

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alison. Lee, Circuit Court Judge

Appellate Case No. 2016-001553

Trey A. Williams, #341036

Respondent,

v.

State of South Carolina

Petitioner.

RESPONDENT'S MOTION TO SUPPLEMENT APPENDIX

NOW COMES Respondent, by and through his undersigned attorney, and motions this Court to supplement the appendix. Respondent filed a document with the Clerk of Court titled "Judicial Notice of Adjudicated Facts" on October 17, 2014. This document is referenced in both the PCR transcript (Appendix p. 191-192) and the Order granting relief (Appendix p. 248). The document was timely filed prior to Respondent's PCR hearing. The PCR Judge references this document in the PCR hearing and has some discussion with counsel for both sides about its inclusion in the PCR packet.

THEREFORE, Respondent respectfully requests that the Court grant his motion and supplement the Appendix in this case by adding the "Judicial Notice of Adjudicated Facts" to the Appendix as pp. 269-280.

Respectfully Submitted,

March 13, 2017



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Attorney for Respondent

cc. Justin J. Hunter, Esq.

STATE OF SOUTH CAROLINA
COUNTY OF YORK
TREY WILLIAMS, 344266

Applicant

STATE OF SOUTH CAROLINA

Respondent,

FILED-RECEIVED

2014 OCT 17 PM 2:09

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

IN THE COMMON PLEAS COURT

DOCKET NO.: 2013-CP-46-1797

JUDICIAL NOTICE OF ADJUDICATED FACTS

The Applicant through undersigned Counsel wishes to file this Judicial Notice of Adjudicated facts as follows:

Respectfully the sole purpose of this Notice of Adjudicated Facts is to show Applicant's diligence in attempting to have PCR Counsel adequately and sufficiently address and fairly inform the PCR Court of all the relevant facts and claims. *Mallory v Smith*, 27 F.3d 991, 995 held the exhaustion requirement demands the PCR Counsel do more than "scatter some make-shift needles in the haystack" of the State Court Record. The grounds relied upon must be presented squarely. The Federal questions must be plainly defined and that bleak references which hint that a theory may be lurking will not suffice, see *Kornahrens v Evatt*, 66 F.3d 1359, 1362. The Rules also specifically mandate that counsel must be permitted a reasonable time to confer, to evaluate the application and to insure that all available grounds for relief are included in the application and allow use of discovery and all other Civil Rules, which include the use of interrogatories, depositions and other discovery mechanisms such as subpoenas.

Applicant states that he would be denied due process due to ineffective assistance of counsel under the PCR mandate S. C. Code Ann § 17-27-20, through § 160 by Counsel's failure to raise adequately and sufficiently Applicants meritorious claims to withstand *Strickland Supra* and to make sure that all issues are raised and ruled on for appellate review. Petitioner asserts this cannot be established in PCR unless he is provided effective assistance of counsel to demonstrate Applicant's due process violations.

Despite the importance of PCR remedies as safeguard against unjust, unconstitutional and erroneous confinements, the systemic devolving of the importance of the PCR process is widespread. Convicted persons in South Carolina raising Post Conviction challenges rely almost exclusively on appointed counsel, most of whom have little experience in this area of the law. The purpose of the PCR Act is to provide comprehensive mechanism to the State's Courts attention to any unresolved and previously not mentioned question of facts and bias relevant to their conviction or sentence. The Application must allege particular grounds for relief and the specific defects in the trial or criminal proceedings that warrant a reversal or rescission including the legal basis for the claim supporting facts; and relief desired "to include affidavits, court records, or other material relevant". Applicant asserts that he is a lay person and cannot be held responsible for PCR Counsel inadequately presenting, developing, investigating, ascertaining and or eliciting any of Applicant's due process violation claims. Such failure by PCR Counsel at this critical stage is outside the range of competent attorney in criminal cases and hence will have operated to deny Applicant his "one fair bite of the apple."

