State of South Carolina
County of Richland

John Wallace Hayward
Applicant

v

State of South Carolina
Respondent

Case No: 2012-CP-40-02863

Notice of Appeal
Rule 203 SCACR

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S.C. SUPREME COURT

This matter comes before the Court pursuant to an application for post-conviction relief (PCR). filed April 23, 2012 that was dismissed with prejudice Sept 28, 2015. Now the applicant will file and serve a Notice of Appeal to secure appellate review. And Pursuant to Rule 243(c) the applicant will provide an explanation as to why the determination by the lower court to dismiss his 2nd PCR was improper.

"The State ^never^ not challenged the PCR judge's (Hon. James R. Barber) finding that respondent's guilty plea was a non-severable agreement between respondent and the State nor challenge the PCR's judges finding that the Richland County Public Defender was ineffective in his representation as to the Richland charges and that relief should be granted as a whole for both counties. Accordingly this finding is the law of the case. Bass v Gopal Inc 384 SC 238, 680 SE2d 917 (SC App 2009); 395 SC 129 716 SE2d 910 (SC 2011) Ulmer v Ulmer 369 SC 486 632 SE2d 858 (2006) (as a general rule, an unchallenged ruling right or wrong is the law of the case. The South Carolina Supreme Court should have declined to address both issues because neither were raised in any manner during PCR proceedings. Issues not addressed by PCR Judge are not preserved for review on appeal. Marlar v State 375 SC 407, 410; 653 SE2d 266, 267 (2007) Simpson v Moore 367 SC 587, 600 n 3; 627 SE2d 701, 708 n 3 (2006) Rather the State's arguement focuses on the Richland County Public Defender's representation as to the Lexington County charges. The record contains a single reference in the arguement made in the State's Final Brief at 13 and the Petition for Writ of Certiorari at 11 on which the South Carolina Supreme Court based it's decision. The reference in it's entirety is:

"Finally the Respondent did not offer any evidence into how counsel's purported lack of preparation regarding the Lexington County charges prejudiced the handling of the Richland County charges and the PCR Court erred finding otherwise." There was no ruling on this conclusory allegation and therefore it was not properly before the South Carolina Supreme Court. Taylor v. Medenica 324 SC 200, 479 SE2d 35 (1996). "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked" Langley v Boyter 284 SC 162, 181; 325 SE2d 550, 561 (Ct. App 1984 rev'd 286 SC 85, 332 SE2d 100 (1985), but cited with approval in Nelson v Concrete Supply Co. __ SC __, 399 SE2d 783 (1991). Our Supreme Court has told us in no uncertain terms that we are allowed to address only those issues propely before us. Caroline Business Broker's v. Strickland 300 SC 492, 388 SE2d 815 (1990). see Connolly v People's Life Ins. Co., 299 SC 348, 384 SE2d 738 (1989).

The conclusory allegation was no more than a bald accertion. A bald accertion without supporting argument does not preserve an issue for appeal In Re McCracken 346 SC 87, 551 SE2d 235

(2001) (an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory) State v Black 319 SC 515, 462 SE2d 311 (SC App 1995) Ellie, Inc v Miccichi 358 SC 78, 594 SE2d 485 (SC App 2004) Bass v Gopal Inc 384 SC 238, 680 SE2d 917 (SC App 2009) 395 SC 129, 716 SE2d 910 (SC 2011).

All five South Carolina Supreme Court Justices signed the order that granted the state's Petition for Writ of Certiorari appealing the applicant's relief granted by the Post Conviction Relief judge. That order states, "The parties shall proceed to serve and file the appendix and briefs as provided by Rule 243(j) SCACR."

Rule 243(j) Procedure Upon Grant of Certiorari SCACR states "Upon the concurrence of any two justices the petition may be granted on any question presented. The

petition will be considered by the Supreme Court without oral arguement. If the petition is granted the Clerk shall notify each party or his attorney specifying the questions to be considered, and the parties shall prepare briefs addressing the question(s)."

