NOTICE OF APPEAL FROM COMMON PLEAS REGARDING A

POST CONVICTION RELIEF

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Jan 16 2024

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

Daniel Coble, Circuit Court Judge

Case No. 2020-CP-32-00388

The State,.....Respondent,

William Craig Caughman,.....Appellant,

Notice of Appeal

William Craig Caughman appeals the order of the Honorable Daniel Coble, dated December 19th, 2023, which denied his application for Post-Conviction Relief with prejudice. Appellant received written notice of the order on December 20, 2023.

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STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS FOR THE ELEVENTH JUDICIAL CIRCUIT
William Craig Caughman, SCDC #355503, Applicant, v. State of South Carolina, Respondent.	Case No. 2020-CP-32-00388 ORDER OF DISMISSAL

This matter comes before this Court by an application for post-conviction relief filed by William Craig Caughman on January 27, 2020. The Applicant was appointed Ola Johnson to represent him on May 6, 2020. The Respondent's original Return was made June 2020. The Applicant made an amended application for post-conviction relief filed by appointed counsel, Ola Johnson, dated October 12, 2023.

On October 24, 2023, the matter was convened for an evidentiary hearing before this Court. The Applicant was present and represented by his appointed counsel, Ola Johnson. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. During the hearing, testimony was received from the Applicant and Deputy Solicitor Suzanne Mayes. After the hearing, the Court took the matter under advisement.

Pursuant to S.C. Code Ann. Section 17-27-80, and based upon careful consideration of the record and the evidence presented, this Court makes the following findings of fact and conclusions of law and deny the application for post-conviction relief, as amended, in its entirety.

ALLEGATIONS

In his initial application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on (verbatim):

1. Ineffective Assistance of Counsel (Richard Breibart)
    a. "Richard Breibart I paid $40,000 to, he got suspended and arrested while my case pending."
2. Ineffective Assistance of Trial Counsel (Wayne Floyd)
    a. "Wayne Floyd went to trial for me but didn't get me an expert witness to challenge the State's."
    b. "Wayne Floyd was ineffective for not trying to get me a plea deal when he knew the State had overwhelming evidence on me."

Applicant requests relief as follows:

> "A reduced sentence, released with time served, or at least I would like my house arrest time with GPS monitor that Judge Newman did not put on sentence sheet."

In his amended application filed by appointed counsel Johnson, he makes the following allegations:

1. Prior to the trial, Applicant's counsel Richard Breibart, misled the defendant and failed to explain the details of the Applicant's case including failing to discuss potential offers from the state.

2. Applicant's counsel, Wayne Floyd, failed to subpoena victim's medical records (p. 449, Line 16-19) to determine the cause of death and failed to retain an expert to testify regarding this or review records.

3. Applicant's counsel, Richard Breibart and Wayne Floyd, failed to meet with the applicant a sufficient number of times to properly review the evidence and discuss this case with applicant.

4. Applicant's counsel, Richard Breibart and Wayne Floyd, failed to negotiate effectively for the applicant and communicate with the applicant.

5. Applicant's counsel, Wayne Floyd failed to ensure the defendant received proper time served credit at sentencing (including house arrest time).

6. Applicant's counsel. Richard Breibart and Wayne Floyd, failed to properly investigate the facts of this case.

ATTACHMENTS BEFORE THE COURT

The Court has before it the Lexington County Clerk of Court records regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, Applicant's appellate records, including the trial transcript, and the records of the current PCR action.

FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections. During its May 2013 term, the Lexington County Grand Jury indicted Applicant for hit and run accident resulting in death (2010-GS-32-02294) and obstruction of justice (2010-GS-32-02842). H. Wayne Floyd, Esquire (Counsel), represented Applicant.[1] Assistant Solicitors Suzanne Mayes and Robert E. McNair, III, of the Eleventh Circuit Solicitor's Office, prosecuted the case. On May 20, 2013, Applicant proceeded to a jury trial before the Honorable Clifton Newman.

On May 23, 2013, the jury found Applicant guilty of hit and run accident resulting in death.[2] Judge Newman sentenced Applicant to a term of twenty years' imprisonment.

On May 31, 2013, Counsel filed a motion for a new trial and reconsideration of sentence. The court convened a hearing on Applicant's motion on May 21, 2015. R. pp. 585–633. Judge Newman denied Applicant's motion by order dated July 25, 2015.

DIRECT APPEAL

Applicant filed a timely notice of appeal. Appellate Defender John H. Strom initially represented Applicant on appeal. On June 17, 2016, Counsel Strom filed a motion to hold appeal

[1] Wayne Floyd died on August 24, 2021. Applicant initially retained Richard Breibart to represent him; however, Mr. Breibart was placed on suspension prior to Applicant's trial. *In Re Breibart*, 398 S.C. 123, 727 S.E.2d 470 (Mem) (2012). Wayne Floyd died on August 24, 2021.

[2] The trial court granted Applicant's motion for a directed verdict on the obstruction of justice charge. R. pp. 514–38

in abeyance and to remand for reconstruction of the record. The Court of Appeals granted the motion and remanded to the circuit court for reconstruction of the record. The court convened two reconstruction hearings on September 16, 2016, and May 1, 2017. R. pp. 657–726. On May 26, 2017, Judge Newman issued an order finding the record had been sufficiently reconstructed so as to provide a full and complete record and allow for meaningful appellate review. R. pp. 765–76.

Appellate Defender Taylor Gilliam represented Applicant for the remainder of his appellate proceedings. Both parties submitted briefs on the following issues:

> I. Did the trial judge err in denying Appellant's motion to suppress, where law enforcement lacked jurisdiction to execute a search warrant on Appellant's property because the multijurisdiction agreement was invalid?
>
> II. Did the trial court err by improperly considering Appellant's alleged alcohol use, where witnesses offered conflicting statements on whether Appellant had been drinking hours before a motor vehicle accident, where there was no testimony that Appellant had any alcohol with his evening meal prior to the accident, and where the trial court suggested immediately prior to sentencing that things might have been different if Appellant had not been drinking?

Following briefing and oral argument, the Court of Appeals affirming Applicant's conviction and sentence in an unpublished *per curiam* opinion. *State v. Caughman*, Op. No. 2020-UP-009 (S.C. Ct. App. filed Jan. 15, 2020). The remittitur was issued on January 31, 2020.

SUMMARY OF TRIAL EVIDENCE

Officer Marion Green of the Cayce Department of Public Safety was dispatched to the scene of a hit and run at 10:08 p.m. on February 21, 2010. R. pp. 113-14. When he arrived at the scene, Officer Green observed a heavily damaged motorcycle and the victim, Frederick Morris, laying in the road. R. p. 114. Officer Green testified the road was littered with parts from Mr. Morris's motorcycle. R. p. 116. Mr. Morris was able to tell Officer Green his name but was unable

to recall any details of the accident. R. pp. 114-15. Kevin Washington, a witness at the scene, told Officer Green he observed a red Ford Ranger driving down 9th Street and he believed that was the vehicle that struck Mr. Morris's motorcycle. R. p. 115. Officer Green noted the street lights could influence someone's perception of color at the scene, as they project an amber color. R. pp. 124-25.

Jennifer Prather, a friend of Mr. Morris, received a phone call from Lexington Medical Center around 3:00 a.m. on the evening of the incident informing her that he was in the emergency room. R. p. 88. Ms. Prather described Mr. Morris as "pretty beat up," and noted he was treated for body fractures. R. p. 88-89. Ms. Prather also described Mr. Morris's condition as, "he had a lot of injuries." R. p. 92. Ms. Prather continued to visit Mr. Morris "around the clock" for the next week while he was hospitalized. R. p. 92. The night before he was due to be discharged, Mr. Morris passed away. R. p. 93.

Dr. Elizabeth Moffatt, a pathologist at Lexington Medical Center, conducted an autopsy on Mr. Morris. R. p. 441. Dr. Moffatt testified there was evidence of trauma to Mr. Morris's body. R p. 452. Mr. Morris's injuries included bilateral rib fractures, thoracic vertebral fractures in his spinal column, a fracture at the base of his skull, pulmonary contusions, a left wrist fracture, and hematomas. R. pp. 453-54. Dr. Moffatt testified this litany of injuries would necessitate the patient being at least partially immobile while being treated. R. p. 454. Dr. Moffatt testified Mr. Morris's cause of death was a pulmonary embolism. R. p. 456. Dr. Moffatt explained that a pulmonary embolism is a blood clot that travels through the blood stream until it is stopped somehow. R. pp. 456-57. Dr. Moffett stated the most common cause of a blood clot is immobility. R. p. 457. Dr. Moffett further stated trauma and surgery relate to risk factors for a blood clot. R. p. 458. Dr. Moffatt testified it was her opinion to a reasonable degree of medical certainty that the blood clot

that killed Mr. Morris was a result of trauma sustained in an automobile collision on February 21, 2010. R. p. 458.

Mr. Morris's motorcycle was subsequently transported to SLED on March 3, 2010, for analysis. R. p. 473. Mike Moskal, a trace evidence analyst for SLED, performed a visual examination of the motorcycle and was able to observe foreign paint embedded between the wheel and the rim of the front tire. R. p. 476. Moskal was able to determine the paint on the motorcycle was an original manufacturer's paint from another vehicle. R. p. 478. The vehicles that were painted with the particular paint found on Mr. Morris's motorcycle were Ford Rangers manufactured from 1999 to 2001, Ford S series vehicles manufactured from 1998 to 2001, Ford Escorts manufactured from 1998 to 1999, Ford Expeditions manufactured from 1998 to 2001, Ford Focuses manufactured from 2000 to 2001, Mercury Tracers manufactured from 1998 to 1999, and Lincoln Navigators manufactured from 1998 to 2000 and 2002. R. p. 479.

On March 10, 2010, Detective Edward Pereira of the Cayce Department of Public Safety was notified by SLED that they found foreign paint on Mr. Morris's motorcycle. R. p. 398. Aside from knowing the suspect's vehicle was a Ford, Detective Pereira testified there were no significant leads in the case until May 5, 2010. R. p. 399. On May 5, 2010, SLED received a Crimestoppers tip stating Applicant was the culprit. R. p. 400. The Crimestoppers tip was made by an individual named Lawrence Gilbert. R. p. 401.

