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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY

The Honorable Perry H. Gravely

ROBERT EARL DILLARD,

APPELLANT,

v.

THE STATE,

RESPONDENT.

Appellate Case No.: 2022-000972

INITIAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Whether failure of trial court to instruct the jury on the definition of reasonable doubt in action against police officer, Detective Randall Chapman, for fake arrest constituted reversible error, particularly in light of instruction given suggesting that dispositive issue was [whether Plaintiff was actually guilty].

(Appellant's Brief, p. 2).

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

Whether Judge Gravely abused his discretion in finding Applicant failed to present a basis for waiving the required fee for the attempted 2022 motion filing when the filing was not identified as falling under any statutory provision or constitutional right that would excuse payment, and the relief sought reflected merely a request for further direct appeal review which was not available in the circuit court?

STATEMENT OF THE CASE

Appellant Robert Earl Dillard is presently confined in the South Carolina Department of Corrections in the Perry Correctional Institution pursuant to orders of commitment from the Pickens County Clerk of Court. Appellant was indicted in 1994 on two counts of murder. Richard H. Warder, Esq., represented Appellant on the charges. Appellant was convicted by a jury on both counts as indicted. On March 2, 1995, the Honorable Frank P. McGowan, Jr., sentenced Appellant to two consecutive life imprisonment terms.

Since that time, Appellant has filed numerous challenges to his convictions and sentence. On September 26, 2018, the Honorable Perry H. Gravely, as Chief Administrative Judge of the Thirteenth Judicial Circuit, found that Applicant – who at that time had pursued a direct appeal, four PCR actions, a state habeas action, two federal habeas action, a request to file another federal habeas action, and three petitions for mandamus – should be restricted in his ability to submit future filings. Judge Gravely concluded that Applicant's "repetitive and abusive filings must be restricted in order to preserve the Court's time and resources and stop any interference with the fair administration of justice." (C/A 2017-CP-39-0182, Order Restricting Future Filings, dated September 27, 2018).

On June 7, 2022, Appellant filed a "Motion to File[] To Proceed In Forma Pauperis in Pre-Payment of Cost Without Cost" with Pickens County Clerk of Court. (R. p. *). On June 7, 2022, Judge Gravely issued an Order Denying Filing of Pleadings," finding that the motion was not presented on proper forms and did not "set forth any supporting information as to" a "basis for waiving Court fees; and" that the documents submitted appears to be "set out as an appeal of his 1995 conviction and" the circuit "[c]ourt is not the proper forum to address" direct appeal issues.

(R. p. *). Judge Gravely directed the clerk to return the documents to Appellant. (R. p. *). Appellant appeals the June 2022 order.

STATEMENT OF FACTS

The facts of the murders have been recited many, many times in the various filings in state and federal courts. Respondent submits the State's presentation of the facts as set out in detail in the return to Appellant's 2007 federal habeas corpus petition:

> The direct and circumstantial evidence presented at trial, viewed in the light most favorable to the State, is as follows. On the afternoon of December 17, 1992, Karen Dillard and Marcus Roseman were found dead by Mary Myrtie Perry, Karen's mother, in Karen Dillard's new apartment. Mrs. Perry immediately reported this to the Pickens City Police Department. [R.] p. 294, line 10 - p. 297, line 13). A .38 caliber gun was found in Roseman's left hand. [R.] p. 76, line 22 - p. 77, line 13). However, Roseman was right handed. (R. p. 213, line 3). [FN 3]
>
> Also, officers processing the crime scenes found four spent bullets. Two of these were removed from the insulation of the wall above the victims' heads, on the back side of the room. [FN 4] When the officers moved Karen's body, they found a copper jacketed bullet, coated with a small piece of material from Karen's shirt, underneath her body. A fourth, lead bullet was likewise found when her body was removed. (This bullet rolled off a box that had been under her body). Several red stains were found and swabbed for analysis. Finally, officers seized the gun (State's Exhibit No. 29(a) found in Mr. Roseman's hand. (R. p. 66, line 9 - p. 73, line 11; p. 77, line 14 - p. 83, line 4; p. 119, line 1 - p. 120, line 10).
>
> Dr. Joel Sexton, a pathologist, performed autopsies on both bodies, on December 17. When he examined Karen Dillard, he found "a fair amount" of blood on various parts of the body. Also, she had three gunshot wounds. Two of these wounds were not lethal. One entered the left lower back, passed upward and through the flank on the left side. This bullet did not penetrate the body cavity, but passed through the soft tissue on the left side and came out in the front. Based upon the condition of the exit wound, Dr. Sexton opined that Karen's body was against some object at the time the bullet was fired. Moreover, this wound was consistent with her lying on the floor, since a bullet was found underneath her body in this location. [R.] p. 131, line 23 - p. 143, line 19).
>
> Another wound grazed the tip of her right thumb and took off a grove of tissue from the thumb. However, the remaining wound was fatal. This bullet entered the back of Karen's head, in the upper neck (at the base of the head). It passed through the spinal column and traumatized the base of the brain. Next, it passed through the chin in two places. Finally, it struck the front of her chest. This was a contact wound; and, Dr. Sexton opined that Karen's head was "doubled over" when the shot was fired because the bullet penetrated the chin twice. [R.] p. 131, line 23 - p. 143, line 19).