The sole question in it's entirety in the State's brief that the State presented for the South Carolina Supreme Court to address is: "Whether Insufficient Evidence Of Probative Value Exists To Support The PCR Court's Finding That Respondent's Guilty Plea Was Not Knowingly And Intelligently Entered Because Appointed Counsel From Richland County Was Either Not Appointed To Handle Respondent's Lexington County Charges And/Or Appointed Counsel's Representation Was Ineffective Regarding The Lexington County Charges?" The above question is the only question that the State asked the Supreme Court to address. It was not proper for the Supreme Court to answer an unasked question to settle an unpreserved issue. State v Bray 342 SC 23 535 SE2d 636 (2000) Again the State does not challenge the PCR judge's finding that respondent's guilty plea was a non-severable agreement between

the respondent and the State, nor does the State challenge the PCR judge's finding that the Richland Public Defender was ineffective in his representation as to the Richland charges. As noted earlier the Supreme Court's order granting the State's Writ of certiorari specified Rule 243(j) SCACR. Rule 243(j) SCACR states in the second to last sentence, "The briefs shall, to the extent possible comply with the requirements of Rule 208(b)." No point will be considered which is not set forth in the Statement of issues on appeal Rule 208(b)(1)(B) SCACR State v Bray 342 SC 23, 535 SE2d 636 (2000) (It is error for an appellate court to consider issues not raised to it). Brief must set fort the issue in statement of issues on appeal Rule 208(b)(1)(B) SCACR Silvester v Spring Valley Country Club 344 SC 280, 285; 543 SE2d 563, 566 (Ct. App 2001). It is error for appellate court to consider issue not properly raised to it. First Saving Bank v McLean 314 SC 361, 363; 444 SE2d 513, 514 (1994) (Stating appellant must provide authority supporting arguments for his issue to be considered raised on appeal.) Accordingly the appellate court did not consider the issue. See also Hunt v Forestry Com'm 358 SC 564; 595 SE2d 846 (2004),

Glassick Inc v U.S. Fid. + Guar. Co 348 SC 76, 81; 557 SE2d 689, 691 (Ct. App 2001), R+G Constr. Inc v. Lowcountry Reg'l Transp. Auth. 343 SC 424, 437; 540 SE2d 113, 120 (Ct. App 2000) Welch v Epstein 342 SC 279, 288 n.1; 536 SE2d 408, 412 n.1 (Ct. App 2000). The State did not offer any authority supporting the argument for its issue to be considered on appeal.

The applicant's Richland convictions and sentences should be vacated because the Supreme Court ruled on an unpreserved issue to reinstate the applicant's Richland convictions and sentences. An appellate court will not consider issues on appeal which have not been preserved for appellate review. State v Dunbar 356 SC 138, 142; 587 SE2d 691, 694 (2003) Wilder Corp. v Wilke 330 SC 71, 497 SE2d 731 (1998) Humbert v State 345 SC 332, 548 SE2d 862 (2001) State v Russell 345 SC 129, 546 SE2d 202 (Ct. App 2001) Hoffman v Powell 298 SC 338, 380 SE2d 821 (1989) TNS Mills Inc v SC Dept of Rev 331 SC 611, 503 SE2d 471 (1998) Hendrix v Eastern Distribution Inc. 320 SC 218, 464 SE2d 112 (1995)

State v Prioleau 345 SC 404, 548 SE2d 213 (2001) State v Benton 338 SC 151, 526 SE2d 228 (2000) State v Tucker 319 SC 425, 462 SE2d 263 (1995) Creech v SC Wild and Marine Resources Dept, 328 SC 24, 491 SE2d 571 (1997) Ulmer v Ulmer 369 SC 486, 632 SE2d 858 (2006) In Re Micheal H. 360 SC 540 602 SE2d 729 (2004) When an appellate court rules on an issue not preserved for appellate review the portion of the appellate's court opinion pertaining to the unpreserved issue should be vacated State v Dunbar 356 SC 138, 142; 587 SE2d 691, 694 (2003) Ulmer v Ulmer 369 SC 486 632 SE2d 858 (2006).

The relief granted to the applicant on his first PCR pursuant to Rule 220(b)(1) SCACR and the following authorities: Cherry v State 300 SC 115, 119 386 SE2d 624, 626 (1989) (apply the any evidence standard of review to PCR actions); Stevenson v State 337 SC 23, 26; 522 SE2d 343, 344 (1999) (recognizing that the Sixth Amendment guarantees the right to counsel for criminal defendants); Nance v Ozmint 367 SC 547, 552; 626 SE2d 878 880 (2006) (observing that prejudice is presumed

when an accused is denied counsel at a critical stage). When all three authorities are applied they show that the applicant was denied his Sixth Amendment right to counsel and his plea was in violation of the United States Constitution and the State Constitution because he died not have an appointed Public Defender from Lexington County at his critical stage. The Supreme Court made the determination that the erroneous deprivation of the applicant's Sixth Amendment Right, a fundamental right to the assistance of counsel is harmless to the applicant entire plea proceeding along with the applicant's Richland County convictions and sentences. Sixth Amendment's guarantee of assistance of counsel is among those constitutional rights so basic to fair trial that their infraction can never be treated as harmes error Holloway v Arkansas 435 US 475, 98 S.Ct 1173 (1978). "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v United States, 315 US 60, 76; 62 S.Ct 457, 467 86 L. Ed 680. The erroneous deprivation of a defendant's fundamental right to the assistance of