Lawrence Gilbert knew Applicant for almost his entire life. R. p. 298. Gilbert testified they played baseball together, vacationed together, and were in each other's weddings. R. p. 298. Gilbert went by Applicant's home on the afternoon of February 21, 2010. R. pp. 298-99. Gilbert arrived sometime around 4:00 p.m. and stayed sometime between thirty and forty-five minutes. R. p. 299. Gilbert noted he saw alcohol but did not remember anyone drinking. R. p. 299. Gilbert

subsequently left Applicant's house and did not see him at any point that evening. R. pp. 299-300. Applicant called Gilbert the next afternoon and told him "he messed up or he had screwed up or something." R. p. 300. Gilbert went to Applicant's home and found him sitting on the back porch. R. p. 300. Applicant took Gilbert into the garage where his truck was parked and Gilbert observed, "the passenger window was broke. The side door was dented up. It seems like that the mirror was dangling down. I noticed that the bottom of the foot jam - - there was a dent about three inches wide and about three inches deep that was black." R. pp. 300-01. Gilbert clarified all of the damage was to the passenger side of Applicant's truck. R. p. 302. Applicant told Gilbert he went to eat and "was leaving and heading toward Columbia at Knotts-Abbott (sic). He said that he had stopped at the light. Nothing was coming and he said he turned and heard a loud bang. R. p. 302. Gilbert asked Applicant whether he hit a car and Applicant replied, "I hit a fucking motorcycle." R. p. 302.

Gilbert later saw a news report about the accident Applicant was involved in. R. p. 303. Applicant told him he wished he didn't use his credit card when he paid for dinner because they had a time that he was there.[3] R. p. 304. Applicant later told Gilbert he removed the doors from his truck and buried them in his backyard. R. p. 304. Applicant subsequently told Gilbert he moved them because law enforcement was searching for them and that they would never find the doors. R. p. 304. Applicant later covered his truck with a white tarp. R. p. 304. The news that Mr. Morris died affected Gilbert greatly, causing him to lose twenty pounds and affecting his ability to sleep. R. p. 306. Gilbert noted that Applicant, "was hurt but it seemed like to me it was hurting me more than him." R p. 307. Gilbert testified he "stewed on it" for about two months before calling Crimestoppers. R. p. 306.

[3] Peter Koutrakis, the owner of Hard Knocks Grill on Knox Abbott Drive testified Applicant conducted a credit card transaction at the restaurant at 10:00 p.m. on the evening on February 21, 2010. R. p. 324.

Charles Campbell was also a neighbor and friend of Applicant. R. p. 275. On the afternoon of February 21, 2010, Campbell spent the day doing yard work and drinking beer with Applicant. R. p. 277-78. Campbell sent his wife to buy more beer at one point during the afternoon because they did not have enough at their home. R. p. 278. Applicant subsequently left Campbell's home when it began to get dark outside. R. p. 279. Two days later, Applicant called Campbell and asked if he could borrow one of his trucks because his truck was damaged on the passenger's side. R. p. 280. Campbell noted Applicant drove a green Ford Ranger. R. p. 280. Applicant told Campbell he went to get something to eat at Wal-Mart and was on Route 7 when he struck the motorcycle. R. p. 283. Campbell later observed Applicant's truck in his garage and saw the damage. R. p. 282. Campbell noted he worked in the towing industry and told Applicant his truck was totaled. R. pp. 282-83. Applicant told Campbell that he thought he hit a motorcycle. R. p. 283. Applicant told Campbell that in the event he was questioned by police, he would just tell them he hit the side of a truck. R. p. 284. Campbell testified Applicant later moved the truck to his back yard and removed the vehicle's doors. R. p. 287. Applicant's truck was later moved behind a tool shed and hidden under a tarp. R. pp. 292-93.

After receiving the Crimestoppers tip, Detective Pereira, Lieutenant Jeffrey Simmons of the Cayce Department of Public Safety, and Agent Mike Robinson of SLED went to Applicant's home and observed a vehicle hidden underneath a tarp in the back of the residence. R. p. 343, 346. The officers then went through a public field at the end of Applicant's street and could see that the vehicle underneath the tarp was the green Ford Ranger described in the tip. R. p. 343. Officers subsequently obtained a search warrant and executed a search of Applicant's property on May 5, 2010. R. p. 347. Lieutenant Simmons noted Agent Robinson was with the Cayce officers when they executed the search warrant. R. p. 351. Once the search warrant was executed, Applicant's

vehicle was taken into custody. R. p. 376. The truck was transported to the Cayce Department of Public Safety where SLED came and conducted forensic analysis. R. p. 377.

Detective Pereira noted that the investigative team was never able to find the doors to Applicant's truck. R. p. 409. After the search warrant was executed on May 5th, Detective Pereira and Agent Robinson went to Applicant's workplace to make contact with him. R. p. 410. Detective Pereira and Agent Robinson subsequently interviewed Applicant at the Cayce Department of Public Safety. R. p. 413. The audio of the interview was played for the jury. R. p. 418. Detective Pereira noted the cuts to Applicant's vehicle were jagged and looked like someone hurriedly completed the task. R. pp. 420-21. Detective Pereira testified the damage to Applicant's truck was consistent with the vehicle colliding with a motorcycle. R. p. 422.

At trial, the State called Clarissa Mack of the South Carolina Department of Motor Vehicles. R. pp. 334-35. Ms. Mack confirmed Applicant owned a Ford Ranger on February 21, 2010. R p. 336. Interestingly, Applicant purchased a Jeep Wrangler on February 25, 2010. R. p. 336. Ms. Mack noted the tag number on the Jeep was different than that of the Ranger. R. pp. 336-37.

SUMMARY OF PCR TESTIMONY

At the outset of the proceeding, Respondent set out generally the claims related to this proceeding. He also advised this Court that the Applicant, through retained counsel Tommy Thomas, had filed a motion in the Court of General Sessions that was pending requesting clarification of Judge Newman's sentencing order on whether he was entitled to credit for time while he was out on bond for house arrest. In that action, Applicant is claiming that Judge

Newman's order did not specify the credited time.[4]

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[4] At the time of his trial and sentencing on May 23, 2013, S.C. Code Ann § 24-13-40 read as follows:

> In every case in computing the time served by a prisoner, full credit against the sentence shall be given for time served prior to trial and sentencing. Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; or (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall no receive credit for time served prior to trial in reduction of his sentence for the second offense.

In State v. Higgins, 357 S.C. 382, 593 S.E.2d 180 (Ct. App. 2004), the Court held that time served credit under § 24-13-40 could only be given to inmates serving time in a penal institution and not on home detention.

However, subsequent to Applicant's trial and May 23, 2013 sentencing, on June 7, 2013, S.C. Code Ann. § 24-13-40, was amended to read as follows:

> The computation of the time served by prisoners under sentences imposed by the courts of this State must be calculated from the date of the imposition of the sentence. However, when (a) a prisoner shall have given notice of intention to appeal, (b) the commencement of the service of the sentence follows the revocation of probation, or (c) the court shall have designated a specific time for the commencement of the service of the sentence, the computation of the time served must be calculated from the date of the commencement of the service of the sentence. In every case in computing the time served by a prisoner, **full credit against the sentence must be given for time served prior to trial and sentencing, and *may* be given for any time spent under monitored house arrest.** Provided, however, that credit for time served prior to trial and sentencing shall not be given: (1) when the prisoner at the time he was imprisoned prior to trial was an escapee from another penal institution; (2) when the prisoner is serving a sentence for one offense and is awaiting trial and sentence for a second offense in which case he shall not receive credit for time served prior to trial in a reduction of his sentence for the second offense.

S.C. Code Ann. § 24-13-40 (emphasis added). The statute, by its terms, gives trial courts the discretion to give - or not to give - credit for time spent on monitored house arrest prior to trial. See State v. Allen, 370 S.C. 88, 94, 634 S.E.2d 653, 655 (2006) (explaining statute providing court "may" revoke probation vested court with discretion). In 2023, Act No. 83, §8 was amended and added the following: "(3) when the prisoner commits a subsequent crime while out on bond; or (4) has bond revoked on any charge prior to trial or plea," effective June 20, 2023.

Counsel Johnson requested the Court to take judicial notice of an Amended Bond Order filed Sept 2010. He stated an allegation for ineffective assistance of counsel relates to that bond and his release under its terms. The claim is that Mr. Floyd failed to argue for Applicant's time served while out on bond under house arrest from September 17, 2010 through May 23, 2017. He calculated calculated 968 days of additional time served would have been potentially available. Counsel Johnson ask the court to take notice of record. State has no objection. Counsel Johnson also advised the Court that he had earlier made two motions that were denied, including an order denying request for certain hospital medical records of the victim prior to the victim's death. Counsel Johnson also advised this Court of his second motion that had been denied requesting funding for an expert in pathology which can assist in client's PCR.

Applicant William Caughman's PCR Testimony

The Applicant, William Caughman was the first witness to testify. He initially claimed that he was never advised of any plea offers from the State by either his initial counsel Richard Breibart or Maura Dawson. He also testified that his trial counsel Wayne Floyd never advised him of any plea offers from the State. Caughman complained that his trial counsel never acquired or subpoenaed hospital records for the victim, which counsel Floyd admitted at trial, citing Tr.p. 449, l. 16-19. He claimed counsel solely relied upon the State's expert (pathologist Dr. Elizabeth Moffat)

Concerning the claim counsel met with him insufficient times, Caughman asserted he met with counsel Breibart probably not over 4 times. Since he was out on bond, Applicant stated he met him at the office. He claimed that his family paid Breibart $40,000.00. He said Breibart's associate, Maura Dawson was the person he talked to most of the time.

Caughman stated he met with Mr. Floyd after what happened to Breibart. He stated they discussed the charges, and Floyd later called him back and agreed to take the case. Caughman stated he received the records they took Breibart's files and gave them to Mr. Floyd. Counsel Floyd told them nothing will happen after the 1st of year. He recalled that they may have talked once and said I'll let you know. One time counsel Floyd came to the house where my truck was and wanted to look over the yard and made comment that he wished that he never took case.

