Appellant attention is directed to Rule 227, SCACR, for the procedure following the filing and service of the Notice of Appeal. Appellant is to provide a written explanation showing that there is an issue which can be reviewed on appeal. Pursuant to conditional order of Dismissal. On August 2, 2010, the

Applicant pled guilty to murder, The Honorable Judge Young sentenced him to confinement for forty (40) years.

I.

The Appellant can show cause pursuant to written explanation pursuant to Rule 243 of the South Carolina Appellate Court Rules.

Pursuant to conditional order of Dismissal 2013-CP-10-5276. The Applicant filed a timely Notice of Appeal. His appeal was perfected by Plea Counsel, David Holton. By order dated October 14, 2010, the Applicant's appeal was dismissed. The Remittitur on November 8, 2010, pursuant to entire sentences Records on August 2, 2010, the Applicant pled guilty to murder. "Trail by Not Filing my timely direct Notice of Appeal pursuant to Appellate Court Rules (g) Special Procedures where a White v State Review is sought, where the petition seeks review under White v State, 263 S.C. 110, 208 S.E.2d

85 1974; The following procedure shall be followed;

After the applicant sentences was imposed by the trial court Judge Applicant trial counsel prejudice applicant which he was sentence on August 2, 2010, and trial counsel had (10) ten days from August 2, 2010 which the direct Notice of Appeal was due for filing by August 12, 2010. The South Carolina 2010 Remittitur see exhibit (A) trial case No. 2007-GS-10-13708, The applicant filed PCR alleges grounds in his PCR Application. "Trial counsel prejudice applicant by failing to file a timely direct of Appeal." The applicant request for trial counsel to file timely Notice of Appeal. and applicant did not voluntarily and intelligently waive applicant right to direct of Appeal. trial counsel did prejudice applicant by failing to file the Applicant timely notice direct of Appeal. see exhibit (B) Letter From the

South Carolina court of Appeals dated November 22, 2013. The South Carolina court of Appeals deputy clerk V. Claire Allen Notify the appellant that a Notice of Appeal has not been filed with this court.

Trial counsel prejudice the applicant and trial counsel is responsible for filing and sending a Notice of Appeal and trial counsel prejudice applicant by default and delay the appellant direct of Appeal and the Appellant filed a Post-conviction Relief Application pursuant to certiorari direct of Appeal which trial counsel responsible was to file the direct of Appeal within ten (10) days after sentences has been imposed by the trial court judge.

"Applicant did not voluntarily and intelligently waive applicant right to direct of Appeal."

certiorari granted to petitioner who alleged that he had not knowingly and intelligently waived right to direct

appeal and sought review of issue arising from his trial, where the post-conviction relief judge indicated that a petitioner may not have waived that right and the prosecution conceded that petitioner was entitled to review a direct appeal issue. Davis v. State SC 1986) 288 S.C. 290, 342 S.E.2d 60.

Ineffective assistance when counsel failed to file timely Notice of Appeal; cite at Williams v. Lockhart 849 F.2d 1134-1137-38 (8th Cir 1988).

In Herbert Smalls v. State of South Carolina, trial counsel default applicant by failing to file a timely Notice of Appeal in a time frame matter within the court's of Appeals.

Court of Appeal may consider an ineffective assistance counsel claim in the instance of direct appeal only if it conclusively appears from the record that counsel was constitutionally ineffective. U.S. v. Almer C.C.A. 4, C.S.C. 2005 430 F.3d 601 certiorari denied.

## II

This PCR court has disfavored and barred the applicant application for PCR filing and review on the merits whereby trial counsel prejudice the applicant by failing to file a timely Notice of Appeal after the Applicant conviction and sentences; "Trial counsel has failure to comply to S.C. Code of Law 17-27-45 (A).

Applicant's amended his original Post-conviction Relief Application filed March 7, 2014. In his amended application the applicant alleges the following:

"counsel's failure to request a competence hearing prior to applicant's Plea"

Guilty Plea trial transcript support extraordinary circumstance in support of written explanation require a review.