Counsel is per se reversible error and never harmless Chapman v California 386 US 18, 87 S.Ct 824 (1967) Gideon v Wainwright 372 US 335, 83 SCt 792 (1963). Therefor Lexington County's error was not harmless to Richland County proceeding since the applicant pled to both County's charges at one hearing, together. Gideon v Wainwright also shows that the Sixth Amendent to the Federal Constitution providing that in all criminal prosecution that accused shall enjoy right to assistance of counsel for his defense is made obligatory on the states by the Fourteeth Amendment and indigent defendant in criminal prosecution in state Court has right to have counsel appointed for him. U.S.C.A. Const. Amend 6, 14 Const. Law Key 263. Applicant's guilty plea was obtained without applicant having full understanding of the plea and it's consequences Boykin v Alabama 395 US 238, 89 SCt 1709 (1965)

~~The applicant did not understand that~~ a ~~Sixth~~ Amendment Constitutional violation occurred during his plea proceeding that his plea and sentence would be invalid and his plea agreement would be separated after the Supreme Court ruled on a unpresered issue that should not have been addressed and causes a due

process violation on the applicant's Fourteenth Amendment Constitutional right and the applicant's South Carolina Article 1§3, State Constitutional right. The rule announced in Gideon v Wainwright 372 US 335, 83 Sup Ct 792, 9 L Ed 2d 799, 93 ALR2d 733 (1963), has been recognized and applied by the S.C. Supreme Court in State v Cowart 251 SC 360, 162 SE2d 535 (1968). The effective assistance of counsel is a necessary requisite of due process of law. State v. Cowart.

Applicant has established sufficient reason why he could not have raised this current allegation in his previous application for post conviction relief; therefore, he has met the burden imposed upon him.

1 STATE OF SOUTH CAROLINA) COURT OF GENERAL SESSIONS
)
2 COUNTY OF RICHLAND) 03-GS-40-890
03-GS-40-905
3 03-GS-32-04182
03-GS-32-04183
4 03-GS-32-04184
03-GS-32-04185
5 03-GS-32-04186
03-GS-32-04187
6 03-GS-32-04188
03-GS-32-04189
7 03-GS-32-04190
03-GS-32-04191
8
STATE OF SOUTH CAROLINA)
9)
-vs-) TRANSCRIPT OF RECORD
10)
JOHN WALLACE HAYWARD,)
11)
Defendant.)
12

13
December 1, 2003
14 Columbia South Carolina

15
B E F O R E:
16
HONORABLE REGINALD I. LLOYD, Judge
17

18 A P P E A R A N C E S:

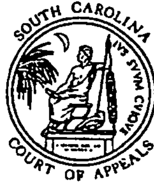
19 Dana Pellizzari, Assistant Solicitor
Tav Swarat, Assistant Solicitor
20 Attorneys for the State

21 Samuel Mokeba, Assistant Public Defender
Ned Longshore, Assistant Public Defendant
22 Attorneys for the Defendant

23

24

25 Carol M. Thueme, R.P.R.
Circuit Court Reporter



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The South Carolina Court of Appeals

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V. CLAIRE ALLEN
DEPUTY CLERK

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January 3, 2006

REMITTITUR

The Honorable Barbara A. Scott
1701 Main St
PO Box 2766
Columbia, SC 29202-2766

Re: The State v. Hayward, John Wallace

2003-GS-32-04182	2003-GS-32-04185	2003-GS-32-04188
2003-GS-32-04183	2003-GS-32-04186	2003-GS-32-04189
2003-GS-32-04184	2003-GS-32-04187	2003-GS-32-04190

Dear Ms. Scott:

The above referenced matter is hereby remitted to the lower court. A copy of the judgment of this Court is attached.

Sincerely,

Kenneth A. Richstad
Clerk of Court

KAR/rj

cc: Assistant Appellate Defender Eleanor Duffy Cleary
John Wallace Hayward, #291763
Assistant Deputy Attorney General Salley W. Elliott
Warren Blair Giese, Esquire

The applicant now challenges the Final Order of Dismissal's claim that the applicant's application for post-conviction relief was not filed within the time mandated by the Post-Conviction Procedure Act.

