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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)
KENNETH JAMES #261378)
Appellant,)
V.)
STATE OF SOUTH CAROLINA)
Respondent.)

IN THE SOUTH CAROLINA
SUPREME COURT

Appellate Case No:
2017-000807

MOTION AND
RULE 243(c), SCACR EXPLANATION

This matter comes before the Court by way of Motion to appeal the decision of the PCR Court filed March 3, 2017. Appellant's allegations alleged from first PCR case (2001-CP-40-3298). Now comes the Appellant, Kenneth James, pursuant to South Carolina Code of Law, Titles, 16-17 subsection [17-27-100];[17-27-90]; [17-27-80], alleging that he is being held in custody unlawfully for the following reason :

1. Ineffective Assistance of PCR Counsel.

PROCEDURAL HISTORY

The Appellant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. Appellant was indicted at the August 1999 term of the Richland County Grand Jury for two counts of Armed Robbery, Assault With Intent to Kill, two counts of Possession of a Firearm During Commission of a Violent Crime, two counts of Kidnapping, Criminal Sexual Conduct in the first degree (1999-GS-40-19103;-19023;-19104;-19105;-19107;-19108 19109;-19110). Appellant was represented on the charges by Douglas Strickler, Esquire and Rob Sneed, Esquire. A jury trial on the charges was held in September 1999 before the Honorable Costa M. Pleicones. The jury convicted the Appellant on all charges as

indicted. On September 24, 1999, Judge Pleicones sentenced Appellant to thirty years for the criminal sexual conduct charge, and a consecutive sentence of ten years confinement for one of the armed robbery counts, for a forty year imprisonment

Appellant appealed his conviction and sentence. The Appellant was represented on appeal by Appellate Defender Wanda H. Haile of the South Carolina Office of Appellate Defense. On September 13, 2000, counsel filed a Final Anders Brief of Appellate Counsel and Petition to be relieved as counsel. The South Carolina Court of Appeals, granted Appellate Counsel's petition to be relieved as counsel. Appellant then filed a pro se Brief, with the Court of Appeals on October 30, 2000, where he raised the following grounds for relief:

(1) Ineffective assistance of trial counsel for allowing the violation of Appellant's Sixth Amendment right to a speedy trial. The state held Applicant in jail for 993 days before calling his case to trial. Applicant filed a pro se speedy trial motion early 1999. At trial Applicant moved to dismiss the charges because the state failed to provide him a speedy trial. Trial judge made three significant factual findings: (1) Applicant wanted a speedy trial, (2) the delay was "horrendous," and (3) prosecution's justification for the delay was "not terribly well explained." Trial counsel failed to argue prejudice or cite United States Supreme Court precedent requiring dismissal.

(2) Trial counsel was ineffective for failing to object to "sleeping jurors" not being removed or questioned. Trial judge clearly stated on record that he himself had noticed one of the jurors had "dozed off a time or two..." It may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that." Trial counsel failed to object.

(3) Trial counsel was ineffective in failing to object to trial court's error in giving instructions which unconstitutionally diluted the state's burden of proof. Trial judge instructed the jury on the elements of aiding and abetting when Applicant was not indicted for this offense/charge, but was charged as the principal. Instructions impermissibly dilute the presumption of innocence.

(4) Trial counsel was ineffective for failing to object when

the state pushed to try Applicant under new armed robbery statute. Current armed robbery statute adds elements not in effect at the time the incident occurred. Applicant should have been tried under statute that was in effect when the offense occurred, trial counsel ineffective for not objecting. Indictments should've been quashed instead of amended. Trial counsel erred in not objecting to trial judge deleting from the indictments with his own pen.

(5) Trial judge erred in denying defense's motion to quash the indictments and dismiss charges due to state's violation of Rule 3(c). The state's violation of Rule 3(c) SCRCrimP, S.C. Const. Art. 1, Sec. 8, S.C. Const. Art. V, Sec. 4. The state failed to timely act on the arrest warrants-warrants issued 1996, indicted August 1999- The Solicitor failed to also file the indictments with the Clerk of Court. Also, state lacked subject matter jurisdiction by state's failure to comply

(6) Trial counsel was ineffective for failing to impeach state's witness, Dr. Stacey Smithson. The state described the attack on the victim as "vicious." Dr. Smithson corroborated these claims by stating that he found redness, abrasions and lacerations, ect. However, Dr. Smithson's written examination report states that there were no signs of trauma on any part of the victim's body.

(7) Trial judge erred in denying directed verdict.

(8) Trial counsel failed to adequately prepare for case..... by failing to obtain the assistance of experts.

(9) Trial Court lacked Subject Matter Jurisdiction due to prohibited practice of prosecutors appearing as sole witness before Grand Jury.

(10) Appellate Counsel Wanda H, Carter was ineffective in filing a frivolous brief on appeal. In her petition to be relieved as counsel, pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396(1967), counsel states she has thoroughly reviewed Applicant's lower court record, and in her opinion the record fails to demonstrate either preserved or other legally substantial issues to present to the court. However, transcript of trial proceedings and facts contained therein, will confirm that several arguably issues were preserved for appellate review.

The South Carolina Court of Appeals dismissed the appeal and affirmed the convictions, Unpublished Op. No.2001-UP-082 (filed February 6,2001), withdrawn and refiled March 21,2001.The remittitur was issued on April 4,2001.

STATE PCR PROCEEDINGS

2001-CP-40-03298

Appellant subsequently filed an application for Post-Conviction Relief on August 8, 2001, where he alleged he was being held unlawfully for the following reasons:

1. Ineffective assistance of Trial Counsel;
2. Ineffective assistance of Appellate Counsel;
3. Violation of Due Process: Speedy Trial.

The State filed its Return on March 26, 2002. An evidentiary hearing was convened on April 28, 2003, at the Richland County Courthouse. Appellant was present and represented by counsel T. Andrew Johnson, Esquire. The Respondent was represented by J. Hagood Hamilton, Jr., Esquire, of the South Carolina Attorney General's Office. Appellant testified on his own behalf. Also testifying was Appellant's former trial attorneys, Mr. D. Strickler and Mr. R. Sneed. On May 23, 2003, the Honorable James R. Barber issued an Order of Dismissal denying relief and finding that the issues raised by Appellant were without merit.

Appellant then appealed the decision made by the PCR court and filed a timely notice of appeal. After filing the timely notice of appeal, PCR counsel filed a Johnson petition to be relieved as counsel. Then, the Appellant again files another pro se Brief on "PCR Appeal" raising again, all the allegations that he raised in his first pro se brief.

The South Carolina Supreme Court issued an Order on February 16, 2005, dismissing the appeal and granting counsel's request to be relieved as counsel.

SECOND PCR APPLICATION 2015-CP-40-05186

In his second and current application for Post-conviction Relief the Appellant alleges that he is being held in custody

unlawfully for the following reasons:

1. Ineffective assistance of PCR Counsel.

The PCR judge failed to address Appellant's ineffective assistance of Appellate Counsel and PCR Counsel failed to file a Rule 59(e), SCRPC Motion to alter or amend the judgement as required by S.C.Code Ann. subsection 17-27-80 and Rule 52 (A) SCRPC. PCR Counsel failed to protect Appellant's rights pursuant to Rule 71.1(g), S.C.Code Ann. subsection 17-27-100; the right to seek Appellate review of the denial of Applicant's PCR application and violation of Applicant's 14th. Amendment, Procedural Due Process Rights.

Appellant filed his second PCR application August 25, 2015.

Respondent, represented by J. Clayton Mitchell, Assistant Attorney General, of the South Carolina Attorney General's Office, made it's Return on May 17, 2016, requesting that the Application be summarily dismissed based upon the expiration of the statute of limitations, the presumption against successive PCR application and raises an issue not cognizable in PCR.

The matter was before the Honorable Alison Renee Lee, who issued a Conditional Order of Dismissal signed May 20, 2016 and filed May 23, 2016, provisionally denying and dismissing the action, while giving the Applicant twenty (20) days from the date of service of said Order in which to show why the dismissal should not become final. The Appellant then filed a document titled "Response to Return and Motion to Dismiss," on June 16, 2016, in which Appellant argues his allegations in his second PCR application were not raised or were not properly raised in the previous application because of PCR court errors, PCR counsel's errors and statute violations arose at and after the Appellant's first PCR hearing.

After reviewing all pleadings, the Honorable Deandrea G. Benjamin, issued a Final Order of Dismissal, finding that "for the reasons set forth in the Court's Conditional Order of Dis-

missal, the application for PCR is hereby denied and dismissed with prejudice. This Court hereby advises the Applicant that he must file and serve a Notice of Appeal within thirty (30) days of the service of this Order to secure appellate review," signed March 1, 2017 and filed March 3, 2017.

The Appellant then filed and served a Notice of Appeal, signed April 3, 2017. Daniel E. Shearouse, Clerk Of Court for the Supreme Court of South Carolina, issued a letter/Notice to the Appellant, signed and dated, April 6, 2017, notifying Appellant that his case has been assigned the appellate case number 2017-000807. Additionally, the notice advised the Appellant, that since the order of the circuit court determined that this action is barred as being successive and as being untimely under the statute of limitations, Appellant must provide the written explanation required by Rule 243(c), SCACR, WITHIN twenty (20) days of the date of this letter.

