

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

**RECEIVED**

SEP 20 2017

APPEAL FROM CHARLESTON COUNTY  
The Honorable Deadra L. Jefferson  
Case No. 2015-CP-10-00420

**S.C. SUPREME COURT**

Appellate Case No. 2017-001828

Demetric Hardaway, 330891,

APPELLANT,

vs.

State of South Carolina,

RESPONDENT.

APPELLANT'S EXPLANATION  
243(c) BRIEF

Demetric Hardaway, 330891  
TCI SA-226  
1578 Clarence Coker Hwy.  
Turbeville SC 29162  
(APPELLANT PRO-SE)

South Carolina Attorney General  
Ruston Weston Neely, Esq.  
Post Office 11549  
Columbia SC 29211  
(COUNSEL FOR RESPONDENT)

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PROOF OF SERVICE

I certify that I have served my (Appellant's Explanation (243 (c)) Brief on Respondent's Counsel of Record (South Carolina Attorney General's Office, Ruston Weston Neely, Esq., Post Office Box 11549, Columbia, SC 29211 by depositing the same in the United States Mail, Postage Prepaid on this.

This 22<sup>nd</sup> Day of September, 2017.

S/ Demetric Hardaway  
Demetric Hardaway

## SUCCESSIVE

As this PCR is under White v. State 208 S.E.2d. 35, in essence a Direct Appeal denial, it should not be considered Successive. Moreover, when looking at Matthew v. Evatt 251 F.3d. \_\_\_\_\_. Our Fourth Circuit has ruled that South Carolina recognize successive Applications in three circumstances: One, When there are procedural Irregularities, Two, When Counsel does not differ from that at Trial, and, Three, When an Applicant "prepares" his application without the benefit of Counsel.

The Applicant would contend that: One, Applicant prepared his application "Pro-Se" and Counsel, who was appointed did not substantially alter or change his issues. Secondly, During the time of Applicant's plea and possibly during his PCR hearing, Charleston County Prosecutor and the Public Defender's Office was under an investigation for some sort of collusion and working relationship that was too close. Mrs. Desa Ballard lead that investigation. That comes to my second point, That PCR Counsel had worked for the Charleston County Public defenders office the same office that represented me during my Plea. Therefore, Counsel did not differ from that at the Plea. The Applicant would contend that either one of these can substantiate a reason for the allowance of a successive PCR.

Also, After the Plea, Counsel was asked to Petition for a sentence reconsideration. Higgenbottom v. State \_\_\_\_ S.E.2d. \_\_\_\_\_. When there was a 18 year sentence on the table just prior to the new Public Defender being appointed. When a Defendant accepts a 20 year sentence, when just prior there was a 18 year deal on the table it is a reasonable conclusion that a reasonable person under this circumstance would have accepted the 18 year plea if he had adequately apprised.

Because this issue could not have been filed as it relates to Direct Appeal, as it relates to the First PCR that deals with the Ineffective Assistance of Counsel and only the Federal Habeas Corpus was decided, That Applicant filed this Action as it relates to the failure as it relates to Direct Appeal see Aice v. State 409 S.E.2d. 392 (1991) Foxworth v. State 274 S.E.2d. 415 (1981); Arnold v. State/ Plath v. State 420 S.E.2d. 834 (1992).

Because the Investigation did not come to light as it relates to the conflict between the Solicitor's and Public Defenders Office the Applicant could not have raised this Issue, nor could he have known about it until it's revelation compare easterwood v. Champion 213 F.3d. 1321

#### STATUTE OF LIMITATIONS

The Applicant would contend that the Conditional Order fails to acknowledge S.C. Code Ann. § 17-27-45 (C), Which South Carolina Law Specifically allows an Applicant to file from one year of "Actual Discovery through the exercise of Due Diligence." As considering the evidentiary fact of the Charleston County Public Defenders Office both Representing Applicant at his Plea and the same Public Defenders Office having counsel at his PCR hearing. Specifically, (App pg. 36 lines 1-11) as PCR Counsel admitted on the record that he had worked for the Public Defenders Office and that she was consulting for the Solicitor's Office, the same office that had Prosecuted the Applicant.

In Short, it was after the First PCR and during the Federal Habeas Corpus that it only then came to light about the investigation concerning the conflict of interest between the Solicitor and Public Defenders Office. Secondly, The Direct Appeal issue could not have been raised during the PCR in which Ineffective Assistance of Counsel .

South Carolina Appellant Court Rule 203 does not show any distinction between a "Plea of trial". [After a Plea or Trial resulting in a conviction a Notice of Appeal shall be served on the Respondent] [In Part]. Secondly under Roe v Flores- Ortega 528 U.S. 470 States if a Defendant ask for an appeal or If a Reasonable Defendant would have wanted an appeal. In this case, where there was an 18 year sentence on the table and then the Defendant pleas to a 20 year sentence would have accepted that 18 year plea.