The applicant will use S.C. Code Ann. § 17-27-45(a) to show this Court that the applicant's next ground should also require this current post-conviction application to continue and dismiss the State's Conditional Order of Dismissal. S.C. Code Ann § 17-27-45(a) read as follow:

> An application for relief 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 applicant pleaded guilty to the offenses he challenges (two Richland County armed robberies, 2003-65-40-870 and 2003-65-40-905) on December 1, 2003. The Remittitur from applicant's direct appeal was issued on January 3, 2006. (Pages 11-12 of this Response and Objection to the Conditional Order of Dismissal) The Remittitur that was issued on January 3, 2006, In regards to The State v. Hayward John Wallace only have nine of the twelve indictment/charges that the applicant pled to on counsel's advice on December 1, 2003. The three indictment/charges that are not on the Remittitur are the following: 2003-65-40-870, 2003-65-40-905 (the two offenses this Post-Conviction Relief Application are challenging) and 2003-65-32-4191. With the three indictment/charges not on the Remittitur after the applicant's direct appeal was dismissed, the Remittitur was sent down improperly to the lower Court by mistake, error or inadvertence of the appellate Court. When the remittitur has been properly sent, the

appellant court no longer has jurisdiction over the matter and no motion can be heard thereafter Wise v SCDC 372 SC 173, 642 SE2d 551 (2007); Mickle v Blackmon 255 SC 136, 177 SE2d 548 (1970); Thomas v Lynch 87 SC 44 68 SE 817 (1910); Carpenter v Lewis 65 SC 400, 43 SE 881 (1903); State v Keels 39 SC 553, 17 SE 802 (1893). The only exception to this rule is when the remittitur is sent down by mistake, error, or inadvertence of the Court. Keels supra. State v Adams 83 SC 149, 65 SE 220 (1909). The applicant's two Richland County indictments/charges are not on the remittitur. The final disposition of a case occurs when the remittitur is returned by the clerk of appellate court and filed in the lower court. McDowell v SC Dept Soc Services 300 SC 24, 386 SE2d 280 (Ct App 1989); SCDOT v Buckles ex rel. Estate of 2009 WL 9528925

Muller v. Myrtle Beach Golf & Yacht Club, 313 SC 412, 415 438 SE2d 248, 250 (1993) Martin v Paradise Cove Marina 348 SC 379, 559 SE2d 348 (SC App. 2001) see Rule 221 SCACR.

By the applicant's three indictments/charges that are not on the Remittitur, those three indictments/charges are still in the jurisdiction of the appellate court. The PCR court nor the SC Supreme Court had any jurisdiction to rule on the applicant's three indictments/charges that are not on the Direct Appeal Remittitur because they are still in the jurisdiction of the S.C. Court of Appeals. Jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution, the laws of the state, and is fundamental. Anderson v Anderson 299 SC 110, 115, 382 SE2d 897, 900 (1989). Subject matter jurisdiction may not be waived even with consent of parties. Hunter v Boyd 203 SC 518, 525, 28 SE2d 412, 416 (1943). The issue of subject matter jurisdiction may be raised

at any time including when raised for the first time on appeal. Brown v State 540 SE2d 846, 848-9, 343 SC 342, 346 (2001). A judgment by a court cannot be ruled upon where court had no right to act. Hooks v State 577 SE2d 211 353 SC 48 (2003), Brown v State 540 SE2d 846, 343 SC 342 (2001). Once again the South Carolina Supreme Court erred in making a ruling on the three indictments/charges that are not listed on the Remittitur along with the nine other indictments/charges that were vacated by the PCR Court. Then before the S.C. Supreme Court made an erroneous ruling on the three indictment/charges that are not listed on the Remittitur, the PCR Court made an erroneous ruling to vacate all twelve of the applicants indictments/charges when only nine indictments/charges were on the Remittitur after the applicant's Direct Appeal was dismissed. Those three indictments/charges are still in the jurisdiction of the South Carolina Court of Appeals. Final disposition of case occurs when remittitur is returned by clerk of appellate court and filed in lower court, until that time case is pending on appeal. Christy v Christy 317 SC 145 452 SE2d 1 (SC App 1994) By the three indictment/charges not being on the Remittitur the three indictment/charges were never filed in the lower court. The South Carolina Court of Appeals still has jurisdiction over the three indictment/charges because the judgment by the PCR Court and the S.C. Supreme Court are void concerning the three indictment/charges that are not on the Remittitur. Subject matter jurisdiction refers to the court's "power to hear and determine cases of the general class to which the proceeding in question belong." Dove v Gold Kist, Inc. 442 SE2d 598 (1994) Bunkum v Manor 467 SE2d 758 (SC App 1996) Watson v Watson 460 SE2d 394 (1995). The actions and judgments of the