This Motion, Appellant's explanation as required by Rule 243(c)/Motion for Austin Review, timely follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the PCR Court's Final Order of Dismissal, dated March 1, 2017, the Appellant would show this Court:

Appellant asserts that he received ineffective assistance of PCR Counsel in that after the PCR judge's Order failed to address Appellant's claim of ineffective assistance of Appellate Counsel where Appellate Counsel failed (among several things) to raise arguable issues on direct appeal, specifically, Appellant's ineffective-assistance-of-trial-counsel, where trial counsels failed to:

(1) object to sleeping jurors not being removed or questioned and failing to object when the trial judge addressed the issue. (See App.p.1328 line 20- p.1329 line 7). (See also, Attachment A., of this motion, which provides legal citations and sufficient detailed factual argument that shows the merit of this specific claim). And (2) failed to adequately challenge the quashment of the indictment instead of amended. Amendment changed the nature of the offense charged. Therefore, trial counsel erred in not objecting to the judge deleting from the indictments with his own pen. (See, App. p.104 line 16 -p.111 line 18; p.1410 line 25; specifically, p.1413 line 14-p.1414 line 16). (However, by allowing the trial judge to delete them in his own pen, somehow resulted in a serious "non-deleted" error, because the indictments still read out completely. The erroneous "or while alleging" language remains. (See Original Transcript-Record On Appeal, p.1362-63 and p.1380-81. Additionally, the Appellant contends that it's highly likely that the jury viewed the defective indictments during their deliberations.)(See, also

Attachment B., of this motion, which provides legal citations and sufficient detailed factual argument that shows the merit of this specific claim).

The PCR judge failed to address the claim of ineffective assistance of appellate counsel and PCR counsel failed to file a Rule 59(e), SCRCP Motion to alter or amend the judgement as required by S. Code Ann. § 17-27-80 and Rule 52 (A) SCRCP.

PCR Counsel failed to protect Appellant's rights pursuant to Rule 71.1(g), S.C. Code Ann. § 17-27-100; the right to seek appellate review of the denial of Applicant's PCR application and violation Appellant's 14th. Amendment Procedural Due Process Rights.

In Garner v. State, 636 S.E.2d 860, the Supreme Court held that Order granting Post-Conviction Relief that did not address all claims was not final Order subject to certiorari review: Appellate Court Rule 227(A)(17-27-80) Pruitt v. State, 310 S.C. 254, 423 S.E.2d 127.

An Order in a post-conviction matter, which does not include specific findings of facts and conclusions of laws relating to each issue presented, but instead dismisses some of the issues without prejudice to them being raised in a future PCR proceeding does not constitute a final order or judgement and therefore, is not reviewable by Writ of Certiorari. Rule on all of the issues raised in the application in a final order without leaving some issues to be determined at a later date; see, McCray v. State, 408 S E.2d 241 (remand was required on appeal from denial of post-conviction court dismissed movant's ineffective assistance of counsel allegations without making findings of facts on specific

allegations raised, violating statute and precluding Appellate Review. Code 1976, § 17-27-80; U.S.C.A. Const. Amend. 6.

The Appellant contends the same court findings would apply here.

EXPLANATION AS REQUIRED BY RULE 243(c) SCACR.

Now the Final Order of Dismissal states three reasons for dismissing the Appellant's application: First (1) that it is successive in two ways, the first way being that, the Appellant failed to establish sufficient reason why he could not have raised his current allegations in his previous application for post-conviction relief, Therefore, he failed to meet the burden imposed upon him by Land v. State, 274 S.C.243, 262 S.E.2d 735 (1980) S.C.Code Ann. § 17-27-90 (1985) which states:

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

Under this statute, successive Post-Conviction Relief applications are forbidden unless an Applicant can point to a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. Aice v. State, 305 S.C.448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised... in the previous application." [Emphasis in original]. Id., 305 S.C. at 450. 409 S.E.2d at 394. If the Applicant could have raised these allegations in a previous applica-

tion, the the Applicant may not raise those grounds in successive applications. Id. The Applicant bears the burden of showing that the allegations could not have been raised previously. Land, 274 S.C. 243 262 S.E.2d 735 (1980).

However, the Appellant contends ~~he did~~ and can demonstrate "sufficient reason" why his allegations were not raised or were not properly raised in his first application. The Appellant's ineffective assistance of Appellate Counsel allegation **was raised** in the Appellant's original PCR application, (see, Original PCR application, question 9.b. and App.p.1412-p.1419) but it was not raised adequately by his PCR Counsel at the hearing, and the PCR Judge failed to address this allegation, (see, App.p.1422-1427).

Additionally, the Appellant's allegations of PCR court errors, PCR Counsel's errors, and the statute violations arose **AT AND AFTER** THE Appellant's first PCR hearing. Therefore, there was no possible for the Appellant to raise those allegations IN the previous application. There was no way to raise a claim before it actually occurred. Accordingly, Appellant's second application cannot be dismissed as successive.

The Appellant contends that the same court findings of reverse and remand/ new hearing found in Pruitt, Garner, and McCray, are completely applicable to his case, since his PCR counsel's incompetency, along with the PCR court errors and statute violations are identical to those cases. As demonstrated above, the PCR judge in the Appellant's first PCR hearing failed to address all of the Appellant's allegations as required, and PCR Counsel was ineffective assistance in failing to file a Rule 59(e) Motion to alter or amend the court's Order. Therefore, these

errors by PCR Counsel and the PCR judge prejudiced the Appellant because all of his allegations were not addressed, thus, under Garner, the Appellant never received a Final Order or judgement subject to Certiorari Review; Appellate Court Rule 227 (A)(17-27-80), Pruitt, supra. And PCR Counsel's failure prevented the Appellant from his right to obtain review of a meritorious ineffective-assistance-of-trial-counsel claim. Furthermore, since the Appellant did not knowingly and intelligently waive his right to Appellate Review, PCR Counsel failed to protect Appellant's rights pursuant to S.C.Code Ann.§ 17-27-100; right to seek Appellate Review of the denial of his first PCR application and violation of his 14th. Amendment Procedural Due Process Rights.

Additionally, see, Odom v. State, 523 S.E.2d 753 (S.C.1999) and Austin v. State, 305 S.C.453, 409 S.E.2d 395(1991). Under Austin, a Post-Conviction Relief applicant is entitled to an appeal if the Post-Conviction Relief judge affirmately finds either: (1) the Applicant requested and was denied an opportunity to seek Appellate Review; or (2) the right to Appellate Review of a previous Post-Conviction Relief Order was not knowingly and intelligently waived. Code 1976, § 17-27-90; Rules Civ. Proc., Rule 71.1(g); King v. State, 308 S.C.348, 417 S.E.2d 868 (1992).

INEFFECTIVE ASSISTANCE OF PCR COUNSEL

Now, (2), the second reason the Final Order of Dismissal states that the application is successive, is that; "...the Applicant's current application for Post-Conviction Relief should be

dismissed because it raises a claim that is not proper for Post-Conviction Relief. The Respondent submits that the Applicant's contention that he received ineffective assistance of counsel on his prior Post-Conviction Relief application is not a ground for relief and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. Pennsylvania v. Finley, 481 U.S.551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state Post-Conviction Relief actions. Coleman v. Thompson, 501 U.S.722 (1991).

However, Appellant's Austin Appeal (his 2nd. PCR application) is attacking the PCR procedure used in his case, not the merits of his sentence. So, as a method of effectuating the purpose of Rule 71.1(g) SCRCF and enforcing Austin's entitlement to a PCR proceeding the Court held Austin could attack his PCR Counsel as ineffective by petition for a Writ of Certiorari. *Id.* The same findings would also apply to the Appellant's case here.

Furthermore, in Turner v. State, 682 S.E.2d 792 (2009) the court found, (our holding today does not alter our PCR jurisprudence regarding claims of ineffective assistance of PCR Counsel, nor should it be interpreted as creating additional rights to PCR applicants. Indeed, this court has granted relief based on "ineffective assistance of PCR counsel" despite the fact that "[R]ight" to PCR counsel arises from Rule 71.1 SCRCF, and not from the Constitution. See, Washington v. State, 478 S.E.2d 833 (1996) (Granting PCR where the defendant alleged ineffective assistance of PCR Counsel do to so many procedural irregularities)

Also, the Appellant contends that the "...unless the court

finds..." section under S.C.Code Ann.§ 17-27-90, is extremely vital to the understanding of Appellant's merit to his ineffective assistance of PCR counsel allegation. PCR Counsel inadequately raised the ineffective assistance of Appellate Counsel allegation, in that, trial counsel Robert Sneed sent Appellate Counsel a six page letter, detailing 20 to 30 significant issues that Appellate Counsel could and should have raised on direct appeal for the Appellant (see, App.p.1414 lines 13-16; p.1417 line 24-p.1418 line 5).

But instead of boring out and explaining to the court what these 20 to 30 significant issues were and exactly why Appellate Counsel was ineffective for not raising them, PCR Counsel repeatedly focused on asking trial counsel, "what else could you have done?" once the case reached the appellate stage, or "what other duties do you have, if any, [after] handing a case over to Appellate Defense." PCR Counsel failed to truly focus on and address what Appellate Counsel did or did not do, that resulted in the Appellant's ineffective assistance of Appellate Counsel allegation. PCR Counsel failed to adequately argue, raise, and correctly couch and frame the Appellant's ineffective assistance of Appellate Counsel allegation.

