THE Supreme Court of Soutth Carolina
DANIEL E. SHEAROUSE
Clerk of Court
P.O. Box 11330
Columbia, S.C. 29211

RECEIVED
FEB 15 2017
S.C. SUPREME COURT

RE: Olayink Ajamu Babatunde, et al v State
Appellate Case No. 2017-000165
Lower Court Case No. 213CP4005284

Dear Mr. Shearouse,

Inclosed you will find an explanation to the aforementioned case.

Sincerely yours

Olayinka Ajamu Babatunde
Perry Correctional Institution
430 Oaklawn Road
Pelzer, S.C. 29669

February 10, 2017

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	**IN THE COURT OF COMMON PLEAS** **FOR THE FIFTH JUDICIAL CIRCUIT**
OLAYINKA A. BABATUNDE #270816	**DOCKET NO.:** 2013-CP-40-05284
Applicant **v.**	**APPLICANT'S RESPONSE TO COURTS CONDITIONAL ORDER OF DISMISSAL**
STATE OF SOUTH CAROLINA **Respondent**	

COMES NOW the Applicant Olayinka A. Babatunde who responds to the Courts Conditional Order of Dismissal. Applicant would like to show the Court the following:

1. See Attached Memorandum of Law in Support of Application for Post-Conviction Relief and Factual/Legal reasons why Application should not be dismissed.

2. See Sworn Affidavit of Olayinka A. Babatunde #270816.

Applicant requests that this Court not dismiss his application inasmuch as a genuine issue of material fact exists and Respondents are not entitled to Summary Judgment as a matter of Law.

Respectfully Submitted,

Date: 5-13-2014

Olayinka A. Babatunde

Olayinka A. Babatunde #270816
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

OLAYINKA A. BABATUNDE #270816

Applicant

v.

STATE OF SOUTH CAROLINA

Respondent

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

DOCKET NO.: 2013-CP-40-05284

SWORN AFFIDAVIT OF:
OLAYINKA A. BABATUNDE #270816

COMES NOW the Affiant Olayinka A. Babatunde after being first duly sworn to tell the truth and nothing but the truth states:

1. Applicant did in fact file a PCR application on June10, 2003 and Amended it on February 14, 2006 well within the one (1) year time frame allowed by statute. However, the PCR Court did not rule on all my issues that were raised.

2. The two issues raised in this current PCR matter is not new grounds for relief. They were raised in the original PCR; evidence was presented regarding these two issues but the PCR Court did not adjudicate the issues.

3. The two issues raised in the current PCR matter was never knowingly, voluntarily, and intelligently waived by me in the proceeding that resulted in the conviction and sentence or in any other proceeding that I have taken to secure relief.

4. I did not knowingly voluntarily waive any right and my PCR Counsel, Tara D. Shurling, Esquire's failure to file a Rule 59(e) motion on my Fourth Amendment claim was not an intentional abandonment or relinquishment of that issue on my behalf.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

OLAYINKA A. BABATUNDE #270816

Applicant

v.

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IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

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4. I did not knowingly voluntarily waive any right and my PCR Counsel, Tara D. Shurling, Esquire's failure to file a Rule 59(e) motion on my Fourth Amendment claim was not an intentional abandonment or relinquishment of that issue on my behalf.

5. I believe that I am entitled in the interest of fundamental fairness to an adjudication on the merits of these two issues because they were both fully presented in a timely fashion.

Further I sayeth not:

Respectfully Submitted,

Date: 5-13-2014

Olayinka A Babatunde
Olayinka A. Babatunde
Affiant

SWORN to me this:

29th day of April, 2014

Nancy C Merchant
Notary Public for South Carolina

My Commission Expires: 1-23-2023

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
OLAYINKA A. BABATUNDE #270816	DOCKET NO.: 2013-CP-40-05284
Applicant v. STATE OF SOUTH CAROLINA Respondent	MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR POST-CONVICTION RELIEF AND FACTUAL-LEGAL REASONS WHY APPLICATION SHOULD NOT BE DISMISSED SUMMARILY