court in the absence of subject matter jurisdiction are void Id; see also State v Smalls 336 SC 301 519 SE2d 793 (Ct App 1999) (general rule that lack of subject matter jurisdiction may be raised at anytime supercedes SC Code Ann § 17-27-90) Here the applicant proves that the statue of limitations does not apply to the three indictments/charges that are not on the Remittitur that was sent by the Clerk of the S.C. Court of Appeals down to the circuit court for the final disposition of the applicant's Direct Appeal. With jurisdiction still being in the SC Court of Appeals the PCR Court and the S.C. Supreme Court actions are void. see SC Code Ann § 17-27-20(A)(2). Therefore the Final Order of Dismissal's challenge of statue of limitations should be dismissed, along with the entire Final Order of Dismissal. The Supreme Court held that summary dismissal of the petitioner's second PCR application was error becase genuine issues of material facts existed as to whether his claim was successive or barred by the statute of limitations. McCoy v State 401 SC 363, 737 SE2d 625 (2013). When considering the State's motion for summary dismissal, where no evidentiary hearing has been held, the PCR judge must assume facts presented by the applicant are true and view those facts in the light most favorable to the applicant Leamon v State 363 SC 432, 434, 611 SE2d 494, 495 (2005) (citing S.C. Code Ann § 17-27-80).

Where an applicant alleges facts that would establish an exception to either the statue of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR court, a question of fact is raised which can only be resolved by a hearing Cf. Delaney v. State 269 SC 555, 556; 238 SE2d 679, 679 (1977)

Final

The applicant now challenge the ~~[illegible]~~ Order of Dismissal's statement that the applicant has failed to set forth with any specificity what the evidence is, how it would have affected the outcome if used at trial, or why such alleged evidence was not readily discoverable at the time of trial or his previous PCR action.

The applicant specifies what the evidence is when he applied for a successive PCR application becase one page, the second page, of that evidence was missing when the applicant received his copy from the Richland County Clerk's office. The applicant resubmits that newly/after discovered evidence with Attachment 5(c) of his PCR application. (Pages 18-19 of this Response and Objection to the Conditional Order of Dismissal) That letter from Brian T. Petrano, the Asst Atty Gen who represented the State in the applicant's first PCR hearing, written to the solicitor of Lexington County, the Hon. Donald V. Myers, telling Solicitor Myers that "It does NOT appear LWOP is a possibility due to the fact that he (Hayward) has a minimal prior record and these offenses occurred during a spree."
At the applicant's PCR hearing Sam Mokeba, plea/trial counsel for the applicant, testified that he advised the applicant to plea to avoid LWOP. (Applicant's current PCR application has several testimonies from Mr. Mokeba stating this fact ~~along with the applicant's testimony himself)~~ Applicant and plea/trial counsel testimony proves applicant pled to avoid LWOP. Both the plea record and the applicant's PCR testimony are considered on appellate review of a PCR matter. Rollison v. State 346 SC 506, 552 SE2d 290. (SC 2001) In guilty plea issues it is proper to consider the guilty plea transcript as well as evidence at the PCR hearing Harres v. Leeke 282 SC 131 318 SE2d 360 (1984). So the Office of the Attorney General's letter that the applicant uses as newly /after discovered evidence proves that the applicant's plea

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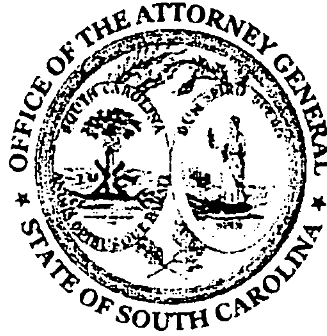

ALAN WILSON
ATTORNEY GENERAL

April 18, 2011

The Honorable Donald V. Myers
Lexington Judicial Center
205 E. Main Street
Lexington, South Carolina 29072
Office Telephone: 803-785-8352
Fax# 803-785-8255

RE: **John W. Hayward, 00291763 v. State of South Carolina**
Appeal from PCR Case No. 2006-CP-40-7301 (Post-Conviction Relief)

Solicitor Myers:

Enclosed please find a copy of:

1. Order of the South Carolina Supreme Court dated March 07, 2011 and Remittitur, dated March 23, 2011 reversing the granting of PCR only for the Richland charges.
2. Order from the Honorable James R. Barber, III dated April 8, 2008 granting PCR for both the Richland and Lexington County charges.

