

**VOLUME II OF II**

STATE OF SOUTH CAROLINA  
IN THE SUPREME COURT

**RECEIVED**

**Jan 24 2024**

**S.C. SUPREME COURT**

—————  
Certiorari to Spartanburg County

Honorable G.D. Morgan, Jr., Circuit Court Judge

—————  
STEPHENO ALSTON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001011

—————  
APPENDIX  
—————

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ATTORNEYS FOR RESPONDENT

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1 Q Okay.

2 MS. ROSS: I have no further questions.

3 THE COURT: All right. (To the State) Redirect?

4 MS. MARTO: Briefly, Your Honor.

5 **REDIRECT EXAMINATION OF LARA CAUDY, ESQ.**

6 BY MS. MARTO:

7 Q Now, when it comes to the CAD report, it's your  
8 understanding that that showed that the driver's license  
9 came back as valid, correct?

10 A Based on what you all are telling me, yes. But I've  
11 never seen the CAD report.

12 Q Okay. And it was your understanding that the purpose of  
13 the stop was complete, not once the driver's license came  
14 back, but once the warning was filled out; is that  
15 correct?

16 A Not necessarily. So, you know, I -- I do think that  
17 there is an argument that the stop was completed  
18 somewhere between six and eight minutes as opposed to the  
19 15-minute mark that I argued in my brief.

20 Q Okay. But at the time when you were briefing it, it was  
21 your understanding that the purpose of the stop ended at  
22 15 minutes, correct?

23 A That's what I argued. It -- it sounds like it's  
24 incorrect now, based on -- you know, I didn't have the  
25 benefit of the CAD report. So when I watched the video

1           and maybe based on what statements that were made during  
2           the -- during the trial, you know, I concluded that it  
3           was around the 15-minute mark.

4   Q       And you argued that the stop was unnecessarily prolonged  
5           and that the officer was engaged in stalling tactics,  
6           correct?

7   A       Correct. I -- I think that's clear from the video. I  
8           think even the -- the Court of Appeals, the Supreme Court  
9           agreed with that assertion.

10   Q       And do you recall if the Supreme Court found that they  
11           would've decided the issue differently if they were in  
12           the position of the circuit court, but that there was  
13           sufficient enough evidence to affirm; is that your  
14           understanding?

15   A       I'm not sure they said that they would've decided  
16           differently, but they just said it -- it's not up to them  
17           to just make that decision. They have to -- the standard  
18           of review is whether there's evidence to support the  
19           trial judge's decision. So whether they would've decided  
20           differently or not is irrelevant.

21           MS. MARTO: No further questions, Your Honor.

22           THE COURT: All right. (To Ms. Ross) Any recross?

23           MS. ROSS: No, Your Honor.

24           THE COURT: All right. Anything else from the  
25           State? Any other witnesses?

1 MS. MARTO: No, Your Honor.

2 (WHEREUPON, the witness was excused.)

3 THE COURT: (To Ms. Ross) Let me ask you: At what  
4 -- at what point in the stop did the discussion  
5 involve the inconsistent travel plans and the issue  
6 of what states were on the rental agreement? At  
7 what point did that occur?

8 MS. ROSS: And I will -- I put the video up for your  
9 review. I welcome you to look at it. There was  
10 initial questioning up at the car about travel  
11 plans. And then after this part that I think came  
12 in at like 1:03, somewhere on that video, is when --  
13 is when I see that report, the traffic ticket fly  
14 up, and you can just tell it's filled out. And --  
15 and he asked the final question about the year of  
16 the car right then.

17 And then after that, he continues to ask more  
18 about the travel plans, about the children and  
19 family, and, "You're close to your mother," and,  
20 "Where does she live?" So there -- there are two  
21 parts of those travel plans. And we would argue  
22 Part A came right when he walked up to the window,  
23 but Part B was after when we would argue the CAD  
24 report shows, and -- and -- the -- the visual of  
25 this instant that you see the ticket fly up in the

1 wind proved that the -- the ticket was complete.  
2 The purpose of the stop was complete. And, at that  
3 point, he's getting more information that the  
4 Supreme Court, I would argue, relied on and the  
5 Court of Appeals to -- as a basis for their  
6 reasoning and their ruling to affirm.

7 THE COURT: (To the State) But there was a point  
8 where the officer did go up in the beginning at the  
9 window and have a discussion; is that correct?

10 MS. MARTO: That's my understanding. My  
11 understanding is that there was initial questioning,  
12 and seemingly, something didn't sit right, and then  
13 he revisited the topic after most of the wording had  
14 been completed.

15 THE COURT: All right. And then how about the  
16 discussion on the lease and the states? What do we  
17 know -- and I'll look at it again, but it -- do we  
18 know -- do y'all -- can y'all point to that? If --  
19 if not, I'll -- I'll find it on my own. But I just  
20 wanted to see if y'all knew. Was it after the  
21 flipping up of the warning on the video, or was it  
22 before?