LEGAL MAIL  
MAIL ROOM

Applicant claims he was not competency to enter a guilty plea and suffer with a mental health diagnosis call "Bipolar" during the applicant guilty plea and applicant sister address the trial court with respect that her brother does has mental health background and does has problem understand right from wrong and when he is not take his medication he always get involve in trouble with the law and counsel was aware of this information during the time of the applicant guilty plea and counsel fail to request a mental examination once counsel had heard this information from family member that spoke with counsel about her brother before the applicant was advise to plea guilty, and applicant read level skills was very poor and his IQ is between 51 & 52; Level:

Due to the applicant mental health background been diagnosis with "Bipolar" and the applicant can not assist himself by prepare his post-conviction Relief Application and comply to all available statute limitation and pursuant to S.C. Code of Law Ann 17-27-45 (A), reads as follows:

LEGAL MAIL  
MAIL ROOM

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.

In a post conviction relief (PCR) proceeding, the burden is on the applicant to prove the allegation in his application, and if there is any probative evidence to support the finding of the PCR Judge, those findings must be upheld; like-wise, a PCR Judge's findings should not be upheld if there is no probative evidence to support them, cite at Thompson v State S.C. 2000) 340 S.C. 112 531 SE2d 294.

The applicant states that he was housed in Mental Health in Charleston S.C. at 8585 Vistavia Road Charleston SC, and housed at MHC 171 Ashley Avenue Charleston S.C. 29425

LEGAL MAIL  
MAIL ROOM

Applicant claims of incompetency to stand trial, insanity at time of act, and an unknowing and involuntary guilty Plea were not barred by the procedural default rule of Wainwright v. Sykes At Horace v. Wainwright 781 F2d 155 (11th Cir 1986),

The applicant received effective representation despite his counsel's failure to request a mental examination which might have formed the basis of an insanity defense or a determination that he was not competent to stand trial, where counsel was familiar with the defendant from previous representation and did not believe that he was mentally deficient, he had discussed the defendant's case with him on several occasions before the guilty plea, and the defendant's family members who testified as to the defendant's incompetency never raised their concerns to counsel prior to the defendant's guilty plea, Jeter v. State S.C. 1992) 308 S.C. 280; 417 SE2d 594.

In Applicant Herbert Smalls v. State, S.C. the applicant can show that trial counsel

has prejudice applicant by failing to request a mental examination, which might have formed the basis of a insanity defense or a determination that he was not competent to stand trial, where there is evidence that he was insane under the law at the time of the crime, see similar to applicant case see Jeter v State, S.C. 1997) 308 S.C. 230, 417 SE2d 594.

The applicant has show that he was prejudice by his counsel's failure to request a mental examination which might have formed the basis of an insanity defense or determination that applicant was not competent to stand trial, where no evidence suggested that he was insane under the law at time of the crime, see Wolfe v State 485 S.C. 367 S.C. 1997) Failure Request for continuance prior to day of trial and failing to develop certain defenses. we agree.

When a prisoner, either state or Federal seeking post-conviction relief, arrest with substantial fact to back up his allegation, that at time of the trial he was not competent to stand trial, and that there was no resolution of that precise issue before he was tried, convicted and sentenced, the

protection of the Fourteenth amendment to the constitution require that such conviction and sentences be set aside unless upon adequate hearing it is shown that he was mentally competent to stand trial (386 Fed 105).

### Conclusion

Wherefore as the Records support the Applicant is housed within Mental Health SCDC at McCormick Court and the Respondents should Review the guilty Plea transcript and scheduled a hearing on the Merits in the lower court, and this written explanation should be granted.

Granted or Denied

Dated \_\_\_\_\_ 2015

\_\_\_\_\_  
Clerk of Supreme Court



## The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
[www.sccourts.org](http://www.sccourts.org)

November 22, 2013

Herbert Smalls, 258624  
Lee Correctional Institution  
990 Wisacky Hwy  
Bishopville, SC 29010

Dear Mr. Smalls:

We are in receipt of your letter dated November 16, 2013. A notice of appeal has not been filed with this Court. Your attorney would be the one responsible for filing and sending a notice of appeal. If you have any inquiries about filing a notice of appeal, please contact your attorney.

Very truly yours,

*V. Claire Allen, Deputy*

CLERK

**EXHIBIT [ B ]**

# The South Carolina Court of Appeals

The State,

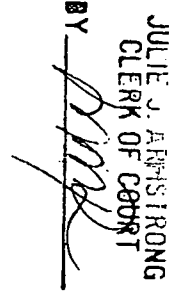
Respondent

v.