Caughman stated he was never aware or talked about any plea deals with counsel. Breibart advised him that they were going to trial.

Concerning the allegation about credit for jail time or house arrest, Caughman indicated this was not discussed. Caughman acknowledge the only credit he received was for actual jail time.

Caughman claimed he was not aware of any private investigator being involved in his case. Mr. Breibart had my parents pay some fees to Leigh Leventis. He was advised at one point that he was told "I have this lady and I'll guarantee you'll walk." However, he told him that he did not have any more money. Caughman indicated that there were misleading statements in the investigation. He stated he spoke with Maura Dawson about the conversations with Cayce Police Department by Charles Campbell, his ex-wife, and Lawrence Gilbert.

On cross-examination, Applicant claimed that knowing evidence they had on him, he would have pled guilty, but admitted that he did not know. He claimed the evidence against him was strong based upon the statements by his friends given to law enforcement and the admissions. He stated that he did not ask his lawyers to take a plea, but was trusting his lawyers. He claimed he was scared and did not know what to do.

At the PCR hearing, he admitted he was driving the truck that night after he left the café, resulting in accident with Toby Morris. He admitted that he left the scene for whatever reason. He

described it as "the stupidest mistake in my life" and he panicked and left.

The Applicant stated he did not testify at trial. He admitted he spoke with counsel Floyd about testifying. Floyd advised them that they had the video and it would be played and that he should not take the stand. He stated he was not going to testify.

He was aware the prosecutors in the case were Suzanne Mayes and Derrick Mobley earlier. He stated he first saw Mobley when he came to court for his bond reduction hearing. He stated that was the only time he saw Mobley. The next time he saw him was when he saw Breibart and Mobley walking together and learned he then worked with Breibart's firm.

He never had any discussion in his presence about a plea offer from Suzanne Mayes, who he only saw at roll call prior to the trial. Caughman stated from the time he got out on bond, he was only told that they were going to trial.

The applicant indicated that they wanted the medical records from the hospital to see if there was anything that happened at Lexington hospital that caused or could have prevented his death. He noted there was evidence presented at trial that after the victim got to the hospital, he began to recover. However, a blood clot formed and caused his death. He confirmed that counsel Floyd challenged that blood clots can happen because of other things. He also confirmed the trial judge gave instructions on proximate cause and a lesser included offense instruction on hit and run causing death and causing great bodily injury, and not guilty.

The Applicant stated that he should have had a medical expert to challenge what said about the blood clots or if given the proper medication to prevent blood clots. He speculated that it could have swayed jury to give me a lesser charge. He recalled counsel asking the pathologist about whether the victim was on blood thinners. He claimed the State should have given him the hospital records. He admitted at trial, the State indicated that they did not have the medical records, when

counsel Floyd asked for sanctions against them for not providing them to the defense. He admitted the failure to provide the hospital records came up at a subsequent hearing before Judge Newman. He acknowledged that during that hearing, Judge Newman said if you had hired an independent expert, they would have needed to request those records.

The Applicant indicated he was aware of the State's case against him before the trial. He stated that this was his first trial and did not know what to expect. He thought his friends would be testifying against him. He was they had visited his home, found his truck, but still didn't find the door. He claimed at the hearing that he put the door in a metal dumpster and that it was not wasn't buried. He confirmed he had two Bud Lights and was aware the State had receipts of it. He confirmed he knew the bulk of the State's case and statements from law enforcement. He was aware that the victim seemed to gain coherence and was confident he was about to be released to some sort of center. He acknowledged this was counsel's understanding also. However, he claimed he did not know about great bodily injury and death, because he was charged with death, He admitted he asked counsel what a potential sentence for death was and told 1 to 25 years, band for great bodily injury it would be 1 to 10 years. He understood it except that it was a lot of time. As for the appeals, he was initially represented John Strom and then by Taylor Gilliam of the South Carolina Office of Appellate Defense.

On re-direct, counsel inquired that counsel Floyd had an opportunity to get the hospital records, but did not do so. He speculated it might have resulted in a lesser offense. However, he was aware that neither side got those records.

Deputy Solicitor Suzanne Mayes PCR Testimony

Deputy Solicitor Suzanne Mayes testified about her extensive experience as a prosecutor for 32 years. She became a member of the Eleventh Circuit Solicitor's Office in March 2011. At

that time, this file already existed. She stated it was previously handled by then Assistant Solicitor Derrick Mobley after the 2010 crime. She stated Mobley had left the office and began working with Richard Breibart's firm who was representing the Applicant.

She testified that they had provided discovery with counsel Breibart and Maura Dawson and communicated with them. In her correspondence she reviewed prior to this hearing, she offered to meet with them and offered to send any material in preparation of trial. She stated there was an indication that when Breibart was removed and his materials went to the Court's trustee that Applicant came and picked the Breibart file and provided file to Wayne Floyd. She stated she communicated with counsel Floyd and observed files provided to Floyd and asked him to check all materials and DVDs to check that they were working in order.

The DVDs should have been the audio recordings with law enforcements and allegations. In his meeting with law enforcement, Applicant denied any involvement and did not admit that he was driving vehicle that struck victim. Deputy Solicitor Mayes stated that today at this hearing was the first time aware acknowledging he was driver.

As to plea offers, Solicitor Mayes noted she did not have access to any of Mobley's correspondence or emails that would have preexisted and had requested them from storage and what we received was in the courtroom. She indicated the file was missing some emails between Mobley and counsel Breibart concerning roll call when he had the case. Also, the Solicitor's Office only could locate a few of the rollcalls when she was involved in 2011 and 2012. She noted on April 22, 2011, she emailed Breibart and Dawson and was looking to schedule a disposition and asked them if they could advise her whether they were pleading guilty or requesting a trial. She stated that at some point later that same day, she was advised that Mobley had made a plea offer and it had been rejected. She emailed Breibart on April 22, 2011 @ 6:17 PM stating: "also just to

clarify, my understanding is that a previous plea offer made by Mr. Mobley was rejected and currently no plea offer has been extended." She testified she never heard anything different nor did they respond to that email.

Concerning her knowledge of the alleged plea offer between Mobley and Breibart, she stated she did not know that and did not want to speculate what it was. She stated that from the time she had case it was going to be trial. She pointed out she had appearances also known as roll call where Applicant came to court and Dawson would have been present.

She pointed out reviewing a March 25th, 2011 document showed that Applicant was present and it has Dawson and Applicant's signature. She had written possible trial term May term on the document. Solicitor Mayes declared her purpose with that wording was based upon a request if this is a guilty plea or trial, and she would have been told it is going to be a trial. We discussed May and she mentioned she found an email and mentioned to others that basically saying ready to go on those trials.

Suzanne Mayes indicated that she did not make a plea offer in the case. She stated that her philosophy may had been different that than what Mobley may have made. She state she looked at the case and we had a USC professor who was traveling on a motorcycle, he was hit, the person driving the vehicle fled the scene and there was an indication of alcohol in the evidence she had. She declared that she did not believe a plea offer was appropriate and the crime carried 1 to 25, She stated that was also her recollection from roll call and apparent in trial that they weren't going to accept anything.

Ms. Mayes reviewed additional documents and stated they also indicate what we call roll call appearances in 2010 and 2011 and don't know date that would have made bond. My recollection is that he was out on bond. She stated they have a court appearance or roll call sheet

signed by applicant and Dawson for March 25, 2011 in which I am requesting May 6 follow-up term to determine whether it will be a guilty plea and then May 6 signed by both applicant and Dawson. and again having him come back June 6, 2011 for further discussion and from there saw correspondence with Dawson where began to schedule trial dates in a subsequent roll call sheet. See Exhibit One and Two.

Concerning his complaint about not receiving the hospital records prior to or during the trial, Deputy Solicitor Mayes declared that they did not have the complete hospital records. She stated they just had the autopsy report done by the pathologist at Lexington Medical Center (LMC). She stated she previously had an attorney pull the Solicitor's file records they did a thorough search of that file and concluded we provided everything we had to the extent of the LMC record.

Mayes testified that she did not remember anything about the records until they started the trial. At that time, when confronted about it during the trial, she stated they didn't have the additional records from the hospital, other than the pathologist materials. She testified from a strategic perspective; they had an autopsy report which is usually what they relied on when trying to prove a death of a person who had been hospitalized. She opined that report incorporated findings of doctors and the injuries of body. From strategy purposes she thought this was sufficient to prove death. Because of HIPAA, she declared they did not have a living person to request consent for the records. She stated she learned that counsel Floyd did not request them from the trial court until the trial was underway. In addition, and at that time, either one could have requested it by an order. Further she noted that counsel Breibart could have done a consent order, but in looking back never was an issue for us or for them.

Deputy Solicitor Mayes further testified that the issue came up during the reconsideration hearing. At that time, she again confirmed that they had not acquired the records from the hospital.

She stated that they do not have the additional hospital records because of HIPAA and we have a deceased person that cannot sign. She testified that prior to trial, law enforcement could have pursed a search warrant, or by consent for a court order where both state and defense requested the records, at the outset could have been ordered, but didn't. She further stated Judge Newman could have obtained by end of week. However, Deputy Solicitor Mayes stated that our indictment was hit and run resulting in death, and based upon the findings of pathologist, that is what we were relying on. She stated as to injuries that led to death, she did not know how the medical records could have helped him.

Upon reviewing the emails in the materials she was able to locate, she saw that her first email about this case is to counsel Breibart and copied to Maura Dawson. This concerned providing the defense with multiple items of evidence, crime scene reports, SLED reports and DNA processing reports from SLED. It also addressed numerous items of audio and video recordings, evidence photographs, dash cam videos from the officers in case. She directed the Court's attention to an email to counsel; Breibart and copying counsel Dawson dated April 22, 2011:

> I am looking to schedule case for disposition in the near future. When you have the opportunity, can you advise as to whether Mr. Caughman will be pleading guilty or requesting a trial.