I. PROCEDURAL HISTORY

Applicant is presently confined at Perry Correctional Institution pursuant to orders of Commitment of the Richland County Clerk of Court. Applicant was true bill indicted at the November 1999 term of the Richland Grand Jury for one count of Armed Robbery (99-GS-40-45868), on count of Burglary in the 1st Degree (99-GS-40-45869), and one count of Kidnapping (99-GS-40-46281). Applicant was represented by James P. Rogers, Esquire, on all charges. On May 3, 2000 Applicant appeared before The Honorable James C. Williams, Jr., where he was found guilty as indicted and was sentenced to fifteen (15) years imprisonment for Armed Robbery, fifteen (15) years imprisonment for Burglary in the 1st Degree, and fifteen (15) years imprisonment for kidnapping, with all sentences to be run consecutively.

Applicant appealed his conviction. Applicant was represented by Katherine Link, Esquire. The South Carolina Court of Appeals affirmed the decision of the trial court on September 12, 2002. State v. Michael McCoy, Op. No. 02-UP-562 (S.C. Ct. App. Filed on September 12, 2002). The Remittitur was sent on September 30, 2002.

Applicant filed his first Post-Conviction relief application on June 10, 2003 and amended February 14, 2006 (2003-CP-40-2837). An evidentiary hearing on this application was held February 15, 2006, at which Applicant was present with Counsel, Tara D. Shurling, Esquire. Following the evidentiary hearing, the record was left open for further testimony on the issue of ineffective assistance of appellate Counsel. A hearing was reconvened on March 3, 2006, at which Applicant was present with Counsel, Tara D. Shurling, Esquire. An Order of Dismissal was issued by the Honorable James R. Barber III on May 22, 2006. Applicant filed a Rule 59 (c)(e) SCRCP motion to Alter or Amend, which Judged Barber denied by order dated June 27, 2006.

Applicant filed his second Post-Conviction relief application on Janurary 26, 2007 (2007-CP-40-0603). Applicant was represented by Tricia A. Blanchette, Esquire. By Order dated on or about September 8, 2008 the Honorable J. Michelle Childs dismissed the application with prejudice in

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part, allowing Applicant to proceed with a belated appeal of his previous PCR application under Austin v. State, 305. S.C. 453, 409 S.E. 2nd 395 (1991). Applicant subsequently filed a Notice of Appeal on November 19, 2008. The South Carolina Court of Appeals denied Applicant's appeal on August 17, 2011. A letter of remittitur was received on September 1, 2011.

In the current application for Post-Conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Trial Counsel was ineffective for failing to adequately preserve for appellate review the question of whether the lower Court improperly limited the scope of defense Counsel's cross examination of a crucial state witness thereby violating the Applicant's right to fully confront his accusers, as protected by the Sixth and Fourteenth Amendments of the United States Constitution as well as the confrontation clause of the South Carolina State Constitution.

2. Appellant Counsel was ineffective for failing to argue on appeal the issue of the Applicant's unlawful arrest without probable cause and without a warrant.

II. STANDARD OF REVIEW:

In a Post-Conviction relief action, the 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.2nd 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "Counsel 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 (1984); Butler, 286 S.C. 441, 334 S.E.2nd 813 (1985).

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. Butter, 286 S.C. 441, 334 S.E.2nd 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E2d 624 (1989).

Courts used a two-prong test in evaluating allegations of ineffective assistance of Counsel. First the Applicant must proved that Counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under the professional norms". Cherry, 300 S.C. at 117, 385 SE2nd at 625 (citing Strickland). Second, Counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different. ". Cherry, 300 S.C. at 117-118, 386 SE2nd at 625.

III. LEGAL DISCUSSION AND LEGAL ARGUMENT:

(1) Trial Counsel was ineffective for failing to adequately preserve for appellate review the question of whether the lower court improperly limited the scope of defense Counsel's

> cross examination of a crucial state witness thereby violating the Applicant's right to fully confront his accusers, as protected by the Sixth and Fourteenth Amendments of the United States Constitution as well as the Confrontation Clause of the South Carolina State Constitution.