Essentially, the plea for the Richland County charges stands and the plea to the Lexington County charges is reversed.

The specific result for this case is somewhat intricate. Mr. Hayward pled in Richland County for both Richland and Lexington County charges. PCR was granted for both. My appeal was bifurcated; one issue was whether PCR was properly granted for the Richland County charges, the other issue was whether PCR was properly granted for the Lexington County charges. Simply put, there was no evidence presented at the PCR hearing to support granting PCR for the Richland charges.

The Supreme Court granted certiorari and ultimately they reversed the granting of PCR for only the Richland County charges, i.e. **the Richland County charges stick and he gets to start over for the Lexington County charges.**

The result is still particularly harsh for Mr. Hayward.[1] Originally, he received a thirty

[1] He originally received a 325 year sentence from Judge Lloyd.

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(30) year sentence for the Richland County charge(s); this 60 year sentence remains intact.[2]

Your (10) Lexington charges were as follows: assault and battery with intent to kill (03-GS-32-4182), burglary – first degree (03-GS-32-4185), criminal conspiracy (03-GS-32-4191), two counts of armed robbery (03-GS-32-4183; 4186) and five counts of kidnapping (03-GS-32-4184; 4187; 4188; 4189; 4190). Those convictions have been vacated and he is a pre-trial detainee.

It does NOT appear that LWOP is a possibility due to the fact that he has a minimal prior record and these offenses occurred during a spree.

In addition, I would like to point out the situation with the co-defendants. Frank McKenzie's Lexington County charges are currently pending as he was similarly granted PCR – his Richland County charges remain in force. The third co-defendant was Mr. Kimjaro Presley, his PCR was recently denied in full and I do not anticipate that denial being reversed on appeal. However, Mr. Presley comes from a wealthy family, he had Jack Swerling, Esquire at the circuit level and has Ms. Tara Shurling for PCR and PCR appeal. Mr. Presely is serving a 50 year sentence for his involvement. He will be 64 years old when he maxes out. While you do not necessarily need him, it is my opinion that Mr. Presley is probably eager to offer to testify against McKenzie and/or Hayward.

The victims in this case are all decent people; I look forward to following this case and seeing how the result works out.

Therefore, Mr. Hayward is technically a pre-trial detainee for the <u>Lexington charges only</u>.

Also enclosed is a CD-ROM containing our entire file, for all three (3) defendants. You should be able to search by word or phrase within the file(s).

Please coordinate with SCDC for Mr. Hayward's transport to Lexington County for any trial/plea proceedings. Should any party have any questions, please do not hesitate contact me. With warm regards, I remain:

Sincerely,

Brian T. Petrano
Assistant Attorney General
bpetrano@ag.state.sc.us

BTP
Enclosures
cc: David Tatarsky, Esquire, SCDC
Dan Johnson, Fifth Circuit Solicitor

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2 The two Richland convictions are for armed robbery (2003GS400870; 905), 30 years each, consecutive.

trial counsel's advice to avoid LWOP was clearly erroneous. That evidence would have affected the outcome of the applicants plea/trial dramatically if counsel would have given the applicant accurate sentencing information, that induced the applicant to turn down a 20yr concurrent plea offer from the State for the applicant's two Richland County armed robbery charges, that led to the applicant going to trial for those two charges. The day that was set for trial that same erroneous sentencing information, induced by the plea/trial counsel, made the applicant stop his trial to plea to those same two Richland County charges together with ten Lexington County Charges. The applicant's plea was induced by erroneous sentencing information. A plea which is induced by erroneous sentencing information is thereby rendered involuntary. Alexander v State 303 SC 539, 402 SE2d 484 (SC 1991) Ray v State 303 SC 374 401 SE2d 151 (SC 1991) Hinson v State 297 SC 456 377 SE2d 338 (SC 1989) There is a reasonable probability that but for counsel's erroneous advice on LWOP the applicant would not have pled guilty and would have insisted on going to trial. see Hill v Lockhart 106 S.Ct 366 (1985) The focus should be whether the applicant would have pled guilty had trial counsel accurately informed him of the situation. Turner v State (S.C. 1999) 335 SC 352, SC Code Ann § 17-27-20. After the SC Supreme Court affirmed the PCR Court's decision of vacating the ten Lexington County charges but reversed the PCR Court's decision to reinstate the applicant's two Richland County charges, the applicant now faces LWOP because of his two Richland County convictions and his ten Lexington County

charges waiting for retrial.