She stated that trial she noted again the follow-up email later that day to same counsel; "just to clarify, my understanding is that a previous plea offer made by Mr. Mobley was rejected and currently no plea offer has been extended. Please feel free to give me a call to discuss." Mayes stated she continued to have the Applicant roll calls subsequently and would have reiterated same (concerning whether it would be a plea or trial).

On cross-examination, Deputy Solicitor Mayes confirmed again that she did not make any plea offers to Applicant or either defense counsel. She further stated it was her recollection that

she never saw anything in writing about earlier offers. She confirmed that she was the one who wrote the email regarding the understanding of previous plea offer, but declared it was coming to her coming secondhand and that she did not know the details of it. She stated when she brought counsel and the Applicant in for roll calls, this gave them the opportunity to talk alone, and there was no indication of plea.

As to the hospital records, she again confirmed that she never had them. She stated that she cannot say anything other than that the pathologist would have had access to *MyChart* that most hospitals have for patients to use and are able to pull up hospital records. She noted that in her report she was including the diagnosis of those injuries and surgeries, and all part of underlying data in reaching her conclusion. She concluded that she did not know what is in the records.

The Respondent's counsel made specific reference to the pathologist testimony that begins at Tr.p. 438 trial transcript, as well as the records attached to the return.

Abandonment of House Arrest Credit Time Served Issue in the Appeal

This Court inquired about the status of the time served issues related to whether trial counsel was ineffective in failing to request home detention credits. *Amended Application Issue 5.* Respondent's counsel noted that the issue is basically in the hands of other counsel Tommy Thomas who filed a motion for clarification that is pending in the Court of General Sessions and the Solicitor's Office. Counsel asserted it had tried to communicate with the SCDC Legal Office about its determination related to this Applicant, but had not learned its position yet. Respondent's counsel recommended that he would recommend to withdraw the claim without prejudice with a commitment to get the facts.[5] Counsel Johnson advised the Court that his client had not

[5] As noted above in footnote 4, at the time of Judge Newman's sentence on May 23, 2013, credit for monitored house arrest was not authorized under state law. It became effective June 7, 2013, subsequent to the trial, but only with a discretionary, not mandatory decision by the sentencing

proceeded through the inmate grievance process requesting these type of credits or challenging the SCDC current determination of limited jail credits. Counsel Johnson agreed to withdraw the allegation at this time without prejudice. This Court allowed the allegation considering time served for house arrest is withdrawn without prejudice and rest of allegations were taken under advisement.

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATED TO ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL

A. Ineffective Assistance of Trial Counsel, Generally

Applicant's claims of ineffective assistance of counsel are without merit. The Sixth and Fourteenth Amendments to the United States Constitution guarantee Applicant, like all other defendants, the right to "assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive *effective* assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions).

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence - a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). The reviewing court applies the two-part test outlined in *Strickland* to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction or sentence. 466 U.S. at 687. To obtain reversal of a conviction, the applicant must prove that (1)

judge. *See Teamer v. State*, 416 S.C. 171, 183, 786 S.E.2d 109, 115 (2016) (observing "We have never required an attorney to be clairvoyant or anticipate changes in the law"); *Bowman v. State*, 422 S.C. 19, 35, 809 S.E.2d 232, 241 (2018)(same)

their attorney's performance fell below an objective standard of reasonableness (the performance prong) and (2) the deficient performance prejudiced the defense to the degree that it deprived the defendant of a fair trial (the prejudice prong). *Id.* at 690–95; *Butler,* 286 S.C. at 442, 334 S.E.2d at 814. The defendant's burden for proving both of these components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. *Strickland*, 466 U.S. at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.

The first prong - constitutional deficiency - is "necessarily linked to the practice and expectations of the legal community." *Padilla v. Kentucky,* 559 U.S. 356, 366 (2010). In order to prove deficient performance, the applicant must show counsel's representation fell below an objective standard of "reasonableness under prevailing professional norms." *Cherry v. State,* 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. *Butler*, 286 S.C. at 442, 334 S.E.2d at 814.

Strickland, however, "does not guarantee perfect representation [-] only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (*quoting Strickland,* 466 U.S. at 687). Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. *Strickland,* 466 U.S. at 686. Just as there is "no expectation that competent counsel will be a flawless strategist or tactician, an attorney may not be faulted for a reasonable miscalculation or lack of foresight or for failing to prepare for what appear to be remote possibilities." *Harrington*, 562 U.S. at 110.

Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as

it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689; *see also Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Thus, a fair assessment of attorney performance requires every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. Because of the difficulties inherent in making such an evaluation, the reviewing court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Butler*, 286 S.C. at 445, 334 S.E.2d at 816. The applicant must overcome this presumption to receive relief. *Cherry*, 300 S.C. at 118, 386 S.E.2d at 625.

A reviewing court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, *viewed at the time of counsel's conduct*." *Strickland,* 466 U.S. at 690. (*emphasis added*) An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged *not* to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690 (emphasis added). The reviewing court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.*

The *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689-690; *see also Harrington,* 562 U.S. at 105 (cautioning that an ineffective assistance of counsel claim could potentially function as a way to escape rules of waiver and forfeiture and

raise issues not presented at trial). Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. *Harrington,* 562 U.S. at 105. Unlike a later reviewing court, the attorney observed the relevant proceedings; knew of materials outside the record; and interacted with the client, opposing counsel, and the judge. Thus, the question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," *not* whether it deviated from best practices or most common custom. *Id.* (*quoting Strickland*, 466 U.S. at 690) (emphasis added).

The second, or "prejudice" prong of *Strickland* is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id.* at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. In determining prejudice, the reviewing court must consider the totality of the evidence before the jury. *Id.* at 695.

Thus, it is not enough "to show the errors had some conceivable effect" on the outcome of the proceeding - counsel's errors must be "so serious as to *deprive the defendant of a fair trial.*" *Id.* at 687 (emphasis added). "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 668. Moreover, the South Carolina Supreme Court has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice. *Bannister*

v. State, 333 S.C. 298, 303, 509 S.E.2d 807, 809 (1998).

The performance and prejudice standards, however, "do not establish mechanical rules; [t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland,* at 696. Moreover, "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.* at 697. The court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. *Id.* If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, the court may evaluate the prejudice prong only. *Id.*

Counsel Breibart and the Alleged $40,000 Fee (Pro *Se* Allegation 1)

In his initial *pro se* allegation, the Applicant contends Mr. Breibart was ineffective because Applicant allegedly paid him $40,000 to represent him, yet he got suspended and arrested during his representation. This allegation alone does not entitle the Applicant to relief. This Court makes the following findings of fact related to this narrow allegation:

1. The Applicant and his family initially retained Richard Breibart after his arrest in 2010.
2. On June 1, 2012, Richard Breibart was placed on suspension from the practice of law by the South Carolina Supreme Court. *In Re Breibart*, 398 S.C. 123, 727 S.E.2d 470 (Mem) (June 1, 2012). Mr. Breibart was disbarred in 2015, subsequent to the trial. *In re Breibart*, 414 S.C. 540, 779 S.E.2d 796 (2015).
3. The Applicant subsequently retained H. Wayne Floyd to represent him on the charges.
4. The Applicant and his family acquired the Breibart files from the Supreme Court's trustee and provided them to Mr. Floyd.

5. Mr. Floyd represented the Applicant subsequent to Mr. Breibart's suspension at the trial on May 20, 2013 and subsequent proceedings before the trial court.
6. Mr. Floyd appeared during the trial on May 20, 2013 and subsequent proceedings in the trial court.

This Court must conclude that the allegation for relief on this ground and its factual basis does not require this Court to authorize a new trial when Mr. Breibart did not represent the Applicant. Sixth Amendment prejudice has not been proven based upon this limited allegation. The mere fact that he had previously retained counsel who was suspended prior to the trial does not alone authorize the grant of post-conviction relief of a new trial. This Court finds that Mr. Floyd was subsequently retained after the suspension and appeared at the trial on Mr. Caughman's behalf. The allegation for relief must be denied.

PLEA NEGOTIATION ISSUES

In his initial application (*Allegation 2(b)*) and amended application (*Amended Allegations 1 and 4)*, he makes allegations against both counsel that they failed to adequately negotiate on Applicant's behalf or failed to advise him of any plea offers by the State. This Court finds and concludes that these claims do not entitle the Applicant to post-conviction relief.

A defendant has the right to the effective assistance of counsel under the Sixth Amendment to the United States Constitution. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Supreme Court has held that a defendant has the right to effective assistance of counsel during the plea bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012); *Judge v. State,* 321 S.C. 554, 471 S.E.2d 146 (1996), *overruled on other grounds by Jackson v. State,* 342 S.C. 95, 535 S.E.2d 926 (2000). "There is a strong presumption that counsel rendered adequate assistance and exercised reasonable

professional judgment in making all significant decisions in the case." *Ard v. Catoe,* 372 S.C. 318, 331, 642 S.E.2d 590, 596, *cert. denied,* _ U.S. _, 128 S.Ct. 370, 169 L.Ed.2d 247 (2007). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim." Id. at 700, 104 S.Ct. 2052.

In *Lafler*, the key issue before the United States Supreme Court was how to apply Strickland's prejudice test when trial counsel failed to sufficiently evaluate and convey the State's plea offer to the petitioner. 566 U.S. at 163, 132 S.Ct. 1376. The Court held that in these circumstances, a petitioner must show that but for the ineffective assistance, there is a reasonable probability that the plea offer would have been presented to the court, the court would have accepted its terms, and the conviction or sentence, or both, would have been less severe under the terms of the offer than under the judgment and sentence imposed. *Id.* at 164, 132 S.Ct. 1376.

On the same day the Supreme Court issued *Lafler*, it released *Missouri v. Frye*, 566 U.S. 134, 147, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012). In *Frye*, the Court held: "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id.* , 566 U.S. 134, 145, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012). It further held "defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." To establish prejudice, it is necessary for a defendant to "show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* A defendant "must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id. Simuel v. State*, 432 S.C. 150, 154–55, 850 S.E.2d 642, 643–44 (Ct. App.

2020).