Upon examining Mr. Roseman, Dr. Sexton found that he had a total of eight gunshot wounds. Only one shot was fired close enough to the body so as to leave gunpowder on his clothing *(i.e.,* was a contact wound). This wound was to his upper left chest. Dr. Sexton opined that the wound was unusual because it only penetrated about 3/4" or 1" into the chest; and, Dr. Sexton actually found two lead bullets. "One [bullet] was obviously stuck in the barrel when the other pushed out and they both entered the skin at that location." However, this wound was either perimortem or post-mortem because there was no hemorrhaging associated with it. [R.] p. 143, line 20 - p. 152, line 17; p. 156, line 11 - p. 159, line 22.

Dr. Sexton recovered both bullets from this wound. Dr. Sexton found seven other wounds. Three of these wounds penetrated the chest. Any of the chest wounds were potentially fatal. [FN 5] Dr. Sexton recovered two of those bullets as well. [FN 6] Another wound entered the back side of Mr. Roseman's left arm. It passed through the arm without causing any major damage. [R.]. p. 143, line 20 - p. 152, line 17; p. 156, line 11 - p. 159, line 22; p. 160, line 7 - p. 161, line 1).

A sixth wound passed through Mr. Roseman's right leg, traveled downward and exited the leg without causing any major bleeding. The seventh wound was another unusual wound because it entered the back of the left calf and produced two missile tracks; yet, there was no indication that the bullet had fragmented. Therefore, "the most likely explanation is that there was a bullet that was bad ammunition stuck in the barrel. The next bullet pushed it on out, and that bullet passed up through the back of the leg, part of it coming out on the medial aspect of the back of the leg, part of it coming out on the front of the leg." The final wound was from a lead .38 caliber bullet which entered near the left ankle and lodged in the ankle, roughly½" under the skin. Dr. Sexton also recovered this bullet. [R.] p. 148, line 3 - p. 161, line 1).

In the course of their investigation, law enforcement discovered that Petitioner had purchased a .357 revolver which had, at one time belonged to Mr. Thomas Pilgrim. Pilgrim had test-fired the gun on two occasions, and officers recovered several bullets from the areas where Pilgrim had fired it. While Pilgrim was unable to remember the day or month that he sold his gun to Nick's Pawn Shop, he recalled selling the gun and signing some paperwork. [R.] p. 122, line 14 - p. 130-A, line 1; p. 250, line 9 - p. 258, line 14; p. 278, line 4 - p. 282, line 5). The operator of Nick's Pawn Shop, Henry P. Nichols, testified that he bought the gun from Thomas Pilgrim on August 10, 1992, and sold it to Petitioner on December 1, 1992. [R.] p. 270, line 21 - p. 272, line 8; see also State's Exhibit No. 42). [FN 7]

Officer George W. Stanley, a firearms examiner formerly employed by SLED, examined the bullets found at the crime scene (State's Exhibits 43 - 45), as well as the .38 caliber found at the scene (State's Exhibit No. 29(a)) several bullets fired by Mr. Pilgrim (See State's Exhibit No. 38) and the bullets removed by Dr. Sexton at autopsy (State's Exhibits No. 34(a) - 34(d)). Officer Stanley opined that State's Exhibit Nos. 43 - 45 -- three copper jacketed .38 caliber bullets -- were all

fired by the same weapon. Two of the bullets removed by Dr. Sexton (State's Exhibit Nos. 34 (a) and 34(d)) were also fired by the same weapon that fired State's Exhibit Nos. 43 - 45. However, his test results on the remaining bullets were inconclusive. Further, he explained that any .357 revolver is capable of firing .38 caliber bullets. [R.] p. 290, line 5 - p. 313, line 23; p. 318, line 10 - p. 323, line 6).