1. Inadequate assistance of Counsel of initial review collateral proceeding may establish "cause" for a prisoner's procedural defaults.
2. A.E.D.P.A. did not bar Applicants from using ineffective assistance of Post Conviction Attorney to establish "cause" and "prejudice" from his procedural defaults and,
3. Remand was required to determine whether Applicant's Attorney in the first State collateral proceeding was ineffective, whether underlying ineffective assistance of Trial Counsel's claims was substantial. In the Supreme Court in "Townsend v Sain, 374 U.S.293, 83 S.Ct 745 stated Federal Courts on Habeas Corpus must hold a evidentiary hearing if Applicant did not receive a full and fair evidentiary hearing in State Court either at time of trial or in collateral proceeding, see 28 USCA § 2243 if:
 - A. Merits of Factual dispute were not resolved in State hearing
 - B. Factual determinations not fairly supported by the records as a whole

- C. Fact finding procedure not adequate.
- D. Substantial allegation of newly discovered evidence.
- E. Applicant not offered a full and fair State hearing.

In Applicant's PCR Application the following allegations have been made to PCR Counsel:

1. Applicant's waiver of trial counsel was invalid and not in compliance with due process of law.
2. Standby Counsel provided ineffective assistance of Counsel.
3. Appellate Counsel provided ineffective assistance of Counsel.
4. Prosecutorial misconduct/vindictive prosecution
5. Applicant's waiver of the Jackson v Denno hearing was not intelligently made.

Insufficient evidence.

PCR Counsel should amend the PCR Application and fairly apprise the State Court of the Federal Constitutional claim by relying on Federal and State cases that employ a Constitutional analysis asserting the claims in terms that call to mind the specific right protected by the Constitution and allege facts that fall well within the mainstream of Constitutional litigation.

PCR Counsel should use interrogatories and subpoenas because the moving party presents his evidence first and has the burden to prove by a preponderance that Applicant is entitled to relief.

Applicant asserts that the trial court did not ask Applicant for his age, educational level, criminal history or competency. See *Gardner v State*, 351 S.C.407(2002). When determining if an accused has a sufficient background to understand the dangers of self-representation, the Courts must consider:

1. Age, educational background, and physical and mental health (Applicant is requesting PCR Counsel to gather mental records for PCR hearing).
2. Whether he was previously involved in criminal trials, Applicant's first offense.
3. Nature of the charges, possible penalties; (record is void of counsel or the Court explaining to Applicant the elements of the charge).
4. Whether Counsel explained to him the dangers (Applicant had conflict of interest with Counsel and made several complaints).

5. Whether he was attempting to delay or manipulate the proceeding.
6. Whether the Court appointed stand-by counsel(the record reflects the trial court Instructing stand-by counsel see trial transcript pg 113)
7. Whether he knew he would be required to comply with the Rules of Procedure of Trial (the records is void of Applicant being informed.
8. Whether he knew of legal challenges he could raise in trial (again record is void of any Explanation.
9. Whether the exchanges between the accused and the court consisted merely of pro form Answers to pro form question(the record reflect likewise)
10. Whether his waiver resulted from either coercion or mistreatment (the records reflects the trial courts tone and demeanor was aggressive and hostile to defendant.

Applicant points PCR Counsel, PCR Courts and this Record of Federal notice to Stand-by Counsel's failure to comply with the State's independent and adequate State ground "Contemptuous objection requirement at trial to the below listed meritorious issues. Applicant was denied from complying with the State's procedures "Solely due to ineffective assistance of Stand-by Counsel", See *Wainwright v Sykes*, 433 U. S., states a State procedural Rule which requires that a "Contemptuous objection" be made deserves great respect from Federal Courts because of:

1. It is a rule employed by a coordinate jurisdiction with Federal System and for the many interests it serves in its own right.
2. It enables the records to be made with respect to the Federal Constitutional claims when the records and recollections of witnesses are freshest and,
3. It enables the Judge who observes the demeanor of those witnesses to make the factual determinations necessary for properly deciding the Federal Constitutional question.