And although PCR Counsel did ask trial counsel why he believed the quashment of the indictments issue was so important (App.p.1413 and p.1414), PCR Counsel failed to explain to the court why Appellate Counsel was ineffective in not raising this issue on appeal. Trial Counsel even expressed that he did not understand how Appellate Counsel was not at the hearing to (defend against or) discuss this issue and that (to trial counsel) PCR

Counsel was unaware of how important this specific issue was, (App.p.1412 lines 1-14). Also, although PCR Counsel did "mention" that a motion to severance was one of the 20 to 30 issues (App.p. 1417), however, the Appellant asserts that ineffective assistance of trial counsel claim on the Constitutional violation that a juror was sleeping during trial--an issue that was ignored by PCR Counsel, but was "obvious on the record" (App.p.1328-29)--clearly stronger and carries more weight than a mere conflict of interest issue. Thus, a complete picture of that issue should have been raised, explained and argued over mentioning the severance issue. (See, Matire v. Wainwright, 811 F.2d 1430, 1438-39 (11th Cir.1987) For example, the eleventh circuit found ineffective assistance of counsel when Appellate Counsel **ignored** "a substantial, meritorious Fifth Amendment issue that was "obvious on the record" and on which trial counsel had expressly objected. Id. at 1438. Similarly Bell's appellate counsel **omitted** to brief a significant meritorious issue that was obvious on the record and instead pursued issues that the appellate court found lacked merit. cf. Gray, 800 F.2d at 646; Bell v. Jarvis, U.S.Court of Appeal, Fourth Circuit. December 2, 1999 198 F.3d 432.

Appellant contends that these errors by PCR Counsel are compounded by the fact that the PCR judge failed to directly address Appellant's ineffective assistance of Appellate Counsel allegation.

Here, Appellant asserts that PCR Counsel failed to adequately raise and argue before the court that Appellate Counsel was ineffective for failing to raise, at the very least, the Appellant's two most vital ineffective-assistance-of-trial-counsel claims; (1) trial counsel was ineffective for failing to object to sleeping

jurors not being removed or questioned, and (2) trial counsel fail to adequately challenge the quashment of the armed robbery indictments instead of amended. These two claims were ignored and should have been raised on Direct Appeal by Appellate Counsel, and also adequately by PCR Counsel.

The Appellant submits that, pursuant to Rule 71.1(g); subsection 17-27-100; and under the factual finding in Odom, his PCR Counsel's ineffectiveness prevented him from his right to seek appellate review of the denial of his first PCR application and violation of his 14th Amendment Procedural Due Process Rights. Which in turn would establish cause for any procedural default the Appellant would've incurred in failing to raise ineffective assistance of trial counsel claim in first Post-Conviction Relief proceeding.

STATUTE OF LIMITATIONS

And (3), lastly, the third reason the Final Order of Dismissal states that the Appellant's second application for Post-Conviction Relief should be dismissed for failing to comply with the filing procedures of the Uniform Post-Conviction Procedure Act S.C.Code Ann.§ 17-27-10 to 160 (Supp.2003). S.C.Code Ann.§ 17-27-45(A) reads as follows: An application for relief filed pursuant to this chapter must be filled 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.(Citing, Peloquin v. State, 321 S.C.468, 469 S.E.2d 606 (1996)).

However, the Appellant can show that the one-year statute of limitation does not apply to his Austin, "belated appeal". Because, as the Court has Ruled in Odom v. State, 337 S.C.256,523

S.E.2d 753 (1991); that the one-year statute of limitations required by S.C. Code Ann. § 17-27-45(A), does not apply to Austin appeals. Austin appeals do not have to be filed within the one-year statute of limitations because they are belated appeals intended to correct unjust procedural defects.

In the current case, the Appellant contends that he was denied his right to appeal, which was a procedural error preventing his fair "bite" at the apple. Austin's policy would be frustrated if the one-year statute of limitation applied to procedural errors made by the PCR courts. Austin is intended to act as an applicant's final safeguard against unjust procedural errors, even errors in the application of the statute of limitations. And as discussed above, the Appellant's Austin appeal is attacking the PCR procedure used in his case, not the merits of his sentence, so the one-year statute of limitations S.C. Code Ann. § 17-27-45(A) is not applicable. Odom, supra. (See also, King, 308 S.C. at 349, 417 S.E.2d at 868 (outlining the procedure used to seek review pursuant to Austin v. State.) (Wicker v. State, 310 S.C.8, 425 S.E.2d 25 (1992)).

RIGHT TO ASSISTANCE OF COUNSEL IN APPEAL

Finally, the Appellant contends that, under the Post-Conviction Relief Rules, an applicant is entitled to a full adjudication on the merits of the original petition, or "one bite at the apple" this bite include an applicant's right to appeal the denial of a Post-Conviction Relief application, [and] the right to **assistance of counsel** in that appeal. Rule Civ. Proc., Rule 71.1(g); Aice v. State, 305 S.C. at 448, 409 S.E.2d at 392 (1991).

The Appellant contends that he never received a full procedural "bite at the apple," because (1) the PCR judge failed to address and make a specific finding of facts and conclusions of laws relating to each and every issue presented. Therefore, the Appellant was not given a full adjudication on the merits of his claim of ineffective assistance of Appellate Counsel, And (2), Appellant was prevented from seeking any review of the denial of his PCR application, because of these errors, and (3) Appellant was denied his right to assistance of counsel in his PCR appeal.

Appellant's PCR Counsel stated in two letters to the Appellant, -the first dated May 21, 2003-; "since you claimed appellate defense was ineffective, they are conflicted out and I have no idea who is going to handle your appeal, besides me." And in the second, -dated June 5, 2003, -"Once we file a notice of intent to appeal (as you told me to do) the circuit court is divested of jurisdiction. I realize you take exception to the Appellate Counsel filing an Anders's Brief, but I am not aware of any errors the judge made, so frankly I am going to have to file a Johnson Appeal which is the PCR equivalent to an Anders Brief. That's why I was asking you if you were going to retain Appellate Counsel or if you intended to proceed pro se." (See, p.21-22 of this motion, for letters from Appellant's PCR Counsel).

Appellant's PCR counsel only filed "a notice of intent to appeal", for the Appellant and the filed a Johnson v. State, petition, to be relieved as counsel. Appellant's PCR counsel was further ineffective in failing to **assist** the Appellant in his PCR appeal, as required under Rule Civ. Proc., Rule 71.1 (g) and Aice, supra, Austin, supra.

Under the PCR Rules, a court will appoint an attorney to a

PCR Applicant if: (1) an evidentiary hearing is required; or (2) the Applicant is indigent and wants to file an appeal. See Whitehead v. State, 310 S.C. 532, 426 S.E.2d 315 (1992); Rule 71.1 (d), (g) S.C.R.C.P.

Also, in [Aice v. State, 409 S.E.2d 392] The Supreme Court determined that claims of ineffective assistance of (PCR) counsel is not grounds for a successive (PCR) application. The Gravamen of applicant's assertions emanates from (PCR) counsel failure to couch and frame the claims. Applicant have a right to have crucial issues considered on collateral review effectively renders the already narrowed provision for PCR under South Carolina Rules Of Civil Procedure Rule 71.1(d) superficial remedy and denys applicant his equal protection rights under the Federal and State Constitutions. Pursuant to [Austin v. State, 305 S.C. 453]. An Applicant has a right to an appellate counsel's **assistance** in seeking review of the denial of (PCR) proceeding.

Thus, the Appellant was prejudiced by PCR Counsel's errors, and the PCR Court's failure to appoint an attorney, in that he was forced to reseach legal citations, creat an argument, present a Brief, and file his PCR appeal without the assistance of counsel. Raising in a pro se Brief, all his allegations, [including] his substantial ineffective-assistance-of-trial-counsel claims, that both Appellate Counsel, Wanda H. Carter, and PCR Counsel, Andrew Johnson, **ignored** and/or **failed** to adequately raise on the Appellant's behalf. Aice, supra.

Appellant asserts, as shown by PCR counsel's letters, PCR Counsel only filed "a notice of intent to appeal", counsel **failed** to help the Appellant raise arguments/brief on PCR appeal until

relieved, nor did PCR Counsel assist his indigent Applicant in obtaining representation by the Office of Appellate Defense. Rule 71.1(g) SCRCF, expressly provides that, if the applicant wishes to seek appellate review, PCR Counsel must file a Notice of Appeal, continue representation until relieved, and assist an indigent applicant in obtaining representation by the Office of Appellate Defense.

The Appellant contends that his allegations, and errors here, mirrors those of the court findings held in Odom, that; "...In order to effectuate an applicant's right to appeal a PCR dismissal, this Court will require PCR judges to advise pro se applicants of both their right to appeal [and] also their right to appellate counsel [when] their PCR applications are summarily dismissed."

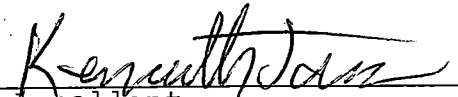
After the dismissal of his first PCR application, the Appellant was never appointed counsel to assist him in his appeal, neither was he informed of his right to appellate counsel's assistance, only that he could proceed pro se. (See, page 23 of this motion, for Clerk of Court's letter to the Appellant, which only advises him of his right to pursue his appeal pro se.

The Appellant contends that he is entitled to a belated appeal in light of the facts demonstrated herein.

WHEREFORE, from the facts demonstrated above and pursuant to S.C. Code Ann. § 17-27-100; 17-27-90, and the Court findings held in Odom v. State, and Austin v. State, the Appellant respectfully asks that this Court GRANT the Appellant's MOTION for a belated appeal, and that the PCR Court's Final Order of Dismissal be Reversed and Remanded.