Finally, Officer Stanley explained that while his testing of State's Exhibits 29(a) was inconclusive as to whether it fired State's Exhibit Nos. 43 - 45, the lead bullets found in the weapon were inconsistent with the copper jacketed bullets. Moreover, the seven copper jacketed bullets found in Petitioner's residence were consistent with State's Exhibit Nos. 43 - 45. [R.] p. 290, line 5 - p. 313, line 23; p. 318, line 10 - p. 323, line 6).

SLED Agent Vello Paavel is an expert in firearms and toolmark identification, who worked on this case after Officer Stanley's departure from SLED. Agent Paavel also examined State's Exhibit Nos. 43 - 46 and State's Exhibit Nos. 34(a) - 34(d), as well as other bullets test-fired from the Taurus .357 revolver by Mr. Pilgrim (State's Exhibit Nos. 39(a) - 39(e). Based upon his expert examination, he opined that State's Exhibit No. 34(d) and State's Exhibit Nos. 43 - 45 were fired by the same weapon as two of the bullets fired by Mr. Pilgrim. Thus, a clear inference from his testimony is that the .357 caliber revolver owned by Petitioner was used to kill both victims. (See R. p. 329, line 6 - p. 340, line 2).

Other evidence presented by the prosecution likewise tended to prove Petitioner's guilt. On December 17, 1992, Mr. James Durham and his girlfriend lived at 67 Henderson Street Apartments, which is the same apartment complex where Karen and Mr. Roseman were murdered. Between 12:30 and 1:00 A.M., Mr. Durham heard "three or four gunshots." Several seconds later, he heard "three or four more" shots. When he looked out of his back window, he saw a black male standing in front of the kitchen door to Karen's apartment. The door was open, and the inside light was on. Therefore, Mr. Durham clearly saw the man. The man then walked into the apartment and closed the door. Mr. Durham described the man as being fairly large and having short hair. [R.] p. 223, line 22 - p. 228, line 6).

Even though Petitioner and Karen Dillard were married, they had been separated for two weeks at the time of her death. Karen moved in with her mother (Mrs. Perry) immediately after the separation. She had two black eyes and a swollen jaw at that time. Additionally, she was upset and crying. [R.] p. 203, line 23 - p. 204, line 4). On December 1, 1992, Karen obtained a protective order from the Family Court. [FN 8] Both the Petition for the Order (State's Exhibit No. 40, R. pp. 484 - 485) and the Order (State's Exhibit No. 41, R. pp. 486 - 487) itself were admitted into evidence. [R.] 213, line 4 - p. 219, line 17).

Despite the Order, Petitioner was aware that Karen was planning to move into the new apartment and, in fact, helped Mr. Roseman move a bedroom suite (from the marital home) into the apartment only three days before the double

murder. He also subsequently telephoned and spoke with Karen at her mother's house. [R.] p. 209, line 24 - p. 213, line 8; p. 221, line 18 - p. 223, line 13). Petitioner and Karen both worked a swing shift at the Bibb Company. Mrs. Perry testified that although Petitioner "regularly" called her house for Karen to ask for a ride to work, he did not call on the morning Karen was found dead. This was the only day he did not call and ask her for a ride to work. [R.] p. 207, line 19 - p. 209, line 23).

On December 17, 1992, Petitioner got a ride to work around 6:00 A.M. from Mr. Vincent L. Earle, who is married to Karen's cousin. [FN 9] As they were driving, Mr. Earle asked Petitioner "how was it going." Petitioner said, "Fine," at first. However, he appeared upset; and, he soon mumbled that he had "messed up" and that it was his fault. (He was apparently referring to his separation from Karen). Petitioner did not mention Mr. Roseman. Petitioner arrived at work at 6:25 A.M., which was 35 minutes early. [R.] p. 233, line 10 - p. 237, line 18; p. 239, line 22 - p. 241, line 18).