On direct appeal Applicant's Appellate Counsel argued that the Trial Court erred in limiting the defense in its cross-examination of a crucial state witness concerning her bias and motive to fabricate her testimony. The Argument was as follows:

> "Apart from the victims' unreliable identifications of appellant as the intruder, the State's only other evidence linking appellant to this crime was the testimony of Annetta Grant, with whom he lived. She gave an account of the crime purportedly based on information he had disclosed to her. The defense attempted to discredit her testimony, eliciting from her that she was first told about the incident by one of the officers". 2 Tr.p. 201.

Specifically, the defense established that the co-defendant implicated her as the driver of the getaway car. Tr. p. 186. The police handcuffed and detained her at the motel. 2 Tr. p. 200. She was not free to leave. 2 Tr. P. 200. She was scared because she was on the run from the law and did not want to go to jail. 2 Tr. P. 196. The police acknowledged she was a suspect in these crimes, and they told her she could be charged. 2 Tr. P. 228-29.

The defense questioned Grant in cross-examination about the potential charges she faced. 2 Tr. p. 202-03. She acknowledged they told her she could be charged with first degree burglary, kidnapping and armed robbery. 2 Tr. p. 203. The defense sought to question her about the potential penalties she faced for such charges, but the Court sustained the State's objection and did not allow this testimony. 2 Tr. p. 202-03, 259-60. This limitation on Appellant's right of confrontation requires that he receive a new trial".

Based on her knowledge of the case, Appellate Counsel opined that the issues were meritorious and she disagreed with the appellate Court's opinion that the second issue dealing with cross-examination of witness Grant, was not preserved for appeal. App. p. 469-70. Ms. Link further testified as follows:

> "I am not aware that I ever even got notice that this case was to be decided on the record and without oral argument. Had I gotten notice of argument, I probably would have stayed on the case. I think it fell through the cracks, and I don't know who made the decision not to take it to the Supreme Court on a Cert Petition, but I think both issues had merit, and if I was ineffective for not being involved in that process, then I was. But I do believe that we rendered, either me or the agency, rendered ineffective assistance to Mr. McCoy by not taking those two issues up to the Supreme Court because I think that both had merit and I think either of them could have gotten reversal". App. p. 466 lines 5-17.

Despite the fact that Appellate Counsel found that the issue in question had merit, and despite the fact that she believed the issue was preserved for Appeal, the Court of Appeals never reached the merits of this meritorious issue because Trial Counsel did not properly Preserve this meritorious issue for appellate review, the Court of Appeals ruled that an objection made during an off-the-record conference which is not made part of the record does not preserve the question for review. York v. Conway Ford Inc., 325 S.C. 170, 480 SE 2nd 726 (1997), see also State v. Prileau, 345 S.C. 404, 548 SE 2nd (2001) (finding an objection not raised and ruled on below affords no basis for reversal).

Appellant Counsel said that the issue had merit and she thinks it could have gotten a reversal. Trial Counsel's failure to properly preserve the issue for review therefore prejudiced Applicant's case. There is a reasonable probability that but for Counsel's unprofessional errors, the result of the proceeding would have been different, Cherry v. State, 300 S.C. 115, 386 S.E.2nd 624 (1989).

(2) Appellant Counsel was ineffective for failing to argue on appeal the issue of the Applicant's unlawful arrest without probable cause and without a warrant.

During the PCR hearing, the Applicant testified that he wrote his Appellate Counsel and asked her to raise the Fourth Amendment claim on direct appeal, and she responded by letter. App. p. 39 lines 15-23. On direct examination Appellate Counsel was asked whether or not she considered raising the search and seizure issue and the question of unlawful arrest. Appellate Counsel testified that she did consider the search issue because her client had corresponded with her about it and she stated that she had no recollection of whether or not she considered the question of his unlawful arrest. Appellate Counsel testified that she responded to Applicant by letter. App. p. 59 lines 5-16.