Respectfully Submitted,

Date: May 18 2017,
Kershaw, South Carolina


Appellant,
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Wednesday, May 21, 2003

RECEIVED

MAY 24 2017

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S.C. SUPREME COURT

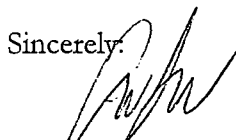
Re: Your PCR

Dear Mr. James:

I received your flow-chart on the various rules of procedure. I am very impressed at the level of detail you put into this. However, the key is that the court did not believe that officer Thomas, who is a police officer, acted as a solicitor. Officers testify frequently at grand jury proceedings. To argue he acted as a solicitor was a stretch, and the judge did not agree. That was the main argument regarding the grand jury proceeding itself. I have no doubt that there were no circumstances sufficient to allow us to prevail on any of the arguments I see on the notes you sent me.

Again, you did very well at your hearing, but the judge just did not agree with us. Sometimes when you do your best, and put up your best case, the judge disagrees. Since you claimed appellate defense was ineffective, they are conflicted out and I have no idea who is going to handle your appeal, besides me.

Sincerely,



ANDREW JOHNSON, ESQUIRE
andrew.johnson@scbar.org

TAJ

Enclosures: As indicated

CC: File

Member-
Association of Trial Lawyers of America
South Carolina Trial Lawyer's Association
Association of South Carolina Claimant Attorneys for Workers' Compensation

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Thursday, June 05, 2003

Kenneth James, 261378

Lieber CI, Dorm CB0025A

136 Wilborn Avenue

Ridgeville, SC 29472

Re: Your PCR

Dear Mr. James:

I completely disagree with your position. We really are jousting at windmills with the argument that the police officer acted as a solicitor by testifying at your grand jury hearing. There is no way a court is going to agree with you. Officers testify frequently at grand jury proceedings. Police officers are not solicitors. Imagine how the grand jury system would change if the court agreed with you. . . officers could no longer testify in grand jury proceedings. . . Just because the police officer opposed you doesn't mean he acted as a solicitor. The argument actually borders on silliness.

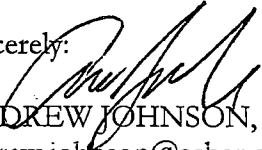
I won't forward your materials to Judge Barber since there is no reason to do so. Once we file a notice of intent to appeal (as you told me to do) the circuit court is divested of jurisdiction.

I realize you take exception to the appellate counsel filing an Anders brief, but I am not aware of any errors the Judge made, so frankly I am going to have to file a Johnson appeal, which is the PCR equivalent to an Anders brief. That is why I was asking you if you were going to retain appellate counsel or if you intended to proceed *pro se*.

I understand you take exception to the indictment not being properly filed, but this issue was not raised at trial so it will not be raised on appeal.

Let me know whether you wish for me to handle the appeal or you wish to have me relieved and new counsel appointed to handle it.

Sincerely:

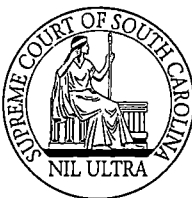

ANDREW JOHNSON, ESQUIRE
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TAJ

Enclosures: As indicated

CC: File

Member-
Association of Trial Lawyers of America
South Carolina Trial Lawyer's Association
Association of South Carolina Claimant Attorneys for Workers' Compensation



The Supreme Court of South Carolina

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January 28, 2004

Kenneth James #261378 - Dorm EA 31-A
Lieber C I - Dorm EA 31-A
P. O. Box 205
Ridgeville, SC 29472


Re: James, Kenneth v. The State

Dear Mr. James:

Your counsel has submitted a Petition for Writ of Certiorari indicating that this appeal is without merit and moves to be relieved as your counsel. Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988). The records of this Court reflect that counsel served you with a copy of the Petition and Appendix on January 28, 2004.

→ You may, within forty-five (45) days of the date of this letter, file with this Court a pro se response to the Petition filed by your counsel. In this response, you may raise and argue any issues you believe the Court should consider in this appeal. Upon receipt of your pro se response or the expiration of forty-five (45) days, the matter will be submitted to the Court for its consideration.

Very truly yours,



CLERK

DES/jj

cc: Office of Appellate Defense
T. Andrew Johnson, Esquire
Assistant Attorney General J. Hagood Hamilton

ATTACHMENT A.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel Wanda H. Carter was ineffective in failing to raise ineffective assistance of trial counsel for failing to object to sleeping jurors, not being removed or questioned and failing to object when the trial judge addressed the issue.

During trial proceedings after the jury instructions were given before deliberations, the trial judge explained that he had sent all 13 jurors back:

Court: Now, the reason I sent all 13 of them back is because I noticed one of the jurors had dozed a time or two. I do not think that that juror — it did not amount to a *State v. Hurd* inquiry as far as I am concerned. I think that — I don't think that he was dozing. I think it may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that.

Mr. Gasser: We'd leave it to this court's discretion.

Mr. Strickland: I've been resting my eyes off and on this entire week your honor.

Court: Okay, Mr. Shuper.

Mr. Shuper: No objection your honor.

(App.p.1328, line 1-p.1329 line 7.)

In *Hurd*, the court held that after noticing that juror had nodded off during jury charge in criminal trial, trial judge was required to either determine whether juror was in fact asleep, recharge entire jury or replace juror, and trial judge failure to do so constitutes reversible error. See, *State v. Hurd*, 325 S.C. 384, 480 S.E.2d 94 (1996).

Here, the record shows that Judge Pleicones initially found as a fact that he did "...noticed one of the jurors had dozed [off] a time or two." Therefore Appellant asserts that under *Hurd*, after noticing that juror had nodded off, the trial judge was required to do a factual determination whether

juror was in fact asleep, or replace the juror and trial judge's failure to do so constituted reversible error. The trial judge abused his discretion, and trial counsel was ineffective for not objecting.

In criminal cases, "the right of trial by jury shall be preserved inviolate." S.C. Const. Art. 1 § 14. See also, U.S. Const. Art. 3 § 2 and Amend. 6. A "defendant has a constitutional right to be tried by competent jurors," which implies a tribunal both impartial and mentally competent to afford a hearing." Tanner v. United States, 483 U.S. 107, 134, 107 S.Ct. 2739, 2755, 97 L.Ed.2d 90 (1987) (Marshal, J. dissenting) (citing Jordan v. Massachusetts, 225 U.S. 167, 32 S.Ct. 651, 56 L.Ed. 1038 (1912)) Consistent with these principles, "A juror who has not heard all of the evidence in the case or the court's instructions as to the applicable principles of law is grossly unqualified to render a verdict." Peoples v. Valerio, 141 A.D.2d 585, 529 N.Y.S. 2d 350, 351 (1988).

Now, as demonstrated above by the Appellant, there was evidence provided by the record, that does show that trial judge did indeed noticed that at least one juror (Appellant claims there were 3 jurors that) "had dozed a time two." And although the trial judge stated: "I think it may have been a classic case of resting his eyes," this statement under Hurd, was not a factual determination as to whether juror was in fact asleep, in light of the trial court's failure to question the juror. Thus Appellant asserts that in the absence of any questioning of the juror(s), the trial judge's statement "I think ...it may have been..." was only an assumption or speculation to the juror(s) attentiveness, state of mind and competency. A violation of Appellant's U.S. Const. Right Art. 3 § 2, Amend. 6... A "defendant has a constitutional right to be tried by [competent] jurors," which implies a tribunal both impartial and [mentally competent] be afford a hearing." Tanner, *supra*, Jordan, *supra*.

In addition see, e.g. A.G. Barnett, Annotation, inattention of Juror from sleepiness or other cause as Ground for Reversal or New Trial, 88 A.L.R.2d 1275 (1963). In a number of cases where the appellate courts affirmed trial judges even though they did not replace juror who allegedly fell asleep, the trial judge questioned the juror as to whether he was attentive, or in cases involving

instructions, recharged the entire jury. *Id.* Thus, we hold that "it is incumbent upon the trial court to conduct a probing and tactful inquiry to determine whether a sworn juror is unqualified," and "the court must not speculate...but must ascertain the juror's state of mind and must place reasons for excusing or retaining the juror on the record," Valerio, 529 N.Y.S.2d at 351. State v. Reevey, 159 N.J. Super 130, 387 A.2d 381 (App.Div(1978 Cf. State v. Holland, 261 S.C. 488, 201 S.E.2d 118 (1973) (stating that "[i]t is the duty of the trial judge to assure himself that each and every prospective juror is unbiased, fair and impartial").

Here, Appellant contends, it is clear that judge Pleicones was not sure himself that the juror(s) was unbiased, fair, impartial and mentally competent to afford a hearing, by the statements that; (1) he noticed, juror had dozed off repeatedly" a time or two," (2) "I think ... it may have been a classic case of resting his eyes. But I'm here for comment if anybody wants to make a comment on that." And (3) also from the fact that he made an issue of sending all 13 jurors back for deliberation.

Here, the trial judge failed to conduct a probing and tactful inquiry on the sleeping juror(s) to determine if they were qualified or unqualified, thus being left to only Speculate to the juror(s) state of mind. And trial counsel was ineffective for failing to object, especially when the trial judge asked if counsel had any comment on the matter. Trial counsel failed to safeguard Appellant's Constitutional Rights by failing to object and allowing the Appellant to be tried and convicted by jurors who had not heard all the facts of the case because they were asleep and were unqualified and incompetent to render a verdict, and by a trial judge who, under Hurd, Valerio and Holland, failed to do his duty and assure himself [by] questioning the juror(s), to conduct a factual determination whether juror(s) was in fact qualified or unqualified and competent.