Petitioner likewise behaved unusually at work on December 17. Aside from the fact he reported to work very early, he was not very talkative that day. Also, rather than taking his routine cigarette break in the canteen, he walked the hallways and looked out of the windows more than normal. [R.] p. 242, line 5 - p. 24 7, line 2). [FN 10] Further, Karen was a "regular" employee and it was unusual for her to miss work. Nor had she followed office policy by calling in sick. Although Petitioner and Karen did not work in the same area at the Bibb Company, Petitioner would have passed by her station if he went to the canteen, and he could have seen whether she was at work. However, Petitioner never inquired about why Karen, his normal ride to work, was not there. [R.] p. 242, line 5 - p. 24 7, line 2; p. 359, line 11 - p. 362, line 13).

After discovering the bodies, three police officers went to the Bibb Company to inform Petitioner about his wife's death. When Detective Trotter told Petitioner that they had come about his wife, he did not inquire as to why they were there, nor did he cry or show any emotion. Instead, he began describing the events of the previous day that he had spent with Karen. When Officer Trotter told him that Karen was dead, Petitioner did not inquire as to how she had been killed. Rather, he said, "Damn, we should have stayed together." Also, he again explained his whereabouts on December 16. Petitioner agreed to go with the officers to the police station for further questioning. [R.] p. 7, line 16 - p. 10, line 23(a); see also p. 388, line 8 - p. 390, line 6).

On the way, the officers went by Petitioner's house. Petitioner gave a written consent (State's Exhibit No. 28) and the officers searched the residence. They found seven copper jacketed bullets on the night stand and a wet sweat suit hanging in the shower. The sweat suit had a white residue on it, and was so wet the officers could wring water out of it. Finally, officers swabbed a red stain on the frame of Petitioner's front door. [R.] p. 22, line 6 - p. 28, line 12; p. 33, line 21 - p.

34, line 2; p. 50, lines 11 - 12; p. 83, line 9 - p. 88, line 4; p. 89, line 19 - p. 90, line 11; p. 120, line
11 - p. 122, line 9).

After arriving at the police station and after making a written waiver of his Miranda rights, Petitioner again described his activities from the previous day. He said Karen dropped him off at home, about 10:00 p.m. on December 16, and he fell asleep on the couch. The next morning he started walking to work and eventually got a ride with Vincent L. Earl, who is the husband of Karen's cousin. [R.] p. 10, line 22 - p. 11, line 25; p. 13, line 14 - p. 21, line 22).

Petitioner likewise told the police about a fight he had with Karen just two weeks earlier, when he admittedly slapped Karen's face and her eye hit his knee. [R.] p. 413, lines 2 -10). He also told them that he had gone to jail for criminal domestic violence. [R.] p. 413, lines 11 - 15).

On August 21, 1992, Greenville police had responded to a call at a Greenville Burger King. At that time, Karen told a police officer that Petitioner had dragged her from the car, beat her and kicked her. He then shot at her -- missing her foot. Petitioner was arrested several hours later. He admitted that he and Karen had argued earlier that night, but did not elaborate. He also admitted that he had a weapon in the trunk of his car. He showed this weapon to the arresting officer, and the officer seized it. As a result of this incident, Petitioner subsequently pled guilty to criminal domestic violence and discharging a firearm within city limits. [R.] p. 259, line 6 - p. 265, line 15).

James F. Simpson was in jail at the time of the murders of Karen Dillard and Marcus Roseman. [FN 11] App. Vol. Two, p. 503- 525. However, he testified that he had a conversation about these deaths, with Petitioner, at the Haynie Street Men's Club in February, 1993. [FN 12] Petitioner told Mr. Simpson that he had killed both Karen and Marcus Roseman, and he explained how he did it. Petitioner admitted that he had killed the victims on the day Karen was moving into the apartment. He got someone to give him a ride to the apartment. He then waited until Karen and Mr. Roseman returned. When he confronted them, Karen asked him why he was there. He immediately pulled out a pistol and shot Mr. Roseman. Then, he shot Karen. Also, he told Mr. Simpson that "he tried to shoot [Mr. Roseman's [G]oddamn balls off." Following the shooting, he returned to where his ride was waiting and went home. Finally, Petitioner told Mr. Simpson, "Well, I don't have to worry about it no damn more." (Sic). Later Mr. Simpson gave a statement to the police. [R.] p. 363, line 2 - p. 368, line 13; p. 381, line 9 - p. 384, line 20; State's Exhibit No. 49).

Simpson initially testified that he went to jail for a probation violation the second week of February 1993, then corrected himself to say it was 1994. App.p. 505, [lines] 10-25.