Also, Specifically as it relates to the actual issue he would have raised had he filed and received his appeal would have been:[ The Plea Judge inadequately told Applicant that [If you ever get another strike against you, then the sentence of the Court will be life without the possibility of parole] (T.Tr. pg 2 lines 19-25 & Pg. 3 Lines 1-17) At this point the Applicant felt compelled to plea of he would receive a Life sentence at "any" other conviction.

However, true if a Defendant is Convicted of a "Most Serious" offense and then is convicted later on for another "Most Serious" offense at a later a later date then and only then will the offender be given Life. The Instructions of the Plea judge was in such a way that had an appela been perfected, That this conviction would have been set aside due to the instructions that were given by the Court. Secondly, the Court said that he "Will be given Life. However, even if charged in the future for another "Most Serious Offense" it have been the Solicitor's discretion by giving "Notice of their Intent to seek life. Thereby the so called Mandatory Life that the Court instructed in the plea proceeding would have been discretionary and not mandatory. Futher, When there was an 18 year offer that was taken off for the apparent reason that paid counsel left and a Public Defender was re-appointed, and after Counsel was instructed to File for a Sentence Reconsideration and where there was no form of Jeopardy for doing so see Higgenbottem v. State \_\_\_ S.E.2d. \_\_\_\_\_. There is no reason that Counsel should

not have complied with this request.

As it relates to the Statute of Limitations The time should have been tolled due to his First appeal as a matter of Right. Applicant Plead Guilty on September 25 2008, Assuming that his Counsel had complied with his request for a Sentence Reconsideration he waited until April 30 2009 until filing his First PCR Application, The Court reviewed this Application and Counsel was appointed to represent Applicant for this First Action. Respondent made their return on August 17 2009 and an evidentiary hearing was convened on March 3 2011 before the Honorable R. Markley Dennis Jr. The Court issued its Order of Dismissal on May 2, 2011 and filed its decision on May 4 2011, This Time should be tolled.

The Applicant timely filed his PCR Appeal and Counsel was appointed. Respondent filed their Return on February 28 2012. The Supreme Court transferred Jurisdiction to the South Carolina Court of Appeals. The S.C. Court of Appeals denied this Writ of Certiorari on July 16 2013 and the Remittitur was sent to the lower Court on August 1 2013, This Time should be tolled. On September 20 2013 the Applicant filed his First Federal Habeas Corpus and on August 20 2014 the R & R was accepted and the Habeas Corpus was denied.

Specifically, even assuming that the time is not tolled between actions the determination of this action being outside the Statute of Limitation is clearly erroneous. The Applicant plead guilty on September 25, 2008, That would be tolled during which time he would have had to file his Notice of Appeal. However, it would have been 217 days subtracting the 10 days for which he could have filed an appeal it would have been **(207 days)** During the pendency of this first PCR this time would have clearly been tolled due to the pendency of this action. The PCR Was ultimately denied by the S.C. Court of Appeals by Order August 1 2013, However The Applicant did not receive it until after August 10 2013. The Applicant could have decided to file for a Motion for reconsideration in the S.C. Court of Appeal or could have appealed the Court of Appeals decision back to

the South Carolina Supreme Court which would have tolled the Statute of Limitation until Sept 20 2013. Petitioner filed his Federal Habeas Corpus on September 20 2013 or (20 days later) During the pendance of this Federal Habeas Corpus the time would have likewise been tolled. The Applicant understands that under the AEDPA that his Statute of Limitations run concurrently as it relates to his State and Federal action, In Short, that he has only one year Statute of Limitation as it relates to this case. However, the Report and Recommendation was to dismiss this Habeas Action and the District Judge did agree with this finding by Order of the Court Dated August 29 2014. However, The Applicant could have Appealed to the Fourth Circuit Court of Appeal and asked for a C.O.A. which would have tolled this action for an additional 30 Days until September 28 2014. On January 21 2015 (115 days later), Applicant filed this second action. In all, the Applicant has used ( 342 days toward his Statute of Limitation) Therefore, The Statute of Limitation Argument is manifestly without merit.

#### FAILURE TO STATE A CLAIM

The Respondent's assertions that the Applicant has failed to State a claim is likewise without merit and the Applicant would Object. Under South Carolina Law (S.C. Code Ann. § 17-27-10-160 (2003) An Applicant may commence a Post Conviction relief action on the following grounds:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or Laws of this State;
2. That the Court was without jurisdiction to impose sentence
3. That the sentence exceeds the maximum authorized by Law;
4. That there exist evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice ;
5. That his sentence has expired, his probation, parole or conditional release (was) unlawfully revoked or he is

otherwise unlawfully held in custody or other restraint  
;or

6. That the conviction or sentence is otherwise subject to collateral attack upon and ground of alleged error heretofore available under any common law, Statutory or other writ, Motion, Petition, proceeding or remedy, Specifically, the Applicant would content that under S.C. Rule 12 (b) that this issue has never been able to be litigated due to the circumstance of this case.