By failing to object to the sleeping juror(s), trial counsel was ineffective because his performance fell below the standard of objective reasonableness for attorneys, and this resulted in (1), prejudice to Appellant because he was tried by unqualified and incompetent jurors, which

negatively affected the outcome of the case. And (2) trial counsel's error prejudiced Appellant because there's a reasonable probability that but for counsel's error, he may not have been convicted had this juror(s) been removed or questioned as required. (See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984) (establishing federal standard for ineffective assistance of counsel). Williams v. Taylor, 529 U.S. 362, 390-91, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389, 416 (2000) (holding that analysis of the prejudice prong should focus solely on whether there was a reasonable probability that but for counsel's errors, the result of the proceeding would have been different).

Therefore, in light of these facts, above Appellant contends that trial counsel's error played a serious role in or had a "substantial and injurious effect" on the jury's decision-making process, which negatively affected the outcome of Appellant's case. In Brecht, the Supreme Court held that errors are not harmless when they have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 133 S.Ct. 1710, 1722, 123 L.Ed.2d 353, 373 (1993) (internal citations omitted). Also, See United States v. Doninquez Benitez, 542 U.S. 74, 82n. 7, 124 S.Ct. 2333, 2339n. 7, 159 L.Ed.2d 157, 167n. 7 (2004) holding that using the Brecht standard means that the government has "the burden of showing that constitutional trial error is harmless". Sanders v. Cotton, 398 F.3d 572, 582 (7th Cir. 2005) (holding that the harmless error rule was waived because the state did not raise it in district court).

Further, the Appellant has a fundamental constitutional right to be tried by "competent" jurors, Tanner, supra, and he was not. Therefore, Appellant contends that because of the seriousness and nature of trial error, any alleged default of a state procedural rule is not an adequate reason to deny Appellant a belated Appeal on a constitutionally meritorious ineffective assistance of trial counsel claim. Appellant contends that the state rule is unfair and frustrates (interferes with) the enforcement of his federal rights, and therefore, it is not an adequate reason to bar review of his claim (see, Hoffman v. Arave, 236 F.3d 523, 531 (9th Cir. 2001) ("[I]f a state procedural rule

frustrates the exercise of a federal right, the rule is 'inadequate* to preclude federal courts from reviewing the merits of a federal claim"); Jackson v. Shanks, 143 F.3d 1313, 1318-19 (10th Cir. 1998) (determining the state procedural rule that claims not raised on direct appeal are procedurally barred cannot be applied to ineffective assistance of counsel claims because doing so would "deprive [petitioner] of any meaningful review of the ineffective assistance of counsel claim").

Here, Appellant's claim(s) are claims of ineffective assistance of ^{trial}counsel, and therefore procedural bar cannot apply, (see, e.g. Murray v. Carrier, 477, U.S.478, 106 S.Ct. 2639, 91 L.Ed.2d 379 (1986) (holding that a habeas petitioner may avoid procedural default by showing that counsel's performance was [constitutionally ineffective]. Also, for example, in Kimmelman v. Morrison, 477 U.S. 365, 384-865 106 S.Ct. 2587-88, 91 L.Ed2d 305, 325-26) the court refused to rule on the defendant's motion to suppress evidence because counsel's motion was untimely. The defendant nonetheless ultimately obtained a hearing on the merits of the suppression motion by raising a claim that his trial counsel was ineffective for failing to make a timely suppression motion.

Additionally, Appellant would also argue that state procedural rule is not "independent" of federal law. The state law is intertwined or connected with federal law, and not entirely separate from federal law (Ake v. Oklahoma, 470 U.S. 68, 74-75, 105 S.Ct. 1087, 1092, 84 L.Ed.2d 53, 60-61 (1985); see also, Bryd v. Scott, 45 F.3d 876, 880 (5th Cir. 1994) (Finding that state court decision was "intertwined with federal law, and did not express clearly that its decision was based on state procedural grounds"). If judges have to necessarily answer questions about federal law in order to decide the question of state law, then the state law is intertwined or connected with federal law. For example, if the state procedural rule about timeliness says that when fundamental or constitutional errors are made the claim is not considered untimely and can be reviewed, then the state court judges have to decide questions of federal law — constitutional issue — before deciding if the state procedural rule applied to the case.

Appellant contends, since the trial error here is a fundamental constitutional error, then the

state court would have to answer questions about federal law in order to decide the question of state law. See, LaCrosse v. Kernan, 244 F.3d 702, 706-07 (9th Cir. 2001) (holding that the state's "untimeliness" rule did not constitute "independent" state grounds because at the time Petitioner defaulted his claim, the rule had a "fundamental constitutional: error exception" that involved a ruling on federal law"). Also see, Jackson v. Leonardo, 162 F.2d. 81, 84-87 (2d Cir. 1998). In Jackson, the court of appeals held that the defendant's double jeopardy claim was procedurally barred, but granted relief on the defendant's claim that his appellate counsel was ineffective for failing to raise the double jeopardy claim. Here, the Appellant contends that he should also be granted relief/belated Appeal, because both his trial counsel, appellate counsel and PCR counsel were ineffective for not objecting to and/or raising Appellant's claim(s).

Appellate counsel's brief was only a dry summary of Appellant's case (see Tr. p. 1363-p. 1365) the brief contained absolutely no reference to evidence or to Trial Counsel's motion or objections, which shows that Appellate counsel failed to be active advocate for Appellant, (see People v. Stokes, 95 N.Y.2d 633, 638-39, 744 N.E.2d 1153, 1156, 722 N.Y.S.2d 217,220 (2001)(finding defendant's right to appellate counsel was not adequately safeguarded because the brief submitted by appellate counsel contained no reference to the evidence or to defense counsel's objections at trial and made clear that counsel did not act like an advocate on behalf of the client). Appellate counsel is to be an active advocate as opposed to that of amicus curiae. Appellant's appeal was not taken in good faith. Johnson v. United States, 352 U.S. 566, 77 S.Ct. 550 1 L.Ed2d 593 (1957).

Appellate Counsel failed to consult with Appellant on any important decision or concerns about the case, counsel failed to demonstrate a professional level of skill and knowledge to a duty of loyalty, and a duty to advocate the Appellant's cause, to serve her "client" to the best of her ability and safeguard his rights on appeal.

These basic professional standards could include, but are not limited to, "a duty of loyalty, a duty to avoid conflicts of interests, a duty to advocate the defendant's cause, the duty [to consult

with defendant] on important decisions." Strickland v. Washington, supra.

The Appellant asks, when appellate counsel had, at her ready disposal, not only preserved errors on record, but was also personally sent by Trial Counsel Robert Sneed, 20 or 30 significant potential claims, (App. p.414 lines 6-13; p.1417 line 24 - p. 1418 line 5.) and failed to raise any of these "highly" arguable issues, or consult with her client, (the Appellant)...What other reasonable explanation could there have been for such poor, deficient and unprofessional service, as rendered here by Appellate Counsel, other than Appellate Counsel was ineffective and unconcerned about her indigent client's rights?

"An indigent criminal defendant is constitutionally entitled to an effective attorney in his 'one and only appeal as of right*," which usually occurs in a state court of appeals. Ettis v. Lucey, 469 U.S. 387, 389 105 S.Ct. 830, 836, 83 L.Ed2d 821, 830 (1985); Douglas v. California, 372 U.S. 353, 357-58, 83 S.Ct. 814, 816-17, 9 L.Ed2d 811, 814-15 (1963); Mason v. Hanks, 97 F.3d 887, 902 (7th Cir. 1996) ("[W]hen we are convinced that a petitioner might well have won his appeal on a significant and obvious question of state law that counsel omitted to pursue, we are compelled to conclude...that the appeal was not fundamentally fair and that the resulting affirmation of his conviction is not reliable.").

Here, the Appellant was forced to raise his "sleeping juror" allegation in a pro-se brief on Appeal and on PCR Appeal because, (even though he requested it be raised) both Appellate Counsel and PCR Counsel omitted to pursue Appellant's ineffective assistance of trial counsel, for failing to object to sleeping juror(s) not being removed or questioned allegation.

Appellate Counsel ignored two substantially meritorious issues; a defective indictment claim and a violation of Appellant's Six Amendment Constitutional Right to be tried by competent jurors claim ("sleeping jurors"), claims that were obvious on the record, (and one-defective indictment-on which trial counsel had expressed to be quashed), and instead pursued just one clearly and significantly weaker issue-severance.

In her brief, Appellate Counsel did raise the issue of severance, but failed to adequately argue the issue. In her Argument Appellate Counsel simply stated; "Robert James - Appellant's co-defendant - was prejudiced because guilt was most probably imputed to him via the case against Kenneth James. (Appellant) Kenneth James was prejudiced because as defense counsel argued: a severance would have allowed Kenneth James and counsel to "be masters of [their] own destiny as far as the selection of the jury, presentation of evidence and/or ..." (See, Tr. p.1365).

This statement by Appellate Counsel is hugely vague. Counsel failed to explain, *in what way*, was this prejudice from the case against the co-defendant imputed to the Appellant? Appellate Counsel does not even attempt to give truly plausible example in which, some type or any type of guilt was imputed to the Appellant, via the case against his co-defendant.

Appellate Counsel's argument supplied no realistic justification or grounds for an issue of severance. Appellate Counsel's failure to raise any [arguable] issues in brief on direct appeal created presumption of prejudice, satisfying the prejudice prong of Appellant's claim of ineffective assistance of Appellate Counsel, in that Appellant was essentially left without representation on direct appeal. Delgado v. Lewis, 168 F.3d 1148 (9th Cir. 1999); U.S.C.A. Const. Amend. 6, Criminal Law Key 641.13(7).