Herbert Smalls,

Appellant.

The Honorable Roger M. Young  
Charleston County  
Trial Court Case No. 2007-GS-10-13708

BY   
JULIE J. ARMSTRONG  
CLERK OF COURT

2010 NOV -9 PM 2:01

FILED

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## REMITTITUR

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No Petition for Reinstatement having been filed in the above matter since issuance of this Court's Order dated October 14, 2010,

IT IS SO ORDERED that the above appeal be and hereby is remitted to the Clerk of Court for Charleston County.

JOHN CANNON FEW, CHIEF JUDGE

BY V. Claire Allen, Deputy  
Clerk

Columbia, South Carolina

Original to: The Honorable Julie Armstrong

cc: Chief Appellate Defender Robert M. Dudek

David Michael Holton, Esquire

Assistant Deputy Attorney General Salley W. Elliott

The Honorable Julie J. Armstrong

FILED

11/8/10

# The South Carolina Court of Appeals

The State,

Respondent

v.

Herbert Smalls,

Appellant.

The Honorable Roger M. Young  
Charleston County  
Trial Court Case No. 2007-GS-10-13708

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## ORDER

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Appellant is attempting to appeal from a guilty plea. Pursuant to Rule 203(d)(1)(B)(iv), SCACR, Appellant is to provide a written explanation showing that there is an issue which can be reviewed on appeal. In this case, Appellant argues his sentence of forty years' imprisonment for murder was not permitted by the statute in effect at the time of the shooting because section 16-3-20 requires a life sentence or thirty years' imprisonment. However, Appellant did not raise this issue to the sentencing judge to rule on the question. Because of counsel's failure to follow this basic step, the question is not preserved. Accordingly, the appeal is dismissed.

AND IT IS SO ORDERED.

Columbia, South Carolina

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**FILED**

10/14/07

**FILED**

2010 AUG 13 AM 11:18

JULIE J. ARMSTRONG  
CLERK OF COURT

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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BY \_\_\_\_\_ **APPEAL FROM CHARLESTON COUNTY  
Court of General Sessions**

**The Honorable Roger M. Young, Presiding Judge**

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**CASE NO.: 2007-GS-10-13708  
Warrant Numbers: F-969628  
Charges: Murder**

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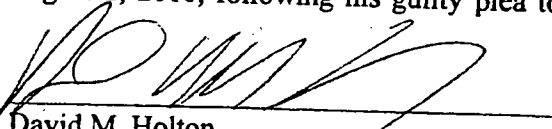
**STATE OF SOUTH CAROLINA, RESPONDENT**

**VS.**

**HERBERT ANTONIO SMALLS, APPELLANT**

**NOTICE OF APPEAL**

Defendant appeals from the conviction and the sentence of the Honorable Roger M. Young, Judge, Ninth Judicial Circuit, dated August 2, 2010, following his guilty plea to the charge of Murder.

  
\_\_\_\_\_  
David M. Holton  
Attorney for Defendant-Appellant  
PO Box 30684  
Charleston, SC 29417-0684  
(843) 225-1670

Other counsel of record are:  
Greg Voigt, Assistant Solicitor  
Office of the Solicitor, Ninth Judicial Circuit  
O.T. Wallace County Office Building  
101 Meeting Street  
Charleston, SC 29401  
(843) 958-1900

CC  
AG  
AT

AW  
9

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

Herbert Smalls, #258624,

2013-CP-10-5276

Applicant,

v.

State of South Carolina,

Respondent.

CONDITIONAL ORDER OF  
DISMISSAL

FILED  
2013 SEP 17 PM 4:39  
JULIE M. HARRIS  
CLERK OF COURT

This matter is before the Court by way of an application for post-conviction relief filed September 10, 2013. The Respondent filed its Return.

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Charleston County Clerk of Court. The Applicant was indicted at the December 2007 term of the Charleston County Grand Jury for murder (2007-GS-10-3708. David Holton, Esquire, represented the Applicant. On August 2, 2010, the Applicant pled guilty to murder. The Honorable R. Markley Dennis sentenced him to confinement for forty (40) years.