A Contemptuous objection may lead to the exclusion of evidence or behavior objected to, thereby making a major contribution to finality in criminal litigation. Without the evidence claimed to be vulnerable on Federal Constitutional grounds a jury or Judge may acquit a Defendant and that would end the case; or, a jury or Judge may nonetheless convict and he will have one less Federal claim to assert

in his Federal Petition. Furthermore an objection on the spot may force the prosecution to take a hard look and even if the prosecutor thinks that the State trial Judge will admit the evidence he must contemplate the possibility of reversal by the State Appellate Court or the ultimate issuance of a Federal Writ based on the impropriety of the State Courts rejection of the Federal Constitutional claim. See *Stone v Powell* 428 U. S. 465, *Henderson v Kibbe*, 431 U. S. 145, 157.

Applicant asserts that there can be no dispute of the prejudice he suffered because of the involuntary, unknowing and unintelligent waiver of trial counsel and stand-by counsel's failure to comply with the independent and adequate State procedural ground which could prevent direct review of his Constitutional violation. Said failure to comply with the State's Contemporaneous objection Rule, affected substantial rights and thereby may be noticed although they were not brought to the attention of the Courts due to ineffective assistance of Stand-by Counsel. See *U. S. v Olano, Supra*, *U. S. v Young, Supra*, *U. S. v Atkinson, Supra*, and *Chapman v California, Supra*. Applicant also cites many cases which shows counsel was ineffective for failing to preserve any issue at a full trial for appeal by way of contemporaneous objection. *Medlock v One 1985 Jeep Cherokee*, Vin 1JCWB7828FT12900, 322 S.C. 127, 134, 470 S.E. 2d 375, 378 (1996). To preserve an issue for appeal a contemporaneous objection is necessary and specific grounds must be clearly stated. *State v White*, 311 S. C. 289, 428 S.E. 2d 740 (CT App 1993); *State v Lynn* 277 S.C. 228, 226, 284 S. E. 2d 786, 789 (1981). Concluding defense counsel's failure to contemporaneously object did not preserve the issue for appellate review.

It is clear that Stand-by Counsel's failure to comply with the State Contemporaneous Objection Rule is the "cause" and "prejudice", see *Martinez v Ryan*, *Coleman v Thomas Supra*, *U. S. v Frady*, *Engle v. Isaac*, *State v Outlaw*, *U. S. v David*, *Adkins v Bordenkircher*, and many other cases support Applicant's stand. *Meadows v Leqursky*, 904 F 2d 903 (C A 4 W NA 1990), held it had to waive the State's prosecution requirements to meet the ends of justice, waived the contemporaneous objection requirements when the denial of constitutional rights deprives the defendant a fair trial.

Indeed the purpose of Stand-by Counsel is to help a defendant who intelligently, knowingly and willingly waived right to trial counsel and whom is not familiarized with the rules of procedure of a trial,

to direct, consult advise and inform him on when and how to protect his constitutional rights under due process of the law. If trial court instructs stand by to do nothing, see trial transcript page 13, then defendant is without such standby counsel and therefore denied the chance to test the prosecutions case to insure that the proceeding serves the function of adjudicating guilt or innocence while protecting the rights of the person charged. The Defendant required the guiding hand of Counsel and or standby counsel at every step in the proceeding against him. Without standby counsel's help though he be not guilty he faces the danger of conviction because he does not know how to establish his innocence, even more so important when Applicant's waiver of counsel was unintelligent, unknowing involuntary and through coercion and trial court instructing standby counsel to do nothing. This action of trial court and stand by counsel denied Applicant assistance of this critical stage in the trial and petitioner was abandon by standby counsel and failed to recognize meritorious issues, present meritorious defenses and or challenge testimony and evidence. Applicant raised trial counsel's in effectiveness to the trial courts, filed many complaints on counsel's untruthfulness, conflict of interest his concern that counsel was unprepared, unwilling and incompetent to represent him at trial thus the Applicant felt forced to proceed pro-se

Applicant explained to the Court that he had no faith in trial counsels ability to protect any of his rights at trial based on this on going conflict of interest with Counsel. This pre-trial unprofessional performance of counsel violated Applicant's due process to a fundamental fair proceeding and was the reason Applicant was forced and coerced to an involuntary, unknowing and unintelligent waiver. Applicant asserts it was solely because of standby counsel's failure to advise, suggest or inform Applicant on what, when why and how to object which is ineffective assistance of counsel that Applicant was denied a fair trial. It therefore was standby counsel's errors that were sufficiently egregious and prejudicial.