Appellant contends that it was completely unreasonable for Appellate Counsel to ignore the two clearly stronger claims discussed above, in favor of the one significantly weaker issue she presented. (See, Moultrie v. U.S., District Court, D. South Carolina, Beaufort Division, May 15, 2001, 147 F.Supp.2d 405) ("Ineffective assistance of appellate counsel may be shown if defendant can prove that counsel emitted obvious and strong issues while pursuing significantly weaker issues." U.S.C.A. Const. Amend. 6); (U.S. v. Manson, U.S. Court of Appeals, 4th Circuit. December 18, 2014. 774 F.3d 824.) ("Effective assistance of appellate counsel does not require the presentation of all issues on appeal that may have merit: generally only when ignored issues are clearly stronger than those presented should the court find ineffective assistance for failure to pursue claims on appeal. U.S.C.A.

Const. Amend. 6.); (Also, U.S. v. Baker, Court of Appeals, 4th Circuit. June 13, 2003. 719 F.3d 313; (Patrick v. State, S.Ct. South Carolina. March 11, 2002. 349 S.C. 203) (" . . . appellate brief devoted only three short paragraphs to the issue, did not give any useful analysis, and cited only one case, the petition for rehearing did not note the issue with particularity,..."); (Bell v. Jarvis, U.S. Court of Appeal, 4th Circuit. December 2, 1999. 198 F.3d 432) (Counsel on direct appeal provided ineffective assistance in failing to pursue Sixth Amendment Public trial claim; claim was obvious on the record, and in view of the controlling Supreme Court and North Carolina precedent and the paucity of findings of fact made by the trial court, it was unreasonable of counsel to fail to argue the public trial claim on Appeal. U.S.C.A. Const. Amend. 6; Also, Matire v. Wainwright, 811 F.2d, 1438-39 (11th Cir. 1987).

The last fact that the Appellant argues here, is that, Appellate Counsel's sole reason for "simply mentioning" the issue of severance in her brief, was because counsel Knew she was required to raise an issue." And in doing so, she would then be able to claim that the Appellant's appeal was without merit, and thus, she would be justified in filing her petition to be relieved as Appellate Counsel.

Appellant asserts that, in light of the facts discussed herein, it clearly shows that Appellate Counsel's performance fell below the standard of objective reasonableness for attorneys, which negatively affected Appellant's direct appeal. Strickland, supra. Appellate Counsel's ineffective deprived Appellant of his Right to Due Process and Equal Protection Clause of the Constitution.

Harris v. Champion, 15 F.3d 1538 (10th Cir.1994). "The Supreme Court has held that, if a State has created Appellate Court as an integral part of the... system for finally adjudicating the guilt or innocence of a defendant." Griffin v. Illinois, 351 U.S. at 18, 76 S.Ct. at 590. The procedure used in deciding appeals [must] comport with the demands of the Due Process and Equal Protection Clauses of the Constitution; Id. at 1558.

Therefore, in conclusion, Appellant contends that, with several highly arguable issues at her

disposal, either preserved in record or provided by trial counsel, Appellate Counsel was ineffective for failing to raise both of the Appellant's ineffective assistance of trial counsel claims discussed herein, and counsel lost a chance to argue claims that would have succeeded. And this failure resulted in prejudice to the Appellant since there is a "reasonable probability" the outcome of Appellant's direct appeal would have been different. Appellant's direct appeal was not taken in good faith and his constitutional rights were violated.

Appellant and his trial counsels, Robert Sneed and Doug Strickland, all testified at the PCR hearing. Judge James R. Barber, denied and dismissed the

Application in a written order filed May 23, 2003. The order did not address the issue of ineffective assistance of Appellate Counsel and PCR Counsel did not file a motion to alter/amend judgment under SCRCR Rule 59(e).

ATTACHMENT B.

INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

Appellate Counsel Wanda H. Carter was ineffective in failing to raise ineffective assistance of trial counsel for failing to object when the state pushed to try the Appellant under an incorrect armed robbery statute. The indictment should have been quashed instead of amend, and trial counsel erred in not objecting to the judge improperly deleting from the indictments with his own pen. And amendment deprived trial court of subject matter jurisdiction.

Appellant contends that Appellate Counsel filed a frivolous brief on appeal, Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Constitutional Law Key 250, 268.1(6) U.S.C.A. Const. Amends. 6,14,(Tr.p.1358-1370) in which Appellate Counsel Wanda H. Cater,-formerly, Wanda H. Haile at the time of Appellant's appeal- only gave a dry summary of the Appellant's case. Appellate Counsel failed to raise any [Arguable] issues in her brief on appeal.

In her petition to be relieved as counsel, pursuant to Anders v. California, supra, Appellate Counsel stated: "Counsel has thoroughly reviewed Appellant's lower court record in an effort to discover all arguable errors for presentation to the court on Appellant's behalf. In Counsel's opinion, the record fails to demonstrate either preserved errors or other legally substantial issues, to present to the Court within the context of this direct appeal."

However, transcript of trial proceeding and facts contained therein will confirm that, several arguable issues and other legally substantial issues were preserved for appellate review (Tr.p.10—p.44; p.1191 line 20-p.1207 line 6; and p.1343 line 23-p.1344 line 23; For Motions, Objections, Directed Verdict Motions, and several Motions for Quash Indictments).

Among that group of quashed motions, was the Appellant's current allegation. And on this claim Appellant contends that Appellate Counsel Carter, was ineffective in failing to raise that trial

counsel was ineffective for failing to object when the state pushed to try the Appellant under the new armed robbery statute, because where under the old statute, a main element is that the suspect had to actually be armed (S.C. Code Ann. §16-11-330(1) (1976)) and the offense predated the new statute (S.C. Code Ann. §16-11-330(A) (Supp. 1999). The indictments should have been quashed instead of amended. Trial counsel erred in not objecting to the judge improperly deleting from the indictments.

At trial counsel argued, "When this offense was committed May 29, 1996, it was under the old armed robbery statute, that essentially the suspect had to actually be armed. Well, under the new version of the statute, the state gets the choice. The suspect is actually armed - as it must be, in order for him to be guilty of this offense - or alleges to be armed. (See Tr.p.104 line 16-p.111 line 16). The new statute did not apply at the time of the offense occurred.

Appellant asserts it is clear, that the state wanted to proceed under the new statute to expand the old statute's operation, because there was no gun (pistol) entered into evidence, no shell casings, no report mentioning any type of, "bullet holes," in anything or anyone, thus, the state had no way to prove that the suspect was actually armed, as required by the old statute. Leaving the State to rely solely on words to try and prove that the suspect was actually armed.

Words alone are not sufficient to establish that an offender was armed with a deadly weapon for purpose of the armed robbery statute Code 1976, §16-11-330(A).

Under the general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the* statutes operation.

Courts are bound to construe a penal statute strictly against the State and in favor of the defendant. See, State v. Muldrow, 559 S.E.2d 847(S.C.2002).

This issue was raised during pre-trial motions (App.p.104 line 16-p.111 line 18). And after defense counsels argued the motion the State moved to amend the indictments and specifically stated:

Court: So, I'll deny the motion to quash, the indictment, allow the amendment to delete the language "or while alleging." And I will do that in each of the four indictments if nobody objects. You're not conceding to it, but if nobody objects to my deleting them in my own pen, does anybody have a problem with that?

Mr. Sneed: No, Sir.

Mr. Shupper: No, Your Honor.

Appellant argues that, knowing it would be incorrect for the State to proceed forward in its attempt to try Appellant under the language of the ¹new statute, the trial judge attempted to correct this issue by "subtly" advising the state to move to amend the indictments. Which the state does move to amend and the court allows the amendment (See, App.p.107 line 21-p.108 line 10, and p.111 lines 2—16 specifically p.107 line 25-p.108 line 2 about the advising portion), by removing the language "or while alleging, either by action or words that he was armed while using a representation of a deadly weapon on the object which the person present during the commission of the robbery reasonably believe to be a deadly weapon." The trial judge deletes them in his own pen, and denies the motion to quash the indictment.

Appellant contends that trial counsel was ineffective in failing to object to the judge deleting the indictments in his own pen because (1) it is the sole [duty] of the grand jury to pass on and indictment or not. The presentment requirement of the Grand Jury are that they have to pass on all the elements of the offense and then there is the other requirement that an indictment should be in substantially the same language. And no one, not the court, the state, or defense counsel, knew for

[1.Footnote-page, 13]

certain [which portion] the Grand Jury passed on in returning these indictments, whether he was actually armed, as it must be, in order for the Appellant to be guilty of the offenses, or it may have been presented to them while armed with a representation of a deadly weapon, and if they indicted him based on that kind of information, that would be inappropriate and incorrect;(2) by allowing the judge to delete them in his own pen, somehow resulted in serious "non-deleted" error, because the indictment still read out completely, the erroneous "or while alleging" language remains.

However, if this court would review the indictments (see "original" Transcript Record on Appeal - pages 1380, 1381, 1362 and 1363) they would show that the, "or while alleging..." language has not been deleted. And although, there are "additional" indictments on page 1393 and 1395 that have been deleted, we don't know for certain which "set" of indictments were presented to the jury at trial in their deliberations.

And the Appellant contends, that since the indictments are preserved in record, "unamended," it's highly likely that the jury viewed the defective indictments during their deliberation.

And (3) the amendment was material change in the nature of the offense charged, because the proof required for amended indictment (S.C. Code Ann. §16-11-330(1)) was different from proof required for original indictment (S.C. Code Ann. §16- 11- 330(A).) (Supp.1999). Thus, The Appellant contends, the amendment to the indictments deprived the trial court of subject matter jurisdiction over the armed robbery charges.