This evidence was not readily discoverable at the time of the applicant's plea/trial nor his previous PCR action because the letter was dated April 18, 2011, 3 years after the applicant's PCR hearing. Again the applicant testified he pled on the advice of plea/trial counsel to avoid LWOP. "Guided by the language of section 17-27-20(A)(4) of the PCR Act we hold that, when a PCR applicant seeks relief on the basis of newly discovered evidence following a guilty plea, relief is appriate only where the applicant presents evidence showing that (1) the newly discovered evidence was discovered after the entry of the plea and in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that under the facts and circumstances of that particular case the "interest of justice" requires the applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a ~~plea of guilty and the compelling interest in maintaining~~ the finality of guilty-plea convictions. In so holding we caution that it will be the rare case indeed where the interest of justice will require that a knowing and voluntary quality plea be vacated though post-conviction relief on the basis of newly discovered evidence for an unconditional guilty plea involving an admission of guilt and a waiver of trial and all defenses will

generally preclude any subsequent challenge to factual guilt. Cf Reise, 192 P.3d at 955 (finding a defendant may withdraw his guilty plea on the basis of newly discovered evidence only when necessary to correct manifest injustice) Such a determination will not be resolved in a formulaic manner, but will necessarily be context dependent." Jamison v State 410 SC 456, 756 SE2d 123 (2014) The applicant has set forth with specificity what the evidence is, how it would have affected the outcome if used at trial, or why such evidence was not readily discoverable at the time of the applicant's plea/trial or his previous PCR action. Before the Court will hold an evidentiary hearing, the applicant must make a prima facie showing that he is entitled to relief. Welch v. MacDougall 246 SC 258 143 SE2d 455 (1965); Blandshaw v. State 245 SC 385, 140 SE2d 784 (1965). Applicant has made a prima facie showing that he is entitled to relief based on the information set forth and, therefore, he is entitled to an evidentiary hearing in the matter. Accordingly ~~this~~ the Final Order of Dismissal of the

Lower court was Improper

Applicant now shows this Court how the following United States Supreme Court companion cases are applicable to his case: Lafler v Cooper ___ US ___ 132 S.Ct 1376 (2012) and Missouri v Frye ___ US ___ 132 S.Ct 1399 (2012) As these opinions were issued on March 21, 2012 this Court finds they can be applied retroactively to this proceeding. The Supreme Court did not indicate that either of these opinions were not new constitutional rules that were not intended to be retroactive. Applicant can show that in the setting, he was denied fundamental fairness shocking to the universal sense of justice during his plea proceeding and to continue the applicant's imprisonment without review would amount to a gross miscarriage of justice.

In Lafler v. Cooper as in Missouri v Frye, a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In Frye, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. In Lafler the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In Frye there was a later guilty plea. In Lafler, after the plea offer had been rejected there was a full and fair trial before a jury. After a guilty verdict the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel's advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth

Amendment, applicable to the States through the Fourteenth Amendment.

The applicant now seeks relief when inadequate assistance of counsel caused nonacceptance and/or rejection of the plea offer and further proceedings led to a less favorable outcome. Applicant took counsel's advice to rejecting a 20yr concurrent sentence for two armed robberies in Richland County, to then prepare for trial that counsel advises applicant to not go forward with and finally advises applicant to plea to the same two Richland armed robberies along with ten aggravating Lexington charges that were in violation of the Sixth Amendment. In Judge v State, the Supreme Court considered whether a defendant was entitled to effective assistance of counsel when the defendant rejects a plea offer. Judge v State 321 SC 554, 471 SE2d 146 (1996), overruled on other grounds by Jackson v State 342 SC 95 535 SE2d 926 (2000). The Court noted that the United States Supreme Court never decided the issue. (They now have with the Lafler/Frye decisions) Observing that most federal and State courts addressing the issue found that right to effective assistance of counsel attached not only to a defendant's decision to plead guilty but also to the refusal of a plea bargain, the Court found that the right to effective assistance attached during the plea bargaining process. Therefore, cousel may be ineffective in his advice to a defendant in deciding to reject a plea offer. Id. However, the Applicant in Judge was denied relief based on the failure to prove prejudice. Id. The

applicant in this PCR proceeding can establish prejudice. This prejudice was on record by the South Carolina Supreme Court (3-2) decision on the applicant's previous PCR application when one of the authorities used to grant the applicant relief was Nance v. Ozmint. There are times when prejudice is presumed. Where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable and prejudice may be presumed. Cronic v U.S. 446 US 648 104 S.Ct. 2039, 80 L Ed 2d 657 (1984); Nance v. Ozmint 367 SC 547 626 SE2d 878 (2006)