The Applicant filed a timely Notice of Appeal. His appeal was perfected by plea counsel, David Holton. By Order dated October 14, 2010, the Applicant's appeal was dismissed. The Remittitur was issued on November 8, 2010.

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

1. Petitioner did not voluntarily and intelligently waive his right to direct appeal.

AM

This Court has before it the Clerk of Court records for Charleston County, the South Carolina Department of Corrections' records, and the Applicant's appellate records.

II.

This Court finds that this Application for Post-Conviction Relief should be summarily dismissed for failing 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 Remittitur was issued for the Applicant's appeal of the conviction he is challenging on November 8, 2010. This Application was filed on September 10, 2013, which was almost two years after the statutory filing period had expired.

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) (2003) authorizes the Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings ... that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Therefore, this Court finds that the application for post-conviction relief should be summarily dismissed for failure to file within the time mandated by statute.

III.

In this Application, the Applicant alleges he did not voluntarily and intelligently waive his right to direct appeal. Ordinarily, this allegation may be sufficient to warrant an evidentiary hearing. However, this Court concludes the Applicant received a direct appeal. The record reflects counsel for the Applicant filed a Notice of Appeal on August 12, 2010. Counsel also filed a written explanation pursuant to Rule 203(d)(1)(B) as to why he should be allowed to appeal from a guilty plea on August 28, 2012. By Order dated October 14, 2010, the appeal was dismissed. The Remittitur was issued on November 8, 2010. The record reflects counsel for the Applicant perfected the Applicant's appeal and the matter was subsequently dismissed after review by the Court of Appeals. This Court finds this allegation is wholly without merit. This Court finds the Applicant exercised his right to direct appeal and his guilty plea was appealed by counsel. This Court finds this allegation is without merit and does not warrant an evidentiary hearing.

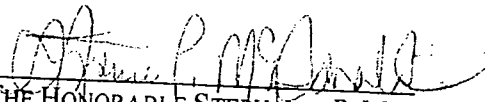
IV.

Pursuant to S.C. Code Ann. § 17-27-70(b), the Court intends to dismiss this Application with prejudice unless the Applicant provides specific reasons, factual or legal, why the Application should not be dismissed in its entirety. The Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. The Applicant shall file any reasons he may have with the Charleston County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General  
Attn: Ashleigh Wilson, Esquire  
P.O. Box 11549  
Columbia, South Carolina 29211

[Signature on the following page.]

AND IT IS SO ORDERED this 13<sup>th</sup> day of March, 2014.

  
THE HONORABLE STEPHANIE P. McDONALD  
Chief Administrative Judge  
9th Judicial Circuit Court

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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MAR 04 2015

APPELLANT  
S.C. SUPREME COURT

Herbert Smalls, -----

VS

The state, -----

Respondent

The Honorable R. Markley Dennis  
Charleston County  
Post Conviction Relief 2013-CA10-5276

Certificate of Service

The pro, se Appellant does hereby certify that he has served below listed parties with a copy of the written explanation indicated below by mailing a copy of same to them in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

Parties served  
Written explanation

(1) S.C. Supreme Court  
Daniel E. Steseuse  
P.O. Box 11330  
Col, SC. 29211

This 27 day  
of February 2015

st Herbert Smalls  
Herbert Smalls #258624  
386 Redemption way  
McCormick SC 29889

(2) Ashleigh R. Wilson office of  
Attorney General  
P.O. Box 11849  
Columbia S.C. 29211

Herbert Smalls 258624  
386 Redemption way  
McCormick, S.C. 29899

Dated 2, 27 2015

2013-CP-10-5276

Appellate Case No# \_\_\_\_\_

Dear Honorable Daniel E. Shearouse  
of the South Carolina Supreme Court:

Enclosed Please find Written explanation,  
And if it meet your standard Approval  
Please sign and return to me a certify clocked  
dated stamped copy:

Respectfully submitted  
sj Herbert Smalls

c/c: H: S: SCOC

c/c: H: D: E: S: S: C: C:

**RECEIVED**

MAR 04 2015

S.C. SUPREME COURT

Herbert Smalls, 258624  
386 Redemption Way  
McGinnick, S.C. 29899

S.C. Supreme Court  
Daniel E. Shearouse  
P.O. Box 11832  
Columbia, S.C. 29211

Legal mail

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FEB 27 2015

NOCI  
MAIL ROOM