During the PCR hearing the Applicant read the letter sent to him by his Appellant Counsel. The letter read as follows:

> "Dear Mr. McCoy: I received your recent letter asking me to raise an additional issue in your case in which you characterize the subject matter jurisdiction issue. I will not be able to do so, as the issue that you seek to raise is not one that implicates subject matter jurisdiction. Moreover, I have reviewed this issue carefully in preparing your initial brief and concluded that it was not a meritorious issue that I should raise in your appeal. First, the State produced witnesses who stated that the beads and you were in plain view when Mrs. Grant opened the motel room door. The State's evidence showed that the room was registered in Ms. Grant's name and that she consented to the search. In light of the evidence presented by the State concerning Mrs Grant's consent to enter and search the room and the other evidence in support of probable cause determination, I simply do not see this issue as one that would prevail on appeal". App. P. 40 lines 19-25, App. p. 41 lines 1-11.

Applicant alleged that the rationale Appellate Counsel used for not raising the Fourth Amendment issue had no legal support. App. p. 41 lines 12-15. Applicant relies on the following testimony to substantiate his allegation:

> Q: Okay. Now as you were doing that what was Ms Grant doing; did she come out of the room and talk with investigator Ross?
>
> A: Me and Ms Grant basically passed. She came out to talk with Investigator Ross. I basically stepped in where I could keep an eye on Mr. McCoy. Tr.p. 161 lines 20-22 (emphasis added).

> Q: Okay, and what did you then do with Mr. McCoy?
>
> A: As I stated, I asked him to go ahead and take his hands from up under the covers. He did. I walked in, me and Investigator Price. We done a quick sweep of the room, make sure there wasn't no weapons readily available to him. At that point I asked him to go ahead and come on out of bed. I pulled the covers back. I advised him to just let me make sure I can see your hands so I went ahead and pulled the covers back, and at that time he got out of bed. I went ahead and I advised him, you know, I'm going to go ahead and cuff you, but I will explain what's going on. It's for your safety and mine. I will definitely explain everything that's going on". Tr. p. 162 lines 11-24 (emphasis added).

> Q: All right, now, did there come a time, Deputy, that Investigator Ross called you out for anything?
>
> A: Once he was secured and I done a quick pat down on him for any weapons, about that time Investigator Ross yelled for me to come there. I made contact with Price and told him I'm stepping outside. So he brought Mr. McCoy to the frame of the door and I went down to the Jeep where Investigator Ross was.

> Q: Okay, and what was—did you become aware at that time of why Investigator Ross wanted you to come down to the Jeep?
>
> A: Once I got down there he had advised me that Ms. Grant has signed a Consent to Search and he wanted me to witness, sign as the witness on it. Tr. p. 163 lines 3-16 (emphasis added).

From the above testimony of Officer J.L. Spearman it is crystal clear that he along with one other Investigator walked into the Applicant's residence without an arrest warrant and without a consent. Not only was this entry warrantless and non-consensual, but the Investigators ordered the Applicant to get out of the bed and when he did they immediately handcuffed him.

A petitioner is constitutionally entitled to effective assistance of appellate Counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). To prevail on his claim of ineffective assistance of appellate Counsel, a two prong test applicable to such a claim must be met. See Southerland v. State, 337 S.C. 610, 524 S.E.2nd 833 (1999). A petitioner must show that Counsel was deficient and that he was prejudiced by Counsel's deficiency. Our courts are understandably wary of second guessing defense counsel's trial tactics. Where counsel articulates valid reasons for

employing a certain strategy, counsel's choice of tactics will not be deemed ineffective assistance, Whitehead v. State, 308 S.C. 119, 417 S.E.2nd 530 (1992). See also Dempsey v. State, 363 S.C. 365, 610 S.E.2nd 812 (2005) and McLaughlin v. State 352 S.E.2nd 476, 575 S.E.2nd 841 (2003). The key word however is the word "valid". Where counsel reasons for employing a certain strategy is not a valid reason, then Counsel's failure to raise a potentially meritorious claim cannot be said to be sound strategy or tactic.