Mr. Simpson subsequently gave a different story to Petitioner's investigator. According to Simpson, he only gave this statement, however, because the defendant's lawyers had promised him that they would take care of his pending case. App. p. 522-523. While Mr. Simpson was not promised anything by the police in exchange for his statement to them, Petitioner's investigator promised to straighten things out for him, in exchange for the contradictory statement. App. Vol. Two, p. 502-524. [R.] p. 368, line 25 - p. 370, line 10; p. 377, line 12 - p. 378, line 8; p. 379, line 24 - p. 381, line 1). See Final Brief of Respondent, p. 3-13.

[FN 3] Toxicology tests on both victims were negative for drugs. Also, the alcohol levels were minimal and were consistent with being caused by decomposition of the bodies. [R.] p. 171, line 19 - p. 179, line 17).

[FN 4] The victim's bodies were laying so closely together that they touched each other.

[FN 5] Dr. Sexton opined that a wound which entered the back of Mr. Roseman's neck and passed through the spinal column was the fatal wound, but explained that the other chest wounds would have caused death.

[FN 6] Both were copper jacketed .38 caliber bullets.

[FN 7] The gun was a Taurus, Model 69, Serial No. JE307987, which is a .357 magnum revolver. [R.] p. 271, lines 6 - 19; see also State's Exhibit No. 42).

[FN 8] Petitioner purchased the murder weapon that day.

[FN 9] Mr. Earle saw Petitioner at the Hot Spot, in Pickens.

[FN 10] Petitioner and Karen's Department Manager, Mr. Edward Poole, had testified that Karen came to work one day with her face swollen. [R.] p. 245, line 25 - p. 247, line 2).

[FN 11] Those charges were later dropped.

[FN 12] Mr. Simpson had socialized with Petitioner a number of years.

(C/A 8:07-cv-01533-JFA, Return, ECF No. 13 at 8-18).[1]

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[1] The facts of the crime were not before the circuit court in deciding the order on appeal; consequently, there are no records to designate, or cite to, for purposes of summarizing the facts

STANDARD OF REVIEW

This Court has found that an order denying a request for *in forma pauperis* status to allow filing without payment of a fee is an appealable matter as it "has the effect of discontinuing the action or preventing an appealable judgment." *Lakes v. State*, 333 S.C. 382, 385, 510 S.E.2d 228, 203 (Ct. App. 1999) (citing S.C. Code Ann. § 14-3-330(2)(1) (Supp. 1997)). In *Lakes*, this Court referenced the argument that the trial judge acted within his discretion in denying such a request. *Id.* The Court reasoned that the lower court failed to make sufficient findings of facts to support its denial. *Id.*, at 386. With that disposition in mind, though the standard of review does not appear to be set out plainly in precedent, Respondent submits that correct standard is to review the ruling for an abuse of discretion as the circuit court judge must consider whether an exception exist, or whether the action shows a fundamental right that would warrant excusing the fee. *See Martin v. State*, 321 S.C. 533, 536, 471 S.E.2d 134, 135 (1995). These are matters requiring findings of facts and conclusions by the circuit court judge such that review under the abuse of discretion standard is appropriate. *Accord Layman v. State*, 376 S.C. 434, 444, 658 S.E.2d 320, 325 (2008) (decision on propriety of awarding attorneys fees reviewed for abuse of discretion); *Cross v. Gen. Motors Corp.*, 721 F.2d 1152, 1157 (8th Cir. 1983) ("Under 28 U.S.C. § 1915, the decision whether to grant or deny in forma pauperis status is within the sound discretion of the trial court."). "An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." *Layman,* at 444, 658 S.E.2d at 325.

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of the crime. Therefore, Respondent submits that this Court may take judicial notice of public records which reflect these facts as summarized in litigation of Petitioner's claims in his federal habeas corpus action. The State's return in that action is a matter of public record and available in the records of the United States District Court, District of South Carolina, in the case number as cited. *See* Rule 201, SCRE. Notably, the instant appeal is limited to the propriety of the order denying the filings. These facts of record give context to the litigation but are not a subject of dispute currently.