The South Carolina Supreme Court addressed a similar claim to the Applicant's in *Collins v. State*, 422 S.C. 250, 260–63, 810 S.E.2d 871, 876–78 (2018). In that case, the Court dealt with an expired plea offer, which is essentially what happened here with a change in the responsible prosecutors. The Court reversed a circuit court order granting PCR relief of a new trial based upon a failure by the newly appointed defense counsel to request reinstatement of the plea offer that had been made and expired to earlier counsel. In reversing, the Supreme Court found defense counsel's failure to request reinstatement of the earlier plea offer which had expired prior to his appointment as counsel was not deficient performance and further that even if assuming deficiency, the failure to request reinstatement did not prejudice the defendant under *Strickland*. The court found that the defendant failed to demonstrate that he would have accepted the expired offer and that the State would not have rescinded it, he failed to show deficiency.

In addressing Sixth Amendment deficient performance, the Court rejected the lower court's conclusion that counsel was deficient. The Court found that analogous to this situation, the Court noted the decision whether to revive the expired plea offer rested exclusively with the solicitor. *See State v. Langford*, 400 S.C. 421, 436 n.6, 735 S.E.2d 471, 479 n.6 (2012) (stating "[u]ndoubtedly, the solicitor has discretion in choosing how to proceed with a case, including whether to prosecute in the first place and whether he brings it to trial or offers a plea bargain"); *see also Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (finding "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"). In *Collins*, the defendant admitted he first learned of the expired plea offer after trial counsel brought the offer to his attention. The Court found: "[E]ven assuming trial counsel neglected to discuss the expired offer with the solicitor, the solicitor would have been under no obligation

whatsoever to revive the expired offer. Thus, there is no evidence of probative value sufficient to support the PCR judge's finding that trial counsel was deficient in his handling of the expired plea offer."

The Court further concluded that even if deficiency was not shown, the defendant in *Collins* failed to prove Sixth Amendment prejudice. As stated in *Frye*, and applicable here, to show prejudice under *Strickland*, a defendant must demonstrate a reasonable probability that: (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;" (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147, 132 S.Ct. 1399; *see Lafler v. Cooper*, 566 U.S. 156, 164, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) (stating "a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed"). Like Caughman, Collins proceeded to trial rather than pled guilty. Like Caughman, in *Collins*, the record was void of any testimony that expressed any previous desire to accept an earlier offer. To the contrary, the evidence was that Caughman always wanted to go to trial. Most importantly, the Supreme Court found in *Collins*, even if Collins wanted to plead guilty, there was no evidence or testimony from the solicitor that the expired offer was still available before trial, nor is there any evidence or testimony that a new offer existed for Collins to accept. In this case, the credible evidence is that Solicitor Mayes indicated to all parties that she

was not going to negotiate on this case, and it was going to be a trial once she became the prosecutor. The Court found in *Collins* that the defendant failed to demonstrate a reasonable probability that he would have accepted any offer, new or expired. *See Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (holding the PCR applicant bears the burden of proving the allegations in their application). This Court must do the same in this setting.

Counsel Breibart's Alleged Failure to Offer a Plea Offer or Renew a Prior Offer

First, this Court must initially find the Applicant failed to show the existence of an actual offer, or at least what if anything the offer actually was that may have been made prior to Solicitor Mayes becoming involved. Certain salient facts are present. The Solicitor's office was unable to locate among its records any particular offer. There is only the testimony of Solicitor Mayes and her April 22, 2011, email to counsel Breibart that "my understanding is that a previous plea offer made by Mr. Mobley was rejected and currently no plea offer has been extended." Solicitor Mayes credibly testified that that after the email, she was involved with numerous roll calls with Breibart (and subsequently Floyd) and there was no indication of either of them in the Solicitor's presence to discuss the elements of the prior alleged plea offer or negotiate anew after the prosecutor firmly declared that no plea offer had been extended. These subsequent discussions with counsel in the Applicant's presence from April 22, 2011 through May 20, 2013 during the roll calls indicated in her signed memorandum that this would always be a trial.

During the PCR hearing, this Court found credible Solicitor Mayes testimony that she was not able to determine what the actual plea offer was, if any, made by former Assistant Solicitor Mobley at the time and refused to speculate about it. What is clear to this Court is that Solicitor Mayes was firm that she was not going to negotiate on this matter with either counsel Breibart or later counsel Floyd. Solicitor Mayes set forth her reasons, including the fact that there was a death

involving a USC professor riding a motorcycle, the flight from the scene, and an additional indication that alcohol was involved. In addition, there was a denial on his part made to law enforcement. Further, the prosecutor had also pursued an additional charge of obstruction of justice with respect to his post-crime attempts "by secreting his vehicle and forcibly removing the door from the vehicle and the rocker panel from the vehicle." See Tr.p. 37.[6]

Further, this Court was not presented with the precise nature of what the alleged plea offer was that was speculated about at this hearing. The current state of the Solicitor's records did not reveal any plea offer, other than the limited and speculative information in the April 22, 2011. This Court is aware the burden of proof is on the Applicant.

The record and Mr. Caughman's testimony reveals that when Mr. Breibart was suspended Caughman took possession of the Breibart file from the trustee before he retained Mr. Floyd. He testified ultimately gave it to Floyd. This gave Mr. Caughman the complete opportunity to review whatever records he had in his file concerning whether any offer was made and if and how it was rejected if available within those files. Mr. Caughman indicated he was not aware of any plea offer. This Court must assume that there was nothing in those records that he received which indicated the existence or substance of any plea offers received or rejection other than Solicitor Mayes email, assuming it was in the file.

Unfortunately, this Court cannot speculate on what, if any, negotiation occurred prior to the change in the prosecution team. The Applicant has failed in his burden of proof in showing the exact nature and substance of any plea offer from the State prior to April 11, 2011. However, this Court can conclusively find as a fact, that after April 11, 2011 through the 2013 trial, the State,

[6] The trial court ultimately dismissed this charge. Tr.p. 284-290. The State argued there was sufficient evidence to submit the charge. Tr.p. 266-270.

through prosecutor Mayes, had made clear it was not going to negotiate or make offers in this case.

The Applicant proceeded to trial in 2013, as was indicated as the Applicant's intent to do since April 2011 during the roll calls. The record, like in Collins, is devoid of any evidence that expressed a desire to plead guilty after the State's unambiguous position was presented in April 2011, through the duration of the roll calls when the Applicant indicated with his own signature his intent to go to trial rather than plead guilty in the Solicitor and defense counsel's presence. Clearly, whatever alleged offer was made to Breibart was never presented or attempted to be renewed by Breibart and Caughman or Floyd after the April 2011 email because they were aware that any such offer was no longer available, not did a new offer exist for Caughman to accept.

During the PCR hearing, in hindsight, the Applicant speculates without an alleged basis of what the plea offer was, that considering the strength of the state's case against him, he would have pled guilty and accepted the unknown alleged plea offer. However, this Court must also conclude that such retrospective speculation lacks any credible basis without an understanding of what the alleged plea offer prior to April 2011 was. This Court finds that Applicant's testimony is not credible, but only speculation. [7] *See also Glover v. State*, 318 S.C. 496, 498–99, 458 S.E.2d 538,

[7] This case was uniquely faced with two hurdles. The Applicant's initial retained lawyer has been disbarred and his law firm dissolved. In addition, on August 12, 2013, respondent pled guilty to one count of mail fraud. On March 4, 2014, respondent was sentenced to sixty-three (63) months in the custody of the United States Bureau of Prisons and to three (3) years of supervised release. In addition, respondent was ordered to begin repayment of restitution of $2,419,326.50 in monthly payments of $100 sixty (60) days after his release from prison. *In re Breibart*, 414 S.C. 540, 542, 779 S.E.2d 796, 797 (2015). His retained trial lawyer died prior to the PCR hearing. The Supreme Court has found that the undisputed testimony of a petitioner that he or she would not have pleaded guilty can, on its own, form the basis for a finding of prejudice. *See, e.g., Alexander v. State*, 303 S.C. 539, 543, 402 S.E.2d 484, 485–86 (1991) ("[T]he only evidence in the record on this point is petitioner's own testimony that had trial counsel not misinformed him that he would face a potential life sentence if he proceeded to trial, he would not have pled guilty. Thus, the second part of the test has been met."); *Smith v. State*, 369 S.C. at 138, 631 S.E.2d at 261 (finding against petitioner, but noting: "The defendant's undisputed testimony that he would not have pled guilty to the charges but for trial counsel's advice is sufficient to prove

540 (1995) (observing mere speculation and conjecture by the applicant is insufficient to establish the allegation that counsel's deficient performance resulted in prejudice).

In summary, the Court makes the following conclusion. The Applicant has failed to show deficient performance because he has failed to show that counsel Breibart actually received a specific plea offer, in writing or otherwise, and the specific nature of that elements of the offer. Absent proof of the actual plea offer received by Breibart; counsel cannot be found deficient.

More importantly, the Applicant has failed to prove Sixth Amendment prejudice on this claim. Like the situation in *Collins*, from April 2011 through the time of trial in 2013, the State was firm that there would be no plea offer or negotiations related to the case. Any offer which may have been previously made no longer existed. Addressing the individual prongs for Sixth Amendment prejudice:

A. The Applicant failed to prove (1) he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel;"

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that defendant would not have pled guilty."). However, the court has suggested that such testimony is not always enough to fulfill the prejudice prong. *See Stalk v. State*, 383 S.C. 559, 563, 681 S.E.2d 592, 595 (2009) (finding that "Hill makes clear that this prejudice prong ordinarily requires more than simply a defendant's assertion that but for counsel's deficient performance he would not have pled but would have gone to trial"). And in other cases, our supreme court has noted that such testimony can be outweighed by other evidence. *See Goins v. State*, 397 S.C. 568, 575, 726 S.E.2d 1, 4 (2012) ("Although Goins testified at the PCR hearing that he accepted the plea because of the erroneous advice on the suppression of the evidence, his testimony specifically was found not to be credible. We therefore find evidence to support the PCR court's finding that Goins failed to prove he was prejudiced by counsel's ineffective assistance because he has not demonstrated he would have gone to trial absent the erroneous advice."); *Taylor v. State*, 404 S.C. 350, 362, 745 S.E.2d 97, 103 (2013) ("Despite Petitioner's assertions to the contrary, there is probative evidence in the Record before us that he would not have chosen to proceed to trial on the Georgetown County charges had counsel told him about the strike."); *see also Lee v U.S.* , 137 S. Ct. 1958 at 1967 (2017)(finding, in a case about deficient advice regarding immigration consequences of a guilty plea, that "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences.").