In Cronic, the Court identified three distinct situations in which a preumption of prejudice is appropriate. **First**, prejudice is presumed when the defendant is completely denied counsel "at a critical stage of his trial." Cronic 466 US at 659, 104 S.Ct. 2039. **Second**, per se prejudice occurs if there has been a constructive denial of counsel. This happens when a lawyer "entirely fails to subject the prosecution's case to meaningful adversarial testing," thus making "the adversary process itself presumptively unreliable." Id. **Third** the Court identified certain instances "when although counsel is available to assist the accused during trial the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. (citing Powell v Alabama, 287 US 45, 53 S.Ct 55, 77 L.Ed 158 (1932)). A finding of per se prejudice under any of these three prongs is "an extremely high showing for a criminal defendant to make." Brown v French 147 F3d 307, 313 (4th Cir 1998).

The applicant can find per se prejudice under all three of these prongs during the applicant's plea proceeding, that, on the advice of counsel, was inviolation of the 6th Amendment. First the applicants plea proceeding had Richland and Lexington County charges together to avoid LWOP. But applicant was given a Rich Co Public Defender for only his Richland charges.(2) He was not given a Lex. Co Public Defender for his Lexington charges(10). Applicant was completely denied counsel "at a critical stage of his trial." Cronic, 466 US at 659, 104 S.Ct 2039. Second there has be a constructive denial of counsel to the applicant during his plea proceeding when counsel from one county had no jurisdiction over cases that he gave advice on and one county denied him counsel. Third the applicant had counsel for the Richland charges, but the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small after counsel's (Rich counsel) advice to reject plea offer, then advise to stop a trial to finally advise to plea with 10 aggravating Lexington County charges. (All ten vacated, remand for retrial.)

Further, where counsel is absent during a critical stage of a defendant's trial, prejudice is presumed and a harmless error analysis is precluded. McKnight v. State 320 SC 356 465 SE2d 352 (1995) The sole purpose of the Sixth Amendment is to protect the right to a fair trial. The applicant's rejection of the plea offer on the advice of counsel then the advice to not go forward with trial to plea anyway with more aggravating charges did prejudice the Richland County convictions and sentences because the Richland County Public Defender's ~~ineffective~~ representation

fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors the applicant would not have rejected the 20yr Concurrent Plea offer /or would not have pled guilty, but would have Insisted on going to trial for the Richland County charges that day of the plea. Strickland v Washington 466 US 668, 104S.Ct. 2052 (1984) Hill v Lockhart 474 US 52 ___ S.Ct ___ ___ The applicant's challenge to the State's Order of Dismissal's claim of Res Judicata, Newly and After Discovered Evidence and Ineffective Assistance of Counsel - Lafler v Cooper / Missouri v Frye was successfully made by the applicant with the facts circumstances and rights of his plea/trial proceeding along with the mandated laws and Constitution of this State and the U.S. Constitution. Because counsel's error did "deprive the applicant of substantive and procedural rights to which the law entitles him," the applicant's plea/trial proceeding was unfair and unreliable.

With the above facts and case law, along with the PCR application, this Supreme Court dismisses the Final Order of Dismissal because the applicant provided an explanation of facts, sufficient facts, argument and citation to legal authority and showed that there is an arguable basis for asserting that the determination by the lower court was improper.

State of South Carolina
County of Richland

John Wallace Hayward
Applicant

v

State of South Carolina
Respondent

Case No. 2012-CP-40-02863

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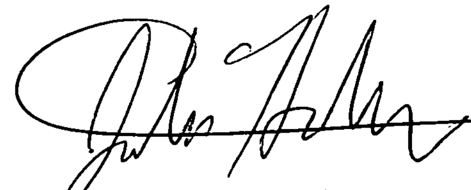

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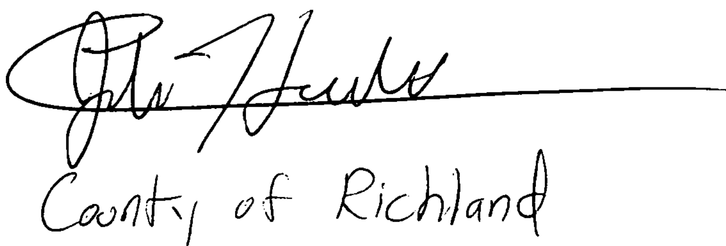

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