As previously noted Appellate Counsel wrote Applicant a letter and told him that the reason why she did not raise his Fourth Amendment claims is because it lacked merits. Her reasons for concluding this was not valid. First she relies on the fact that the State produced witnesses who stated that the beads and Applicant was in plain view.

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Coolidge v. Hampshire, 403 U.S. 443, 91 S.Ct. 2022 (1971). Yet it is also well settled that objects such as weapons or contraband found in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity. The distinction between a warrantless seizure in an open area and such a seizure on private premises was plainly stated in G.M. Leasing Corp. V. United States, 429 U.S. 338, 354, 97 S.Ct. 619, 629:

> "It is one thing to seize without a warrant property resting in an open area or seizeable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property even that owned by a corporation, suited on private premises to which access is not otherwise available for the seizing officer".

As the late Judge Leventhal recognized, this distinction has equal force when the seizure of a person is involved. Dorman v. United States. 435 F.2nd at 389 (1970). So in other words, contrary to Appellate Counsel's articulated reason, the mere fact that the property seized was in plain view did not render the seizure lawful. The fact that made the seizure of Applicant's "person" unlawful was the fact that the Investigators were inside Applicant's residence at the time of the seizure without a warrant or consent. Since this seizure occurred inside of his residence and there was no warrant the seizure was unreasonable and prohibited by the Fourth Amendment.

Secondly, Appellate Counsel relied on the fact that the State's evidence showed that the room was registered in Ms. Grant's name. Applicant assumes that Appellate Counsel was indicating that because the room was registered in Ms. Grant's name that he did not have a legitimate expectation of privacy on the premises. This is not a valid reason either and has no legal support. The record at the PCR hearing attests to the fact that Applicant and his common law wife had been living in this motel for (4) months. It was not an overnight rental of a motel room. It was their temporary home. App.p. 23 lines 2-10.

Since the decision in Katz v United States, 389 U.S. 347, 88 S.Ct. 507 (1967), it has been the law that "capacity to claim the protection of the Fourth Amendment depends......upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the

invaded place". Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 430 (1978). A subjective expectation of privacy is legitimate if it is one that Society is prepared to recognize as "reasonable". Although the motel room need not be Applicant's "home" temporary or otherwise, in order for him to enjoy a reasonable temporary home. Applicant had some property rights in the dwelling, was related by marriage to the lessor of the dwelling, maintains a regular continuous presence in the dwelling, especially sleeping there regularly and Applicant stores his clothes or satisfies the twelve (12) factors which determine whether a dwelling is a "home". See Minnesota v. Olson, 495 U.S. 91, 96, 97 (1990) see footnote on pages 96-97. Moreover it is clearly established law that "all citizens share an expectation that hosts are more likely than not to respect guests' privacy interests, even if guest has no legal interest in premises and does not have legal authority to determine who can enter household. Thus the Appellant Counsel's reliance on the motel room being registered in Ms. Grant's name is not legally valid to act as grounds to nullify his legitimate privacy interest in the motel room.

Lastly, Appellant Counsel relied on the fact that Ms. Grant gave the officers consent to search the room and to enter it. She opined that this fact in combination with the other facts mentioned above led her to believe that the Fourth Amendment issue would not prevail on appeal. This is not a sound or valid reason either.

To be clear, Applicant is not challenging here the seizure of the beads. It is clear from the record that the officers did not seize the beads until after they attained the consent to enter and search. Tr.p. 165 lines 7-20. What the challenge here is is that the seizure of his "persons" and the "entry" into his room was unlawful because it occurred without an arrest warrant and before consent was given.

As previously mentioned, when the Investigator knocked on the door, Ms. Grant looked through the curtains and the Investigators notified her that it was the Sheriffs' Department. Ms. Grant then opened the door. She then agreed to talk to Investigator Ross and walked past Investigator Spearman. She never at this specific time gave consent to enter her dwelling. There were no exigent circumstances and, even if there was the State waived such an argument because it was not asserted in the trial Court. Investigator Spearman then without consent and without a warrant entered the room and handcuffed the Applicant. Tr.p. 162 lines 11-24.