B. the Applicant failed to prove (2) "the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it;" and

C. (3) "the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time."

D. The Applicant failed to prove "that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea, and the prosecution would not have withdrawn it in light of intervening circumstances)" and

E. The Applicant failed to prove "that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

Trial Counsel Floyd's Alleged Failure to Negotiate or Renegotiate for a Plea Offer

The Applicant contends trial counsel Floyd rendered ineffective assistance by failing to negotiate a plea agreement due to the State's overwhelming evidence against him. This claim must also fail for similar reasons to the above section. By the time counsel Floyd took over the case after Breibart's suspension from the practice of law in 2012, Solicitor Suzanne Mayes had already established that there were going to be no plea offers in the case. As noted above, she had a basis for her position based upon her understanding of the facts in the case. Plea offers cannot be forced upon a prosecutor by either the defense or the court. "Under the separation of powers doctrine, which is the basis for our form of government, the Executive Branch is vested with the power to decide when and how to prosecute a case. . .. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense, or they can simply decide not to prosecute the offense in its entirety." *State v. Thrift*, 312 S.C. 282, 291–92, 440 S.E.2d 341, 346–47 (1994). While "it is

the prerogative of any person to waive his rights, confess, and plead guilty, under judicially defined safeguards, which are adequately enforced... a defendant has no constitutional right to plea bargain." *Reed v. Becka*, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct. App. 1999) (citation omitted). The Applicant has failed to show that Suzanne Mayes would have been receptive had any further attempts been made. She credibility stated the only choices were clear – plead guilty to the charge (essentially straight up and face 1 to 25 years) or go to trial. Counsel Floyd was aware of the State's position upon review of the Breibart file provided to him by Caughman directly.

Because Applicant is not entitled to any particular plea offer, his trial attorney cannot be constitutionally ineffective for failing to obtain one. Deficient performance and prejudice have not been shown as to counsel Floyd for the same reasons set forth above related to the *Collins – Lafler – Frye* standards. The allegation is dismissed.

Counsel Breibart's and Floyd's Alleged Failure to Explain the Case or Meet Sufficient Times with Applicant

In his initial amended application, the Applicant further contends that counsel Breibart failed to explain the details of the Applicant's case. (amended application ground 1). He additionally contends counsel Breibart and Floyd failed to meet with him sufficient times to properly review the evidence and discuss the case with Applicant. (Amended Application ground 3).

There is no established "minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel." *United States v. Olson*, 846 F.2d 1103, 1108 (7th Cir.1988) (there is no constitutional minimum number of meetings between attorney and client and observes that an experienced attorney may get more out of a single meeting than a neophyte); *Moody v. Polk*, 408 F.3d 141, 148 (4th Cir. 2005); *Campbell*

v. Polk, 447 F.3d 270, 279, n.2 (4th Cir. 2006) ("we cannot conclude that the fact that Campbell's counsel only met with him five times before trial made them ineffective."). "'[B]revity of consultation time between a defendant and his counsel, alone,' 'cannot support a claim of ineffective assistance of counsel.'" *Davis v. State*, 44 So. 3d 1118, 1130 (Ala. Crim. App. 2009) (*quoting Murray v. Maggio*, 736 F.2d 279, 282 (5th Cir. 1984)); *White v. Godinez*, 301 F.3d 796, 800 (7th Cir. 2002) ("A brief consultation does not by itself establish that counsel's performance was inadequate."); *Chavez v. Pulley*, 623 F. Supp. 672, 685 (E.D. Cal. 1985) ("brevity of consultation time between a defendant and his counsel alone cannot support a claim of ineffective assistance of counsel," especially where the defendant "fails to allege what purpose further consultation with his attorney would have served and fails to demonstrate how further consultation with his attorney would have produced a different result").

In the Applicant's testimony, he asserted that he met with Breibart not over four times. However, he also acknowledged that Maura Dawson, Breibart's associate, was the person he spoke with most of the time. Caughman stated he spoke with Floyd about the case after he was retained. Caughman indicated that prior to trial he was aware of the state's case against him and confirmed this was counsel's understanding of the case also. Caughman never indicated he was surprised by anything in the case.

This Court concludes that the Applicant has failed to show deficient performance related to either counsel. This Court recognizes that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. It is evident from a review of the trial record that counsel was fully aware of the facts of the case presented by the State in the matter. The Applicant also indicated that he was aware of the nature of the State's case against him. As to enough personal meetings between

Applicant and his counsel, Applicant failed to show deficient performance.

Further, Sixth Amendment prejudice has not been shown. The Applicant was unable to indicate any matter missed by trial counsel that additional consultation would have revealed. *United States v. Rogers*, 769 F.2d 1418, 1425 (9th Cir. 1985) (no ineffectiveness without showing what deficient consultation missed). The Applicant fails to identify in any manner in which his defense would have benefited from additional or longer conversations with him. This Court additionally concludes that Caughman wholly fails to demonstrate how additional meetings with counsel would have altered the outcome of his case, to a reasonable probability. Strickland prejudice has not been proven.

Failure to Retain Expert to Review Medical Records of the deceased and determine cause of death and Failure to Obtain the Additional Medical Records.

Applicant contends counsel Floyd was ineffective for failing to retain a pathologist to counter the State's expert regarding the victim's cause of death. The Applicant suggests that counsel Floyd was deficient in failing to acquire the hospital records of Toby Morris prior to trial to further investigate and determine if there was an intervening failure to the part of the hospital which may have caused the blood clot that was the immediate cause of death. The Applicant asserts that if counsel had been more diligent in acquiring the hospital records beyond what was provided in the autopsy report that he was provided, it could have led to a verdict of hit and run causing great bodily injury. This Court must find that the Applicant has failed to prove deficient performance and prejudice.

During the trial, the issue of proximate cause of the death because death resulted from a blood clot was discussed. The State proffered the testimony of Dr. Elizabeth J. Moffatt, the pathologist from Lexington Medical Center (LMC) that conducted the autopsy on the victim. This

testimony was proffered as a result of trial counsel's objection that any judgment or finding as to injuries, treatment received, or anything concerning the hospital was inadmissible hearsay since Dr. Moffatt did not actually treat the victim. (Trial Tr. 195–97; R. 441–43).

During her *in camera* testimony, trial counsel questioned Dr. Moffatt about whether she used information obtained from the victim's LMC medical records to assist her with the autopsy. In response, Dr. Moffatt explained that, since she is an LMC pathologist, she was able to access any of the victim's LMC records "as needed" to conduct the autopsy and make the medical findings required. (Trial Tr. 200; R. 446). Trial counsel then asked Dr. Moffatt whether she would have been able to make her final findings without those records. Dr. Moffatt responded that she would have still reached the same conclusion in terms of the diagnosis. (Trial Tr. 200–01; R. 446–47). Finally, he asked if the records were necessary to form her opinion in this case. She explained that the records were necessary in that they exist and are available. She further clarified that it would be malpractice not to review them. (Trial Tr. 201; R. 447).

After trial counsel concluded his cross-examination, Deputy Solicitor Mayes asserted that Dr. Moffatt's testimony regarding her findings is consistent with Rule 703, SCRE,[8] which allows for an expert to make reference to any information that she had reasonably relied upon as other input and in reaching an informed decision. (Trial Tr. 201; R. 447). Deputy Solicitor Mayes stated that would be Dr. Moffatt's ultimate opinion not only as to the cause of death but the medical findings in general. (Trial Tr. 201; R. 447).

In response, trial counsel asserted that the State was attempting to produce evidence

[8] Rule 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."

through Dr. Moffatt regarding the victim's medical records that do not provide any sort of connection with the represented cause of death. (Trial Tr. 201–02; R. 447–48). Since the State did not provide trial counsel with the information Dr. Moffatt relied upon, trial counsel requested sanctions under Rule 5(C)(2), which would prohibit the Stat from using the information at trial. (Trial Tr. 202; R. 448). Finally, trial counsel argued the State was required to prove the cause of death in the victim in a manner that would satisfy the cause authorities as to the nexus between the leaving the scene of the accident and the death of the victim. (Trial Tr. 202; R. 448).

The Court ultimately found:

> You have mentioned Rule Five and mentioned hearsay. An expert can rely upon hearsay in forming an expert opinion. The Rule Five issue deals with whether the statute requires the State to provide the defense with records that they are going to use with an expert reviewing medical records; that that must be provided to you, the medical records.
>
> The State says, well, we provided the autopsy report which gives the witness' findings, and that satisfies Rule Five. The autopsy report gives the witness' findings and opinions.
>
> Outside of this position, I don't find the State is required to provide or produce every record that formed the basis of the party's opinion generally, since the autopsy report was provided to the defense. The autopsy report provided her findings and conclusions.
>
> **Had the Defendant attempted to provide some independent autopsy proceeding which alluded to the medical records of the deceased, then they would have been provided to the Defendant. I don't think that that constitutes a Rule Five violation.**
>
> I will allow the question.

(Trial Tr. 202–03; R. 448–49). (emphasis added)

In her court testimony, Dr. Moffatt confirmed that she reviewed medical records. She testified that she found the victim was admitted to the hospital on February 21. She described the bruising she found on the body, consistent with a motor vehicle accident in addition to the various fractures. R. 453-456. Tr.p. 207-210. She described the hematoma to the adrenal glands as a "soft

tissue bruise or blood clot." R. 456. Tr.p. 210. She determined the ultimate cause of death was a pulmonary embolus. She stated it was a blood clot that travels through the blood stream and then breaks free and travels through the vena system and is stopped. It straddled the pulmonary arteries where there was clotting in both the right and left arteries. She started this was caused by a risk factor of immobility, a small percentage is spontaneous. As to the causes, she declared the immobility of being on bedrest and surgery, trauma, fractures as the top causes, but there are other causes like pregnancy, certain medications, smoking, and emphysema. R. 457. Tr.p. 211.