In Short, the issue here is an issue of a denial of a Direct Appeal, Which the Court knows is a Appeal as a matter of "Right". As Counsel; failed to file a Notice of Appeal considering the Evidentiary fact that there was a 18 year deal on the table just prior to the plea and where the trial judge clearly gave the Applicant Misleading or at the very least confusing information concerning the "Two Strike" "Three Strike" . The Instruction from the Court caused the Applicant to plea under confusing information by the Plea Court.

At the potential, had Counsel investigated, and even admitted at their PCR Hearing that a potential "Self Defense" was without meritas aluded to by the PCR Court (Appex pg 67 Lines 4-7). However, at that trial a defense of Mutual Combat could have provided a more realistic outcome considering the circumstance of this case. As a matter of fact the only thing discussed by counsel a was a potential that the Applicant had produced, even though he had admitted that he didn't think it was a viable defense , What defense had he suggested ? and the answer is simple none. As discussed before, There would have been a realistic defense of Mutual Combat that would have produced a different outcome. Considering the prior threats, The Alleged victim going to the door of a female who the Applicant was "Involved" with, A victim who had a repretation of Using a Gun or Shooting people, Who had abused the Female, The Applicant fearing harm to the person inside of the house

Proceeded to stop the Alleged victim, Knowing that this Victim having a Gun tried to stop any harm to the Female companion, who was inside the house and the reason that this victim was going to see. Armed with knowledge that this Alleged victim had caused serious harm to this "Female" inside the house and that the Alleged victim was armed with a gun, The Applicant was still trying to stop any harm to the Female inside. In Short, a "Self Defense" would have been futile, even alluded to by both Counsel and the PCR Court (Appex pg. 67 Lines 4-7). However, Where the Applicant went to the door or towards the Alleged victim and did not Retreat from harm, even so, a Mutual Combat defense would still have prevailed. Lastly, Considering Appellant's Daughter was inside the residence in question.

#### RES JUDICATA

The Applicant would Object to the Conditional Orders mention of Res Judicata. When the issue of the Conflict of Interest on only came to light to well after the Applicant's plea, where the Solicitor's and Public Defenders Office were investigated due to a Conflict where both offices were "getting along" in and both offices were working together when the Rules of Court provide and both State and Federal provide fa Adversarial process This investigation and it's finding did not come to light until well after the Plea, First PCR and Federal Habeas Corpus were completed. Mrs. Desa Ballard was one of the Lawyers in this investigation and this brought to light the relationship between the two offices. compare Easterwood v. Champion 213 F.3d. 1321.

As the case in Easterwood, the Court will not ignore the reality of prison life and the revalation of the investigation brought to light a work place that would not provide for an Adversarial process to be condusive. Secondly, Considering the issue here is dealing with a Direct Appeal, which could not have been raised

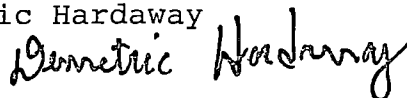
and it was more proper to raise in the second White v. State review. Because the Applicant is entitled to his First appeal as a matter of "Right" he should be granted this review. The Applicant has went futher and submitted the issue had an appeal was had as it relates to the Judges Instruction as it relates to the "Two Strike" and " Three Strike" Instruction if he were to receive a futher conviction. This was not harmless and had this Instruction were not given in this improper way the Applicant would have proceedd to trial, And there is a reasonable probability that at a Trial a Trial Jury would have reasoned under the circumstances enunciated herein, that a Defense of Mutual Combate would have prevailed and the Applicant would have been found not guilty of the Murder Charge. or a Lesser Included Charged and if convicted, The Trial Judge would have sentenced the Applicant to a sentence other 20 years, or that had Counsel filed for a Setnece reconsideration with (10) days that there is reasonable probability that the Court would have given him a sentence lesser that what he was sentenced.  
Higgenbottom Supra.

#### CONCLUSION

Based on the foregoing, The Applicant Prays That this Court allow this action to proceed , make a ruling on the merits, allow a White v. State review by the South Carolina Supreme Court, Rule that this action is not Successive, not barred by the Statute of Limitations, This Petition is Not barred by Res Judicata, and this action Does State a claim. or any other Remedy that this Court Deems just and Proper.

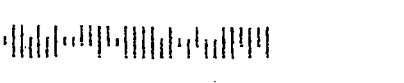
Respectfully Submitting,

Demetric Hardaway



This 22 Day of September, 2017 -9-

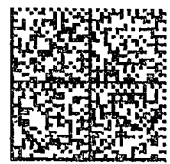
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The Supreme Court of South Carolina  
Daniel E. Shearouse, Clerk of Court  
Post Office Box 11330  
Columbia, SC 29211