A person has been "seized" within the meaning of the Fourth Amendment whenever a police officer accosts an individual and restrains his freedom to walk away; that is, only when an officer by means of physical force or show of authority, has some way restrained liberty of the citizen may Court conclude that "seizure" has occurred. Terry v. Ohio, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968). In determining whether an encounter between a law enforcement official and a citizen constitutes a seizure, and thereby implicates Fourth Amendment protection, the correct inquiry is whether, considering all of the circumstances surrounding the encounter, a reasonable person would have believed he was not free to leave. United States v. Mendenhall, 446 U.S. at 545, 100 S.Ct. At 1872-73 (1980).

Applicant alleges that is clear that a reasonable person would not have believe he was free to walk away from two police detectives who ordered him out of the comfort os his bed and immediately

accosted him by placing handcuffs on him, which effectively restrained his freedom to walk away. Thus he was "seized". This seizure was unreasonable because the Investigators did not have a warrant, did not receive any consent to enter Applicant's residence a the time of his seizure, therefore at the time of Applicant's seizure the Investigators were on the premises illegally. All evidence obtained by searches and seizures in violation of the Constitution is by that same authority inadmissible in a State court. Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684 1691 (1961). Since the positive identification of the Applicant by the victims occurred while Applicant was seized and in handcuffs. Tr.p. 166-167. The identification is evidence that was obtained by a seizure in violation of the Constitution and should have been suppressed as the Fruit of a Poisonous Tree. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963). Furthermore, because of the illegal entry into Ms. Grant's residence, Ms. Grant's subsequent consent to search the premises after the Investigators had entered the residence was tainted and therefore invalid. See Florida v. Royer, 460 U.S: 491, 103 S.Ct. 1319 (1983). Therefore even the seizure of the "beads" was unlawful and could have been suppressed.

In light of the facts of Applicant's case and the applicable law an Court opinions, it would be wholly unreasonable to attempt to justify Appellate Counsel's failure to raise a meritorious Fourth Amendment claim as sound strategy. Applicant alleges that the record and law strongly supports his allegation that Appellate Counsel was ineffective for failing to argue on appeal the issue of his unlawful arrest.

IV. FACTUAL AND LEGAL REASONS WHY APPLICATION SHOULD NOT BE SUMMARILY DISMISSED:

Applicant alleges that this Application for Post-Conviction Relief should not 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 et. Seq. Applicant would like to show this Court the following:

Timeliness - S.C. Code Ann 17-27-45(2) 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 limitation shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2nd 606 (1996). Applicant's conviction became final on the date of his conviction or the date the remittitur from his direct appeal was issued. In this case the "later" date would be the date of the remittitur which was issued September 30, 2002. Adding one (1) year per S.C. Code Ann. 17-27-45 (2) and one (1) day per Rule 6 (a) SCRCP means that Applicant had to File his PCR application by October 1, 2003. Applicant did in fact file a PCR Application on June 10, 2003 and amended February 14, 2006. This was well within the one (1) year time frame allowed by statute. However, the PCR

Court did not rule on all the issues that were raised, and did not make specific findings of fact and Conclusions of Law relating to the issues raised within that application which are the identical issues raised in this application. S.C. Code Ann 17-27-80 gives Applicant a statutory right to a complete adjudication on all the issues that are raised. The PCR Court deprived Applicant of that right and denied Applicant one full bite of the apple. Applicant argues that since these are the exact same issues raised in his PCR Application filed on June 10, 2003 and amended on February 14, 2006 but never adjudicated, that that is the date of filing which should be applied to this current PCR Application.

Successive - S.C. Code Ann 17-27-90:

> "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 no so raised, or 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". (emphasis added).

The South Carolina Supreme Court held that successive applications for Post-Conviction Relief are to be disfavored. Land v. State, 274 S.C. 243, 262 S.E.2nd 735 (1980). A successive application should not be entertained 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.2nd 392 (1991). The Supreme Court has defined a successive Application as one that raises grounds not raised in a previous application, one that raises grounds that have already been heard and determined and one that raises grounds that were waived in a prior proceeding. Graham v. State, 378 S.C. 1, 661 S.E.2nd 337 (2008).