She concluded in the direct testimony that the blood clot was the result of the trauma. She stated:

> Q. All right. Now, if a patient has been hospitalized in a patient 37 years old who has been hospitalized for up to seven days, can you tell us whether or not the injury -- whether that would contribute to inability to withstand the breaking off of the [blood] clot?
>
> A. Yes.
>
> Q. Other factors that you mentioned, would trauma and surgery also relate to risk factors for a blood clot?
>
> A. Yes, the mechanism first of all produced immobility or when you have surgery or trauma the blood clotting system is activated as a sort of mechanism of repair the body's trauma by vascular intervention or trauma to the vessels, and there are, of course, blood vessels all over the body and in all organs, bones included. So when that clotting system is activated, it can propagate clot formation.
>
> Q. Tell us, if any, the significance of multiple fractures as opposed to one fracture?
>
> A. Increased risk.
>
> **Q. Dr. Moffatt, do you have an opinion to a reasonable degree of medical certainty as to whether the blood clot was a result of trauma to Toby Morris on February 21st of 2010?**
>
> **A. Yes, I do.**
>
> **Q. What is that opinion?**

A. That it was the result of trauma sustained in that collision.

R. 458. Tr.p. 212. (*emphasis added*).

On cross-examination, counsel Floyd pointed out that at the time of his death, he was preparing to be discharged at some date and was preparing to ambulate. On that date he was walking. She stated blood clots vary, but not in all cases where a risk factor can be determined. She confirmed the only surgery done was to the wrist to repair the broken bone. It was done with anesthesia. Her opinion was that all the injuries were consistent with the motor vehicle accident a few days before the death. She opined that the blood clot was a few days old as opposed to weeks old when it might not be visible. R. 460-461. Tr.p. 214-15. She admitted that blood thinners can be used. Counsel Floyd asked:

Q. Do you know why they were not given?

A. I do not.

He inquired that they can be used when there is a risk of a blood clot. She was unclear how many days the victim had been immobile. She stated she thought he had been mobile for a day. This was because he had somewhat of an inability because of a cervical collar at some point but refused to speculate otherwise. R. 462 Tr.p. 216.

On re-direct, Solicitor Mayes developed through Dr. Moffatt that she would not expect a person to be mobile with thoracic vertebral fractures. She further opined she did not think to a reasonable degree of medical certainty that this blood clot formed spontaneously. R. 462. Tr.p. 216. On re-cross, she confirmed that he was ambulating during part of his admission. Floyd concluded his examination developing possibilities:

Q. And you can't say with absolute certainty what caused his death?

A. Very few things are a hundred percent but based on the evidence that I have he had those factors, two or three factors for a blood clot.

Q. So, you can't say with absolute certainty, and no one can say with absolute certainty?

...

Q. Well, how many of the factors would have to be present before you could say with absolute certainty that a blood clot was not spontaneous?

A. I have confirmed the factors in my autopsy report and in my testimony, but I cannot say with one hundred percent certainty what was responsible for the blood clot.

R. 463. Tr, p, 217.

In making his motion for a directed verdict on the hit and run death case, counsel Floyd urged the following:

MR. FLOYD: . . . We would next move for a directed verdict on these two grounds. First of all, Your Honor, the State has failed to prove that the collision is what caused the death of Mr. Morris.

It has not proven that anything my client did was the actual cause of death. There was testimony about a blood clot but there is no proof that the blood clot did not occur simultaneously and unrelated to those injuries that were described.

The State provided no evidence whatsoever that would prove — as to why he died. He survived the collision, was taken to the hospital and was known to be mobile before he died. There is no chain of causation as required between the accident and this man's death.

We asked about the toxicology reports because that would show whether or not he was being given any drugs to — any drug that would have prevented such a thing from occurring such as a blood thinner of some kind. There was no such testimony, and the State has failed to establish causation of death.

THE COURT: Are you saying there was simple negligence or gross negligence?

MR. FLOYD: I would say gross negligence, Your Honor, because it is such a known risk factor.

THE COURT: The South Carolina Code says that all persons driving a vehicle — a driver of vehicle involved in an accident resulting in injury or death of a person must stop their vehicle and — this is South Carolina Code [56-5-1210]. It says a driver involved in an accident resulting in injury to or death of a person shall immediately stop -- no question. That's the code. It says the driver shall immediately stop when involved in an accident.

Now, the South Carolina Code goes to the impact on the victim so it is saying in the immediate sense -- it is required that a death -- charging a person with

not stopping immediately, regardless of the chain of causation, so I could not direct a verdict of acquittal on the charge of leaving the scene of a wreck. You can see that when you consider the statute.

The way the word immediately is used --- it says resulting in death of a person immediately -- then it says shall stop.

The (inaudible) Code says resulting in injury or death shall immediately stop, rather than resulting in death immediately shall stop. South Carolina says immediately shall stop.

MR. FLOYD: We would suggest that immediately goes to define injury or death of a person -- there is immediate injury or death,

THE COURT: That would mean as long as there is an indication a person is alive there is no indication to stop. There is also mention of leaving the scene with great bodily injury. You may have immediate injury and not have immediate death. How about it, Ms. Mayes?

SOL. MAYES: Yes, sir, Your Honor. The State does not agree with the interpretation posed by Mr. Floyd. There is absolutely nothing to suggest that that was what was intended by the legislation. The words, immediately shall stop at the scene of the accident, describe the duty of the driver, regardless of whether it resulted in injury or death.

THE COURT: If you look at the Georgia law, it is just the opposite of South Carolina law, so it doesn't do any good to consider that, to look at Georgia law.

MR. FLOYD: I think it would rise to the same interpretation, Your Honor.

THE COURT: All right. Well, under a reasonable interpretation of the. statute, if the State's evidence is correct, the Defendant could be found guilty of leaving the scene of an accident involving injury or death. It is up to the jury to determine whether the death, Mr. Morris death, was proximately caused by the wreck as claimed by the State. They heard the pathologist.

So, Mr. Floyd, It is the jury's determination to make. I would have to deny that motion.

R. 516-519. Tr.p. 270-273.

The issue came up again at trial in reference to the instructions on whether there should be a lesser included offense of hit and run with great bodily injury. R. 525. Tr.p. 279. Judge Newman decided to leave it to the jury and charge the lesser offense.

THE COURT: Well, there can be great bodily injury not resulting in death. I think it is an issue for the jury, given the fact that you can leave the hospital and start to take therapy with the expectation of recovery from the great bodily injury. The jury would have to determine the proximate cause issue regarding the death. You have brought up the issue of negligence, gross negligence, within the victim's hospital treatment. The great bodily injury could have been the cause of death as well. If there was a charge of great bodily injury, the jury would have to answer the question of whether or not he is guilty of leaving the scene of the accident causing great bodily injury, and not resulting in death.

R. 525-526. Tr.p. 279-280. The closing arguments were not transcribed.

In his jury instructions, after defining the elements of the two crimes instructed "proximate cause" in the following way.

Now, in order to be guilty of the offense — in order to prove the Defendant guilty of hit and run accident that resulted in death, or hit and run accident resulting in great bodily injury, the State must prove that the accident in question was the proximate cause of the great bodily injury to or death of the victim.

Proximate cause means the direct cause. It is the immediate cause. It is the efficient cause. It is that cause without which the injury to or death of the victim would not have resulted.

There must be a chain of causation from the time of the accident inflicted by the Defendant until the time of the victim's death. Proximate cause does not necessarily mean death occurring immediately following the accident. There may be more than one proximate cause.

In fact, two or more persons may combine together to be the proximate cause of injury to or the death of a person.

The Defendant may be regarded as the proximate cause if it is a contributing cause of injury to or the death of the victim. The fact that more than one probable cause contributed to the injury to, or the death of the victim does not relieve the Defendant of responsibility.

The Defendant's acts need not be the sole cause of the injury or death, but it must be the proximate cause contributing to the injury of or death of the victim.

It is not a defense to show that the victim might have recovered if he had been treated according to the most approved surgical or medical standards, or that if a reasonably prudent doctor would have treated him, or even by showing that the treatment was negligent. If, however, the death was caused not by the wound or injury that the victim had, but was caused by the gross, erroneous, willful, deliberate

treatment, the Defendant would not be liable. In other words, negligence on the part of someone else would not relieve the Defendant from liability if the injury was the proximate cause of the victim's death.

However, gross negligent or intentional activity on the part of the practitioner would relieve the Defendant of liability. The propriety of the medical procedure is a critical question to be determined, criminal liability, criminal intent is required.

For example, the negligence may be proven by other things for a particular crime, which might be purpose, intent, knowledge, recklessness or criminal negligence.

R. 548-550. Tr.p. 302- 304.

In the motion for reconsideration hearing held May 21, 2015, the issue concerning the medical records was presented again as the defense raised an issue complaining that the additional medical records had not been provided. R. 581. Counsel Floyd urged that the pathologist testimony should have been stricken under Rule 5 because the medical records, other than the autopsy report were not provided to them. R. 581. Floyd acknowledged that the pathologist had testified that the pulmonary embolism was a result of the accident, but she admitted that anybody could have a pulmonary embolism at any time. R. 591-92. He complained that since she referred to some hospital records that had not been provided to him or the State, it was a Rule 5 violation. He admitted the additional records were never put in evidence. It was reported that the pathologist had reviewed some records. R. 593. Floyd asserted, other than the autopsy report, he never saw the additional records and that they were not presented in court. Id.

Suzanne Mayes at the reconsideration hearing described the access that the pathologist had to the records of the Medical Center. R. p. 619. She stated the pathologist relied upon the records but did not produce the records in her autopsy report or testimony. R. 620. Hearing Tr. 35-36. She discussed with Judge Newman pages two and five of the autopsy report where the pathologist

addressed the information she looked at in the patient data base and included her opinion on the cause of death. She stated this information put the State and defense on notice that she had reviewed the records. This was provided to both sides, according to Solicitor Mayes. R.623. Counsel Floyd argued that this information would have put the State on notice that they needed to provide the additional records to the defense. R. 625.