Now, on Appellant's first (1) point; that it is the sole duty of the grand jury to pass on an indictment or not. It is clear that the incorrect armed robbery statute (S.C. Code §16-11-330(A)) was presented to the grand jury, and as trial counsel pointed out; "That's the essence of my objection, your honor, is that we don't know if the grand jury truly did pass on the elements of this offense

[because] of the "or" language. Certainly it's not in substantially the same language as the (current) statute. The indictment is deficient in that sense." (App.109 lines 14-18; p.104 line 22-p.105 line6.) And trial judge agree that trial counsel had a valid point (App.106 lines 1-12 and p.107 lines 18-20).

Now, the State argued that it's understanding of the purpose of the indictment is, "to provide sufficient notice to the defense to be prepared. They were served with arrest warrants indicating that they were charged with armed robbery. And the form of the indictment provides sufficient notice > to the defendant and defense attorneys as to what he is charged with." However, Appellant argues that during the nearly three years that Appellant was held in the county jail awaiting trial, (App.p.44 lines 8-9) the State told Appellant and his counsel that he was being charged under Code 16-11-330(A). But at the outset of trial the State moved to amend the indictment, and now try the Appellant under a different armed robbery Code, 16- 11-330(1), which was a different material change in the nature of the offense charged, that has a different aggravating circumstance, thus, misleading the Appellant as to what he was called upon to answer. (See, State v. Guthrie, 572 S.E.2d 309 (S.C.2002) (Trial court erred in allowing the State to amend defendant's burglary indictment at trial by adding the additional aggravating factor of two or more prior burglary convictions; amendment was material change in the nature of the offense charged because the proof required for amended indictment was different proof required for original indictment. Code, §16-11-311(A) and S.C. Code Ann. §17-19-100<1985)).

Furthermore, the trial judge does admit to having doubt, a question in his mind, as to whether the grand jury truly passed on the indictments or not, stating: "There is a question in my mind as to whether or not the ... as to what the grand jury may have passed upon." But then the trial judge turns around and attempts to second-guess or speculate as to what the grand jury's verdict was, stating: "but it seems virtually irrefutable that they had to pass upon this matter, that

the defendants were armed, actually armed with a deadly weapon as opposed to representation thereof." (App.p.110 line 22-p.111/line 1).

However, Appellant contends that, because of the clearly confusing and deficient language of the indictment and the circumstances surrounding it, there is no evidence to support with absolute certainty, the trial judge's statement the grand jury did in fact pass upon matter correctly. The trial court should have informed the State of the necessity of Re-indictment or obtain a waiver of presentment from the Appellant. Because to attempt to second-guess a grand jury's verdict under the circumstances of this case would be fundamentally unfair.

Appellant argues that the armed robbery indictments should have been quashed, because without a written waiver of presentment, the amendment to his armed robbery indictment deprived the court of subject matter of jurisdiction, because the amendment changed the nature of the offense charged. (S.C. Code Ann. §16- 11-311(A)(1)(b),(A)(3), 17-19-100)(Generally, amendments to indictments are permitted for the purpose of correcting an error of form, such as a Sriver's error, otherwise, if the defendant objects to an amendment on the grounds that the amended indictment would change the nature of the offense, the trial judge is obligated to inform the parties of the necessity of reindicment or obtain a waiver of presentation from the defendant. *Cutner v. State*, (S.C. 2003) 354 S.C. 151,580 S.E.2d 120).

(See, also, *Stirone*, 361 U.S. at 217, 80 S.Ct. at 273. "The right to have the grand jury make the charge on its own judgment is a substantial right which cannot be taken away with or without court amendment." *713 Id. at 218-19, 80 S.Ct. 274((emphasis supplied).

Now, as to Appellant's second (2) point; trial counsel was ineffective in failing to object to the trial judge deleting the indictments in his own pen, because, by allowing him to do so resulted in a serious "non-deleted" error, because the indictments still read out completely, the erroneous "or

while alleging" language remains, (See, original transcript - Record on Appeal - p. 1380-81 and 1362-63). And although the trial judge deleted or attempted to delete the indictments in his own pen, (App.p.110 line 22-p.111 line 18) the trial judge even stated; "All right. Hang on a second. I've got to do these. Okay." (line 17) while he took the time to delete the indictments in his own pen, right there on the spot. Nevertheless, somehow unamended deficient armed robbery indictments are preserved in the record, a fact which the Appellant contends, under the circumstance here, demonstrates that it's highly likely that the jury viewed the defective indictments during their deliberations. Thus, resulting in the Appellant being tried and convicted under clearly defective indictments. See, *State v. Hann*, 196 S.C. 211 (1940) 12 52 2d 720 - Indictment not legally qualified - 192 S.C. 318, 47 S.E2d 276, 109 65 65, 83 S.C. 217, 68 S.C. 318, 47 S.E. 395.

Finally, as to Appellant's third (3) point; that trial counsel was ineffective for failing to object to the trial judge deleting the indictments in his own pen, because, by allowing him to do so resulted in him making a material change in the nature of the offense charged. The amendment changed the offense charged [from] a violation of section 16-11-330, — which was subsequently amended, effective June 18, 1996, — to provide as follows: (A) a person who commits robbery while armed with a weapon pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon, or while alleging either by actions or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believe to be a deadly weapon, is guilty of a felony...S.C. Code Ann. §16-11-330(A)(Supp.1999)(emphasis added), [to] a violation of Section 11-11-330(1) — which prior to June 18, 1996- provided in pertinent part as follows: any person convicted for the crime of robbery while armed with a pistol, dirk, slingshot, metal knuckles, razor or other deadly weapon shall suffer punishment by imprisonment at hard labor the term of not less than ten years nor more than/twenty-five years, in the discretion of the trial judge, no part of which may be suspended ... S.C. Code Ann. §16-11-330(1)(1976). (See, *State v.*

Muldrow, 559 S.E.2d 847(S.C.2002; "Under our general rules of construction, the words of a statute must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. State v. Grooms, 343 S.C. 248, 540 S.E.2d 99 (2000). Furthermore, we are bound to construe a penal statute strictly against the State and in favor of the defendant. Brown v. State, 343 S.C. 342, 540 S.E.2d 846 (2001)).

Here, the Appellant contends that it is absolutely clear and undisputed that because of the erroneous "or while alleging" language, the armed robbery indictments are defective on their face. Which was why the State moved to amend them. But it is also equally clear that neither the defense, the State or trial judge knew for certainty, whether the grand jury passed on the correct portion of the armed robbery indictments. And, since it is well established that it is the sole duty of the grand jury to pass upon an indictment or not, on its own judgment, *Stirone, supra*. Thus, the trial judge would erred in speculating as to the grand jury's verdict or making its own judgment [upon] the indictments. Furthermore, in light of the deficiency of, and the confusing and uncertain circumstances surrounding the indictments, the Appellant argues the, "any" amendment at the time of trial, under such conditions, would be error and inappropriate, and deprived the trial court of subject matter of jurisdiction.

Nevertheless, in Appellant's case, the trial judge does speculate as to what the grand jury's verdict was and trial judge made its own judgment upon the indictments (App.p.110 line 22-p.111 line 18), amending the indictments and deleting from them in his own pen. And the amendment changed the nature of the offenses charged because the two aggravating circumstances in the case sub judice are distinct offenses from one another and thus, the proof required for each aggravating circumstance is material different from one another. Compare S.C. Code Ann. §16-11-330(A) and (l).

Appellant argues that, since that the trial judge erred by allowing the State to improperly amend the armed robbery indictments, trial counsel was ineffective for failing to object to the trial

judge deleting the indictments in his own pen, which prejudiced the Appellant because it improperly changed the nature of the offense charged.

The aggravating circumstance upon which Appellant's armed robbery convictions was based has never been presented to the grand jury. Therefore, Appellant argues, that the amendment deprived the trial court of subject matter jurisdiction over the armed robbery charges.

See, State v. Lynch, 545 S.E.2d 511 (S.C.2001). In Lynch, the defendant was convicted of murder and first degree burglary. Defendant appealed. The Supreme Court, Waller J., held that trial court lost subject matter jurisdiction over first degree burglary charge when it permitted state, at outset of trial to amend indictment to replace words "in the hours during darkness" with "caused physical injury." Affirmed in part, and reversed in part.

At the outset of trial, the State moved to amend the indictment on the first degree burglary charge. The State requested that the words "in the hours during darkness" be replaced with "caused physical injury." Over Appellant's objections, the trial court allowed the amendment.

ISSUE: Did trial Judge err by allowing the State to amend the indictment for first degree burglary by changing the aggravating circumstance alleged?

DISCUSSION: Appellant argues that an aggravating circumstance is a required element of first degree burglary, and the aggravating circumstance upon which his burglary conviction was based has never been presented to the grand jury. Therefore, he argues that the amendment to the indictment deprived the trial court of subject matter jurisdiction over the burglary charge.

We agree.

A Circuit Court has subject matter jurisdiction if: (1) there has been an indictment which sufficiently state the offense; (2) there has been a waiver of indictment; or (3) the change is a lesser

included charge of the crime charged in the indictment. *Carter v. State*, 329 S.C. 355, 495 S.E.2d 773 (1998). An indictment is sufficient to confer jurisdiction "if the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer..." *Browning v. State*, 320 S.C. 366, 368, 465 S.E.2d 358, 359 (1995).