ARGUMENT

"[W]hen an indigent litigant files a motion to proceed in forma pauperis pursuant to Rule 3(c), and the complaint does not appear to fit within one of the statutory or constitutional exceptions to the requirement of a filing fee, the clerk of court must submit the motion to a judge for a ruling as to whether the complaint does fit within one of the statutory exceptions or whether the cause of action concerns a fundamental right that requires waiver of the filing fee." *Martin v. State*, 321 S.C. 533, 536, 471 S.E.2d 134, 135 (1995).[2] It appears that was the exact process followed by the clerk and the circuit court below. Further, the record shows that the circuit court judge did not abuse his discretion in determining that no waiver of the fee was warranted.

Appellant attempted to file a civil action seeking to have the circuit court grant a motion to find false imprison and error in his 1994 trial regarding jury instructions on reasonable doubt. (R. * (Motion, May 28, 2022)). Because such a motion does not "fit within one of the statutory or constitutional exceptions to the requirement of a filing fee," the matter was submitted to the circuit court for a ruling on motion to proceed *in forma pauperis*. On June 7, 2022, Judge Gravely, having reviewed the filing, determined there was nothing "presented on the proper forms" or any basis for waiving the civil action fee required under Rule 3, SCRCP. (R.* (para. 1)). Further, Judge Gravely determined that the motion was not cognizable in circuit court but fell into the form of direct appeal rather than a cognizable civil action. (R. * (para. 2)). Therefore, Appellant's motion to file without payment of the civil action fee was denied and the documents returned to Appellant. *Id.*

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[2] The Court in *Martin* listed these express exemptions pursuant to statutory provisions: appeals from magistrate or municipal courts; post-conviction relief actions; motions for orders of protection; delinquency and neglect actions; claims through employment security; and, consent for abortion. The Court also recognized exceptions "where certain fundament rights are involved" and "the Constitution requires that an indigent be allowed access to the courts." *Martin*, at 535, 471 S.E.2d at 135.

The record supports that Judge Gravely did not abuse his discretion in denying the request to proceed *in forma pauperis* or in construing the motion as seeking direct appeal relief. However, that is the only issue reached and available for appeal Appellant, though, has wholly failed to address the only issue that is properly before the Court. Consequently, Appellant has waived and abandoned his appeal.

Appellant filed a notice of appeal after receipt of Judge Gravely's order. Even in his notice Appellant recognized that the order concerned only the filing of the documents:

> Robert Earl Dillard, appeal the order of the honorable perry G. Gravely, dated june 7, 2022. appellate received written notice of denying filing of pleadings order on june 14, 2022. from the perry c.i. mailroom.

(NOA, received July 13, 2022, Appellate Case No. 2022-000972) (errors in original). Further, in his explanation accompanying the notice, Appellant asserted that that he was wrongly denied the right to file. He cited *Lakes v. State* in support of his position but maintained that his pleading was to determine "whether he (Petitioner) was denied due process of law." (Appellate Case No. 2022-000972, Explanation, at 4).

Yet, in his brief,[3] Appellant argues the trial court failed to properly instruct the jury regarding reasonable doubt. (*See* Question Presented). Further, he appears to want to revive his direct appeal, (Brief, at 3), and the appeal from his 2011 PCR action on the same grounds as he alleges here, (Brief, at 5). (*See* C/A 2017-CP-39-0182, Order Restricting Future Filings, at 5 (setting out claims and appeal from 2011 PCR action)). But critically, Appellant fails to offer any argument as to whether Judge Gravely abused his discretion in denying the motion to proceed *in forma pauperis.* Thus, the appeal has been waived and abandoned.

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[3] Appellant was instructed to amend and correct his prior attempts to file a brief. Respondent refers to the Amended Initial Brief of Appellate filed May 11, 2023.

Appellate jurisdiction is obtained by timely service of a notice of appeal of a final order. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) ("The requirement of service of the notice of appeal is jurisdictional..."). An appeal is limited to the issue ruled on below. *See State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon" below); *id.* at 142, 587 S.E.2d at 693-94 ("Issues not raised and ruled upon in the trial court will not be considered on appeal.").

To the extent that Appellant's argument could be construed as offering potential support of his request to file without payment of fees based on merits (which is extremely questionable in the way it is presented), the potential merits of underlying claims (especially where those claims are more appropriately presented in other actions or other courts) simply has no bearing on the payment of fees under Rule 3, SCRCP. It certainly presents no basis for extending subject matter jurisdiction where none exists.