Applicant asserts that standby counsel's failure to advise, suggest or inform Applicant on what, when, why and how to object and comply with the State's contemporaneous objection rule was a complete abandonment at a critical state. This breach of duty and on going conflict of interest was

antagonistic to Applicant with serious prejudicial effects which forced Applicant to stand trial not knowing how to protect any trial rights or procedures.

This is Applicant's formal request to have his PCR Counsel sufficiently and adequately raise the following claims to the State Court, in compliance with the PCR Mandates of S. C. and State and Federal exclusion requirement.

ISSUES PRESENTED TO POST CONVICTION RELIEF COURT

1 Involuntary, unknowing, unintelligent waiver of Counsel

- A. Was the Waiver in compliance with due process of law.
- B. Does the record reflect threats, coercion or duress in this alleged waiver violation.
- C. Was the waiver based on ineffective assistance of plea counsel.
- D. Can Counsel's behavior before a plea or waiver, or which lead to the plea or waiver be considered under the Sixth Amendment.

2 Ineffective Assistance of counsel/trial counsel and standby counsel

- A. The record reflects conflict of interest existed with trial counsel and standby Counsel causing waiver to be involuntary and unintelligent.
- B. Was the waiver the product of ineffective assistance, coercion, or duress of standby counsel.
- C. Was standby counsel ineffective for failing to detect and preserve for appeal, involuntary unknowingly waiver of a Jackson v Denno hearing.
- D. Was counsel and standby counsel ineffective for failing to object and preserve for appeal involuntary, unknowingly and unintelligently made waiver of a Jury trial.
- E. Was counsel and stand by counsel ineffective for failing to request a lesser included charge
- F. Was trial counsel and standby counsel ineffective in failing to properly investigate the facts and the law of the case, failing to appreciate the meaning of applicable

laws and court proceeding

- G. Failing to object to the insufficiency of evidence to support a conviction when the verdict was read.
- H. Was trial counsel and standby counsel ineffective for failing to present Forensic specialist for Applicant's defense.
- I. Was trial counsel and standby counsel ineffective for failing to object to the Prosecutorial misconduct by way of misrepresenting the forensic evidence in to the Courts, fraud upon the court by official court officers of the State, presenting perjured testimony and false documentation to deliberately deceive the Courts

Applicant is requesting his PCR Counsel investigate, ascertain and elicit all of Applicants due process violation claims listed to insure that they are all properly raised and ruled on accordingly in compliance with Constitutional Standards to include SCRCP Rule 59(A) or (E) Motion. Respectfully request an appeal in any adverse decisions.

When an error "could" have been and was the subject of an objection at trial, the appellate Courts have three (3) possible standards of review:

- 1 Harmless beyond a reasonable doubt.
- 2 High probability of harmlessness
- 3 More probably than not harmless

An error is harmless if it is unimportant in relations to the whole and the verdict rendered was surely unattributed to the error. A reviewing Appellate Court need only conclude that the error claimed did preclude a defendant from receiving a fair trial. "It is important to have a trial free of those errors which might influence a verdict when the evidence on the issue of liability is so close that the jury igh reasonably return a different verdict.

The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative error analysis is to address that individually have found to be harmless it is not reversible. It analyses whether their

cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless, unless, on aggregate harmless determination can be made, collective error will mandate reversal, just as surely as will individual error that cannot be considered harmless. The harmless of cumulative error is determined by conducting the same inquiry as for individual error. Courts look to see whether the defendant's substantial rights were affected:

"An involuntary, unknowing and unintelligent waiver of a Constitutional rights and a total deprivation of effective assistance of Counsel at trial is not subject to the harmless error analysis". An involuntary waiver is such the infraction it can never be treated as harmless error.