At the reconsideration hearing, Judge Newman expressed his recollection concerning the presentation of cause of death:

> With regard to the issue of whether or not there was some intervening negligence which caused the death versus the injuries that he sustained on February 21st, whether that was the cause of death, that's something that I remember distinctly being attune to and to have the jury closely examine that issue and make a decision on that question. Mr. Floyd engaged in a rather rigorous cross-examination of State's witnesses who offered opinions that the death was caused by the wreck and not by any medical malpractice or any other independent or intervening in jury.

R. 631. Hearing Tr. 47, l. 14-24.

Prior to the hearing in this case, appointed PCR counsel moved to obtain the victim's medical records and professional services of an expert in pathology for purpose of this PCR hearing. In an order filed by the Honorable George McFadden filed March 7, 2023, the request was denied.[9]

This Court finds that the Applicant failed in his burden of proof in showing that counsel was deficient or prejudicial in failing to take steps to acquire the additional hospital records beyond

[9] This Court notes that the prior order precluded the Applicant from either acquiring the medical records of the victim beyond what counsel and PCR counsel had received or the funding to retain an independent pathologist. The general law in collateral proceedings is that an applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness' failure to testify at trial. *Bannister v. State*, 333 S.C. at 303, 509 S.E.2d at 809 (1998) (citation omitted). However, based upon PCR counsel diligence in attempting to acquire potential information, they cannot be held to that condition, to the extent it is considered a condition precedent.

the autopsy report or seek a pathologist to independent review those records. *Strickland* notes that there are "countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." 466 U.S. at 689. Rare are the situations in which the "wide latitude counsel must have in making tactical decisions" will be limited to any one technique or approach. *Harrington*, 562 U.S. at 106 (quoting *Strickland*, 466 U.S. at 689). "It can be assumed that in some cases counsel would be deemed ineffective for failing to consult or rely on experts, but even that formulation is sufficiently general that state courts would have wide latitude in applying it." *Harrington*, 562 U.S. at 106. Our Supreme Court has held that counsel's failure to retain or call an expert witness at trial to rebut the State's expert testimony will not necessarily rise to the level of deficient performance where he undertakes a vigorous cross-examination of the State's witness. *Frasier v. State*, 306 S.C. 158, 160–61, 410 S.E.2d 572, 573 (1991).

This Court must find that counsel did not take steps prior to trial to obtain additional medical records from Lexington Medical Center other than his Rule 5 request. He received the autopsy report by Dr. Elizabeth J. Moffatt consisting of five (5) pages, which included the conclusions of the cause of death and the basis of the conclusion. Importantly, he was aware that "during his hospitalization he continued to improve. He was ambulating as part of his therapy on 2/28/10, during which he was witnessed to become light-headed and reportedly dyspneic, shortly followed by collapse and unresponsiveness. Full code and resuscitative measure were unsuccessful, and he was pronounced dead on 1/28/10." Autopsy Report, p. 5. Counsel was further aware prior to trial that the stated cause of death was "pulmonary thromboembolism." Report, p. 5. Further, counsel was aware from the Report that the examination of the body demonstrated a large pulmonary embolus involving the right and left pulmonary arteries, injuries consistent with

the history of trauma were identified, including bilateral rib fractures, bilateral pulmonary contusions, and a hematoma of the right adrenal gland." He was also aware from the report that other findings included pulmonary edema and congestion, congestion of the spleen, and fatty metamorphosis of the liver." Importantly, there was "no evidence of vertebral artery dissection, intercranial hematoma, or brain stem herniation."

Although trial counsel Floyd was deceased at the time of the hearing, a portion of his strategy was evidence from the trial and post-hearing motions. First, he relied upon Rule 5 to acquire records from the State related to the witness's testimony. He sought to sanction the sanction the State and preclude the testimony of the pathologist for the failure to provide the defense with the underlying records that were reviewed by the pathologist to form her opinion. This strategy was unsuccessful when Judge Newman denied the sanction request and determined that Rule 5 had been complied with by providing the autopsy report.

What is also evident from trial counsel's action in trial was that it was his motivation to identify matters that could have shown that the accident may have caused "great bodily injury" but did not cause the death. On that point, this Court must conclude that counsel Floyd did not retain an independent pathologist to review the report or assist in receiving additional medical information. This was shown at trial as noted above when Judge Newman stated to counsel that if he had attempted to provide an independent autopsy proceeding that the records would have been provided. R. 449, Tr.p. 203.

Due to counsel Floyd's death, we do not have evidence of any strategic reason from Floyd why he did not retain a pathologist or take steps to move before the Court to have the medical records present and available for his review before or during the trial. *See Dempsey v. State*, 363 S.C. 365, 370, 610 S.E.2d 812, 815 (2005) ("[C]ounsel's decision not to call an expert witness to

rebut the state's expert witness was a legitimate trial strategy," (citing *McLaughlin v. State*, 352 S.C. 476, 575 S.E.2d 841 (2003))) The initial question is normally whether these alleged failures were deficient. Under *Strickland*, there is a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in making all significant decisions in a case.

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A decision "not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.* When counsel's performance falls below this standard, a "defendant must show that there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id. Simpson v. Moore*, 367 S.C. 587, 597, 627 S.E.2d 701, 706 (2006), abrogated by *Smalls v. State*, 422 S.C. 174, 810 S.E.2d 836 (2018). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Ard v. Catoe*, 372 S.C. 318, 331–32, 642 S.E.2d 590, 597 (2007).

This Court finds that counsel Floyd was well prepared with the information he had concerning the circumstances of the victim's death from the autopsy report. He utilized the information in his "vigorous" cross-examination. He pointed out that there were other possibilities that could have caused the blood clot, other than the injuries from the accident. He presented information that there may have been a lack of blood thinners being used on the victim at the hospital. He presented that the victim's medical condition was considered improving by the

medical staff. He further presented evidence through the pathologist no one can say with absolute certainty what caused the death. Importantly, he was able to argue for and receive a lesser included charge of hit and run with great bodily injury as well as proximate cause.

Assuming arguendo that the Applicant's counsel was deficient, this Court must find that Caughman has failed to show Sixth Amendment prejudice. *See Frasier v. State*, 306 S.C. 158, 160-61, 410 S.E.2d 572, 573 (1991) (finding trial counsel was not deficient in failing to procure an expert witness to challenge DNA evidence presented at trial where the record established that counsel vigorously cross-examined the State's DNA experts and attacked the accuracy of the evidence); *Lorenzen v. State*, 376 S.C. 521, 531, 657 S.E.2d 771, 777 (2008) (citing *Frasier v. State*, 306 S.C. 158, 410 S.E.2d 572 (1991)). As noted above on the deficiency prong, Sixth Amendment prejudice has not been shown by the prepared and vigorous cross-examination of the pathologist by Floyd. There is no reasonable probability shown that the result of the proceeding would have been different. What the jury learned from his examination, unlike the State's initial presentation was:

- A pulmonary embolism can have many causes.
- There was no absolute certainty that the accident and injury caused the blood clot.
- The only surgery was on the wrist.
- Immobility can be a cause of blood clots.
- Blood thinners were not used.
- The victim was on the road to recovery and improving when the blood clot occurred.
- The victim was walking when the blood clot caused the death.

In addition to getting the instruction on the lesser offense due to his effective cross-examination, he was able to secure an instruction on "proximate cause". *See State v. Burton*, 302 S.C. 494, 498–99, 397 S.E.2d 90, 92 (1990). It has been held in South Carolina that the negligence of an attending physician is reasonably foreseeable. *State v. Matthews*, 291 S.C. 339, 347, 353

S.E.2d 444, 449 (1986). The proper charge in this context is one on the applicable law of proximate cause regarding medical treatment. *State v. Matthews*, 353 S.E.2d at 449. The trial court charged the jury on proximate cause regarding medical treatment. There has been no indication of gross negligence or intentional activity on the part of the Lexington Medical staff. To the contrary the evidence presented and relied upon by the Applicant at trial was that the victim was improving and on the road to recovery.

This Court must find the failure to retain an independent pathologist or the failure to obtain additional medical records of the hospitalization does not undermine confidence in the outcome. In light of the examination by Floyd of the pathologist, there is no reasonable probability the result of the proceeding would have been different.[10]

Alleged Failure to Investigate the Facts.

In the Applicant remaining allegation, he complains that his counsel failed to properly investigate the case. (Amended allegation 6). A review of the record and PCR hearing in this case reveals his only specific concern related to the medical records and the failure to retain an expert pathologist. During his PCR testimony, Caughman could not point out any evidence that the State presented that he was not aware. He further acknowledged that trial counsel was aware of the State's evidence. The evidence revealed though Solicitor Mayes was that trial counsel

[10] This conclusion is made understanding that PCR counsel was denied funding for an independent pathologist and authorization by the Court to have discovery in this particular area. This decision is not based upon the fact that a pathologist was not called in the PCR action. *See Porter v. State*, 368 S.C. 378, 386, 629 S.E.2d 353, 358 (2006) ("Mere speculation of what a witness'[s] testimony may be is insufficient to satisfy the burden of showing prejudice in a petition for PCR."); *Dempsey v. State*, 363 S.C. 365, 369, 610 S .E.2d 812, 814 (2005) (holding a PCR applicant cannot show that he was prejudiced by counsel's failure to call a favorable witness to testify at trial if that witness does not later testify at the PCR hearing or otherwise offer testimony within the rules of evidence). It is based upon the fact that counsel's examination of the pathologist show there was no Sixth Amendment prejudice.

Floyd was provided with the State's evidence, supplementing the evidence the State had previously provided to then suspended counsel Breibart. The Applicant has failed to show matters that a reasonable lawyer practicing criminal law would have further investigated,

Failure to conduct an independent investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result. *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998); *Porter v. State*, 368 S.C. 378, 385–86, 629 S.E.2d 353, 357 (2006). This Court finds that the Applicant has failed to prove either deficient performance or prejudice under the Sixth Amendment related to this allegation. It must be dismissed.

CONCLUSION

Applicant has failed to show he is entitled to relief on any of the claims for all the forgoing reasons. As such, this Court must deny relief.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and

2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 19 day of Dec, 2023.

DANIEL COBLE
Presiding Judge
Eleventh Judicial Circuit

Florence, South Carolina.