Applicant argues that this present application is not barred by S.C. Code 17-27-90 because by definition it is not a successive Application. Applicant would show the Court the following:

- The grounds for relief raised in this current application was in fact raised in a previous application. To be exact these grounds were raised in the PCR matter docketed as 2003-CP-40-2837.

- The grounds for relief raised in this current application have already been by the Court of Common Please, but has not been determined or adjudicated. See Order of Dismissal signed by the Honorable James R. Barber III on May 17, 2006 filed with the Clerk of the Court on May 22, 2006, and Motion to Alter or Amend Judgment filed by Tara Dawn Shurling, Esquire denied by the Court on June 27, 2006.

- The grounds for relief raised in this current application were not knowingly, voluntarily and intelligently waived. As shown above these grounds were raised

Court did not rule on all the issues that were raised, and did not make specific findings of fact and Conclusions of Law relating to the issues raised within that application which are the identical issues raised in this application. S.C. Code Ann 17-27-80 gives Applicant a statutory right to a complete adjudication on all the issues that are raised. The PCR Court deprived Applicant of that right and denied Applicant one full bite of the apple. Applicant argues that since these are the exact same issues raised in his PCR Application filed on June 10, 2003 and amended on February 14, 2006 but never adjudicated, that that is the date of filing which should be applied to this current PCR Application.

Successive - S.C. Code Ann 17-27-90:

> "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 no so raised, or 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". (emphasis added).

The South Carolina Supreme Court held that successive applications for Post-Conviction Relief are to be disfavored. Land v. State, 274 S.C. 243, 262 S.E.2nd 735 (1980). A successive application should not be entertained 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.2nd 392 (1991). The Supreme Court has defined a successive Application as one that raises grounds not raised in a previous application, one that raises grounds that have already been heard and determined and one that raises grounds that were waived in a prior proceeding. Graham v. State, 378 S.C. 1, 661 S.E.2nd 337 (2008).

Applicant argues that this present application is not barred by S.C. Code 17-27-90 because by definition it is not a successive Application. Applicant would show the Court the following:

- The grounds for relief raised in this current application was in fact raised in a previous application. To be exact these grounds were raised in the PCR matter docketed as 2003-CP-40-2837.

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- The grounds for relief raised in this current application were not knowingly, voluntarily and intelligently waived. As shown above these grounds were raised

and not ruled upon. Applicant only waived three issues. See App. p. 19-20. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 153, 415 S.E.2nd 384 (1992).

As shown above this application by definition is not successive and therefore is not barred by S.C. Code Ann 17-27-90. The Supreme Court ruled in Garner v. State that a PCR Court Order that does not make specific findings of facts and conclusions of law relating to each issue presented does not constitute a Final Order under the Uniform Post-Conviction Proof of Act. Moreover Applicant argues that he does not have to point to a "sufficient reason" for raising the grounds in the current application because these grounds are not new grounds, nor are these grounds successive. The Supreme Court ruling in Land v. State, 274 S.C. 243 (1980) and Alice v. State, 305 S.C. 448 (1991) requires an applicant to pont to a sufficient reason only if the grounds being raised were not previously asserted (new) or if the ground being raised was inadequately raised in the original, supplemental or amended application. In the case at bar neither of these situations apply thus a sufficient reason is not needed. Applicant argues that he is raising these issues again because he has a statutory right under 17-27-80 and a Constitutional right under the Fourteenth Amendment and South Carolina Constitution "Due Process" Provision to a complete adjudication on the merits of his original application.

All of the above is the factual and legal reasons why this Application should not be summarily dismissed.

CONCLUSION:

Applicant is entitled to a evidentiary hearing or in the alternative a complete adjudication. Applicant requests a New Trial, and/or Conviction and Sentence Vacated.

Respectfully submitted,

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