The cumulative error defense provides relief to a party when a combination of errors insignificant by themselves has the effect of preventing the party from receiving a fair trial or proceeding and the cumulative effect of the errors affects the outcome of the trial or proceeding. An appellant must demonstrate more than error in order to qualify for reversal pursuant to the cumulative error doctrine. Rather he must show the errors adversely affected his right to a fair trial to qualify for reversal. Errors may combine to deprive an accused person of a fundamentally fair trial in violation of due process clause of the Constitution. In light of the cumulative affect of the errors assigned above, Applicant was denied a fundamentally fair trial or waiver of counsel. Cumulative errors can be noticed in this State.

Additionally, Applicant makes the following allegation against his Appellate Counsel's effectiveness.

Appellate Counsel was ineffective in failing to raise meritorious issues of involuntary, unknowing and unintelligent waiver of trial counsel, waiver of jury trial and ineffective assistance of counsel claim.

A. Appellate Counsel failed to adequately raise abuse of discretion on the trial Court for the above mentioned issues.

Applicant is alleging that appellate counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for Counsel's errors, the result of the

proceeding would have been different. Therefore because of Counsel's unreasonable standard of representation, Applicant was severely prejudiced because Applicant was denied a chance to raise meritorious issues. Counsel however can also deprive Applicant of the right to effective assistance, simply by failing to render adequate legal assistance. If Counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be ineffective. Counsel's errors resulted in actual and substantial disadvantage to the cause of Applicant's defense.

Applicant contends that the record does not contain any probative evidence to support the notion that waiver was knowingly and intelligently made or the standby counsel was effective in protecting Applicant's Constitutional rights. Counsel appointed to represent an indigent appellant ordinarily should consult with his client at least once to ascertain his client's desires with regards to the alleged trial errors which the appellant wishes to press because counsel has a duty to press arguments initiated by his client which may be arguable, even though counsel does not personally espouse them

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the Courts must examine the record to determine whether appellate counsel failed to present significant and obvious issues on appeal. Generally the presumption of effective assistance of counsel will be overcome when the alleged ignored issues that are clearly strong or meritorious issues. Conversely an appellate advocate may deliver deficient performance and prejudice a defendant by omitting a winner, even though counsel may have presented strong but unsuccessful claims on appeal.

Applicant has given federal notice to PCR Counsel, the State's PCR Courts and all of parties involved in the matter of the issues and Constitutional violations that he wanted adequately and sufficiently raised.

Applicant asserts that he was denied the defense and evidence in his trial to have witnesses testify. Further because this testimony will show applicant's innocence. It would be ineffective and a complete miscarriage of justice if PCR counsel does not investigate, ascertain and present this favorable evidence to the PCR Court for consideration.

RESPECTFULLY SUBMITTED ON BEHALF OF

APPLICANT, Trey Alexander Williams



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October 13, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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MAR 16 .

APPEAL FROM YORK COUNTY
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alison R. Lee, Circuit Court Judge

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MAR 16 2017

Appellate Case No. 2016-001553

Trey A. Williams #341036, Respondent,

S.C. SUPREME COURT

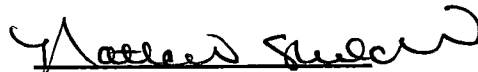
v.

State of South Carolina, Petitioner.

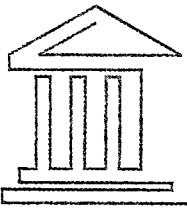
PROOF OF SERVICE

I certify that I have served Respondent's Motion to Supplement the Appendix on Justin J. Hunter with the Attorney General's Office by depositing a copy of it in the United States Mail, postage prepaid, on March 13, 2017 mailed to Post Office Box 11549, Columbia, South Carolina 29211-1549.

March 13, 2017



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March 13, 2017

Daniel E. Shearouse, Clerk
The Supreme Court of South Carolina
P.O. Box 11330
Columbia, SC 29211

Re.: Trey Williams v. State
2016-001553

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MAR 16 2017

S.C. SUPREME COURT

Dear Clerk Shearouse:

Please find enclosed the original and six copies of Respondent's Motion to Supplement Appendix on the above referenced case along with Proof of Service. Please contact me with any additional questions or concerns. Thank you.

Sincerely Yours,

Nathan Sheldon
The Law Office of Nathan J. Sheldon