To the extent Appellant attempts to show that his 2022 motion filing should be construed as a state habeas action, that argument does not support proceeding *in forma pauperis* for clear reasons: Petitioner has filed a state habeas petition in circuit court before thus should know how to label the action as such, (*see* C/A 2005-CP-39-1735), but did not do so here. Further, Appellant filed a state habeas corpus action the original jurisdiction of the Supreme Court and label the action as such, (Appellate Case No. 2021-000115). Notably, in his original jurisdiction action, Appellant submitted a motion to proceed with payment of cost and offered the reason as being the action was one of state habeas and cited to *Lakes v. State*. (Appellate Case No. 2021-000115, [Motion to] Proceed in Forma Pauperis Without Cost, at 1). It is doubtful that in filing in circuit court in 2022 that he had forgotten *Lakes* or the appropriate designation to indicate the filing of a state habeas

action. Second, Petitioner asserted a right to file without cost under an adversarial system and equal protection. (R. p. *). In other words, he did not ask for his motion to be construed as a habeas action or post-conviction relief action. Petitioner cannot argue one ground below and another on appeal. *See, e.g., State v. Bailey*, 298 S.C. 1, 5–6, 377 S.E.2d 581, 584 (1989) ("A party cannot argue one ground for a directed verdict in trial and then an alternative ground on appeal."). Because Appellant "failed to raise this issue at trial," he has "waived his right to argue it on appeal." *Id.*

Further, Rule 208 (b)(1)(E), SCACR requires an appellant to present "discussion and citations of authority" in support of each claim. Even if one were to infer that the merits argument presented goes to the decision to deny the motion to allow *in forma pauperis* proceedings, Petitioner has not cited any authority that would support such position. Again, the argument is waived and abandoned. *See First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (if a party fails to cite authority or the argument consists of mere allegations, the party is deemed to have abandoned the issue on appeal).

Even so, the record shows that Judge Gravely appropriately considered the type of argument Appellant wished to present in considering whether the fee was waived. The judge properly noted that Appellant offered appeal issues, not new arguments. This factual determination is well and fully supported by the record. Notably, the motion does not allege ineffective assistance that would identify the claim as one under post-conviction relief or reflect an indication of any proper collateral action to be pursued. Respondent also submits that Appellant would logically wish to avoid filing under post-conviction relief given the Order Restricting Future Filings. The circuit court found that Appellant's excessive and repetitive filings warranted restrictions and ordered the "Pickens County Clerk not to accept *any further PCR applications* from the Applicant

unless he pays the normal filing fee generally required for the filing of a summons and complaint." (C/A 2017-CP-39-0182, Order Restricting Future Filings, at 8)) (emphasis added). Appellant's seeming attempt to circumvent the restriction landed him back in the Rule 3 requirements, and he failed to show a statutory provision, or constitutional right, that would allow the fee to be waived. *See generally Martin v. State*, 321 S.C. 533, 535, 471 S.E.2d 134, 135 (1995) ("motions to proceed in forma pauperis may only be granted where specifically authorized by statute or required by constitutional provisions").

Lastly, Respondent notes what is inescapable to recognize – Appellant does not accept the jury's verdict that has been affirmed time and time again. But Appellant's desire to continue argument (on the same claims, repeatedly)[4] does not show error in Judge Gravely's decision denying the filing of the 2022 motion. The record supports Judge Gravely's finding that Appellant failed to identify any "basis for waving Court fees." Having failed to show an abuse of discretion in this matter, no relief is due, but Appellant has failed to show an abuse of discretion because he wholly failed to raise and argue that issue with proper citation to authority as required by the appellate court rules. That is abandonment of the issue on appeal.

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[4] The Public Index for Pickens County shows 10 actions under Appellant's name – two for the criminal trial charges and the remaining entries reflecting challenges filed in post-conviction relief, habeas, mandamus and two undesignated. This, of course, does not account for appellate challenges and federal challenges. While the opportunity to litigate challenges is vital to our judicial process it notes remembering Justice Harlan's caution: "If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all." *Williams v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part, dissenting in part). Further, the Court has acknowledged that "the principle of finality ... is essential to the operation of our criminal justice system" because "[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). Appellant's conviction and sentence have been repeatedly challenged and upheld. Continued argument on the same issues is not warranted.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Court affirm the June 7, 2022, Order of Judge Gravely that denied the filing of pleadings in C/A 2022-CP-39-680 in the absence of a filing required under Rule 3, SCRCP.

Respectfully submitted,

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