An indictment may be amended provided "such amendment does not change the nature of the offense charged." S.C. Code Ann. §17-19-100 (1985). For example, an amendment which changes an offense to one with increased punishment deprives the circuit court of subject matter jurisdiction. *Hopkins v. State*, 317 S.C. 7, 451 S.E.2d 389 (1994); *State v. Riddle*, 301 S.C. 211, 391 S.E.2d 253 (1990). We note, however, that an amendment may deprive the circuit court of jurisdiction even if it does not change the penalty. See *Weinhauer v. State*, 334 S.C. 327, 333, 513 S.E.2d 840, 842 (1999). (Citing *State v. Sowell*, 85 S.C. 278, 675 S.E. 316 (1910).

In *Weinhauer*, this Court decide that an indictment for second degree burglary was improperly amended when the State added language that that the offense was committed at "nighttime." The amendment changed the offense charged from a violation of Section 16-11-312(A) ("Person enters a dwelling without consent and with intent to commit a crime therein") to a violation of Section 16-11-312(B) ("[T]he entering or remaining occurs in the nighttime"). S.C. Code Ann. §16— 11— 312(Supp.2000). The amendment transformed the offense from being classified as non-violent to violent. The Court held that "by amending the indictment, the solicitor changed the nature of the offense charged because the circumstance of 'nighttime' burglary was material to charging defendant with second degree burglary under section (B)." *Weinhauer*, 334 S.Ct. at 332, 513 S.E.2d at 842.

The *Weinhauer* Court relied in part on the reasoning of *State v. Sowell*, 85 S.C. 278,284, 67 S.E. 316, 318 (1910). The Court in *Sowell* held that breaking and entering in daytime and in the

of these, especially Appellant's two ineffective assistance of trial counsel allegations discussed herein, and Appellate Counsel lost a chance to argue a claim(s) that would have succeeded.

And this failure resulted in prejudice, since there is a "reasonable probability" the outcome of Appellant's direct appeal would have been different.

Appellant's direct appeal was not taken in good faith. And he was deprived of his right to effective assistance of counsel. Therefore, Appellant is entitled to a belated appeal on his ineffective assistance of Appellate Counsel's allegation.

Appellant and his trial counsels, Robert Sneed and Doug Strickland, all testified at the PCR hearing. Judge James R. Barber denied and dismissed the application in a written order filed May 23, 2003. The order did not address the issue of ineffective assistance of Appellate Counsel and PCR Counsel did not file a motion to alter/amend judgment under SCRCP Rule 59(e).

nighttime were distinct offenses, and therefore, the "time of it*s commission was the essence of the offense." This was despite the fact that both offenses belonged to the same class of felonies and were punishable in the same way. Because the two offense were distinct, the Court stated that the amendment substituting nighttime for daytime "not only changed the nature of the offense charged, but substituted an entirely different one for the one charged." Id.

Similarly, the Appellant contends that the amendment errors demonstrated herein from his case, are nearly identical to the amendment errors in Lynch, and Sowell. The amendment in the Appellant's case also changed the nature of the offense charged. And although both offense belong to the same class of felonies and punishable in the same way, they are two distinct offenses, because the aggravating factor of "actually" being armed, (as opposed to "or alleges" to be) was the "essence of the offense." And the amendment here, violated S.C.Code Ann. §17-19-100).

Therefore, since the courts have held that amendments such as the ones discussed herein are error and improper, for they change the nature of an offense charged. The trial judge here, erred in allowing the amendment and deleting from the indictments in his own pen and trial counsel was ineffective for not objecting. Amendment deprived the trial court of subject matter jurisdiction. Thus, it was unreasonable for Appellate Counsel to omit raising this issue on direct appeal.

In light of all the facts discussed herein, it clearly shows that Appellate Counsel's performance fell below the standard of objective reasonableness for attorney's, which negatively affected Appellant's appeal. Mason v. Hanks, supra.

Appellate Counsel's mistake deprived Appellant of his right to the Due Process and Equal Protection Clauses of the Constitution.

With several highly arguable issues at her disposal, either preserved in record or provided by trial counsel (App.p.1414 lines 6-13) Appellate Counsel was ineffective for failing to raise any one

Respectfully Appellant points out that; In 1996, the General Assembly amended the armed robbery statute, 1996 Act No. 362. This Act stated that the amendments take effect upon approval of the Governor. The Act was approved on May 29, 1996.

Now, the Respondant may argue that this date is the same date the offense was committed, therefore, the crime would have been committed under the amended statute and the indictments in this case properly cited the elements of the offense.

However, although the act was approved on May 29, 1996, it is not the same date the offense was committed, The offense actually occurred on May 28, 1996, as evident by the facts and testimony on the record (demonstrated below).

Defense counsels and the state misquoted the crime date as May 29, 1996, (App.p.104 line 22-p.105 line 3;p.402 lines 12-13) but the record shows that both victims in this case--Ms. Carla Brown and Mr. Winfred Bull-- and other witnesses testified that the incident began and ended on May 28, 1996, and that it wasn't until sometime after midnight that the police finally responded to the 911 call.

Testimony from the record shows that the victims testified that it was on May 28, 1996, that they met at Mr. Bull's house approximately around 9:00 p.m., where they sat and talked a while before deciding to go for "a ride" and get some gas, then attending a softball game at T.S. Martin Park (see, App.p.461 lines 14-22; p.462 line 15-p.464 line 4; p.566 line 22-p.567 lines 1, and 7-11; p.641 line 25-p.642 line 2; p.152 line 25-p.153 line 12). The victims arrived at the park "around 10 something," and then they left and went to Burger King and returned to the park approximately 15 minutes later. (See, App.p.192 line 14-p.193 line 8).

After returning to the park the second time, the victims testified that the game was breaking up, and that it was only a few minutes later, about 10-15 minutes when the lights went out and the first two suspects approached them, (see, App.p.191 lines 8-16; p.633 lines 12-15; p.170 lines 5-10; p.193 lines 9-13; p.613 lines 17-25). And defense witness Frank Manigo who was employed with the City of Columbia Park and Recreation, testified that the lights are on an automatic timer, and the controls to the lights are locked inside a little building, and the lights go off promptly at 11:00p.m. (See, App.p.1109 lines 10-22; p.1110 line 2-p.1112 line 9; p.1253 lines 6-14; p.1263 lines 22-25).

Both victims testified that the incident, "It happened real fast", "It was like real quick thing", "...in a matter of several seconds all 5 suspects were upon them and quickly dragging them into an even darker area where there was absolutely no lighting at all, (see, App.p.616 line 22-p.617 line 10; p.634 line 10-p.635 line 20; p.155 lines 16-22). Moreso, witness Carla Brown testified that the whole thing "basically" was less than an hour, but at least 30 minutes. (See, App.p.178 lines 14-20). Witness

Winfred Bull provided similar testimony, and stated that it was only "a good 35 or 40 minutes" that he struggled and tussled with the suspects before breaking free. (See, App.p.502 lines 1-7).

After breaking free, Mr. Bull ran to the home of Ms. Vernetta Yeadon and explained that he had been assaulted and needed to call the police. Ms. Yeadon was a witness for the state and testified that Mr. Bull arrived at her house sometime between 11:30 p.m. and 12:00 a.m. (See, App.p.706 lines 15-20; p.708 lines 8-12).

Both witnesses, Mr. Bull and Ms. Yeadon testified that after calling the police, it was almost an hour, 35-45 minutes before they actually came (see, App.p.516 lines 13-23; p.711 lines 9-14). And state witness, Officer John Walker, with the Columbia Police Department, testified that he was the first officer on the scene in this case and that he arrived at the location "in between" 12:00 and 12:30 a.m. (See, App.p.443 lines 17-19; p.455 lines 5-7).

Therefore, as testimonies and evidence on the record reflect, this crime was committed during the 11:00 p.m. hour on May 28, 1996. It started shortly after eleven and only lasted 30 to 40 minutes, which is corroborated by state's witness Vernetta Yeadon's testimony that Mr. Bull arrived at her home "between" 11:30 p.m. and 12:00 midnight on May 28, 1996. Thus, the offense occurred the day **before** the 1996 Act No. 362 amended armed robbery statute was approved on May 29, 1996.

Additionally, although the Governor approved the Act in May of 1996, it still did not become effective until June 18, 1996 (as quoted by State v. Muldrow, 559 S.E.2d 847 (S.C.2001)).

[Also, the Appellant respectfully ask; Since the Gocernor signed off on the statute some-time during the day...Wouldn't this make every offense that happen before the actual signing, not fall under the new statute? Therefore, pre-signing offenses would have to have been retroactively applied? Something Appellate counsel and PCR counsel could haved looked at for a possible Newly Discovered Evidence Issue at Direct Appeal/PCR?]

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE SOUTH CAROLINA
SUPREME COURT

KENNETH JAMES #261378
Appellant,
V.
STATE OF SOUTH CAROLINA
Respondent.

Appellate case No:
2017-000807

RECEIVED

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BY MAIL

S.C. SUPREME COURT

1. I am the Appellant in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of **Motion and Rule 243(c), SCACR Explanation** IN THE ABOVE-CAPTIONED MATTER on the following individuals by depositing same in the United States mail, postage prepaid:

THE SUPREME COURT OF SOUTH CAROLINA
Daniel E. Shearouse, Clerk of Court
Post Office Box 11330
Columbia, South Carolina 29211

DATED this 18th day of May, 2017.

SWORN TO AND SUBSCRIBED BEFORE ME

this 18th day of May, 2017

Cynthia A. Amosa, (L.S.)

Notary Public for South Carolina

My Commission Expires December 22, 2018

My Commission Expires: _____

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