23 MS. ROSS: The -- the states that were on the rental  
24 agreement?

25 THE COURT: The -- the -- or the -- the -- either

1           the discussion or the determination about the issue  
2           on the -- about the states on the rental agreement,  
3           where does that come up?

4           MS. MARTO: I'm unsure that was ever orally  
5           discussed. I think you may --

6           THE COURT: I -- I don't remember hearing it on the  
7           video, and I just wanted to make sure I was correct  
8           on that.

9           MS. ROSS: I did not hear that on the video. I  
10          believe that was simply -- these -- some of these  
11          insurance agreements would just write states. So I  
12          think that was just on the piece of paper and in the  
13          testimony at trial.

14          THE COURT: Didn't -- did I understand that Supreme  
15          Court -- the factors that the Supreme Court looked  
16          at were the reasonable suspicion based on the  
17          inconsistent travel plans and the lease or rental  
18          agreement that referenced the states that could be  
19          driven in? Am I correct on that? Is -- is that  
20          what -- so I understood Ms. Caudy to testify that it  
21          was her understanding or opinion that the Supreme --  
22          and I'll read the Supreme Court case, as well, but  
23          that the Supreme Court based the decision -- they  
24          found it was an extended stop and prolonged stop.  
25          However, based on the standard of -- of review and,

1           along those lines, that the stop -- it was a  
2           reasonable suspicion based on the inconsistent  
3           travel plans and the states listed on the rental  
4           agreement. Is that correct? Is that what your  
5           understanding of the Supreme Court?

6           MS. MARTO: My understanding is that they addressed  
7           a lot of different factors, including the fact that  
8           he was coming -- traveling on Interstate 85 from  
9           Atlanta, which the officer said was a criminal hub,  
10          that his plans and deviations from the rental  
11          agreement --

12          THE COURT: All right. But I'm correct, though,  
13          that there was -- there was no discussion on the  
14          video about the rental agreement, correct? Is that  
15          correct? That there was no discussion on the video  
16          about the rental agreement? And, again, I'll look  
17          at the video, but can y'all point --

18          MS. ROSS: I believe there was initially, but I'm  
19          not sure.

20          MS. MARTO: I thought I -- most of it seemed to be  
21          determined based upon the paperwork.

22          THE COURT: On the paperwork.

23          MS. MARTO: But I did hear, I think, maybe a  
24          question or two.

25          THE COURT: But there was no question about there

1           was discussion on the video about the inconsistent  
2           travel plans. Going to Mother's Day, this being  
3           March, and that was -- Ms. Ross, you were saying it  
4           -- it was Part A and Part B. Part A was when he  
5           went up to the -- the vehicle, --  
6           MS. ROSS: Uh-huh.  
7           THE COURT: -- had the discussion through the window,  
8           and then later on, was Part B; is that correct?  
9           MS. ROSS: Correct. Well, I was saying Part B was  
10          after we'd argued the purpose of the stop was  
11          complete.  
12          THE COURT: And after-- yeah. Part B was after the  
13          completion --  
14          MS. ROSS: But the inconsistencies kind of, we would  
15          argue, didn't exist until the -- the purpose of the  
16          stop was extended.  
17          THE COURT: All right.  
18          MS. ROSS: That would be our argument.  
19          THE COURT: All right. Anything else?  
20          MS. ROSS: Judge, I just -- well, you can --  
21          MS. MARTO: No further witnesses.  
22          THE COURT: All right.  
23          MS. ROSS: I -- I would just urge the -- the Court  
24          to review oral argument. The -- and just point out  
25          that a lot has been made when the ticket was ripped

1 off, and that's no longer the law. I believe it's  
2 the purpose of the stop is complete, which is to  
3 validate the license and registration. And I think  
4 that's with "Rodriguez" and "Caballes" is sort of  
5 setting forward and "Tindall" and all this line of  
6 cases are you can't just pretend to not file them.  
7 I mean, you can't just not file -- fill out that  
8 ticket or -- and -- and waste time to go on a  
9 fishing expedition, which is essentially what we'd  
10 argue happened.

11 THE COURT: All right. Ms. Marto, anything to add?

12 MS. MARTO: None. We would just argue that both  
13 appellate counsel and trial counsel did argue that  
14 the stop was prolonged unnecessarily and that the  
15 officer engaged in stalling tactics. And even if  
16 they didn't discuss specific minute marks, those  
17 arguments were made and subsequently rejected. And  
18 so we would state that there was no ineffective  
19 assistance of counsel or appellate counsel because  
20 of that.

21 THE COURT: All right. Thank you. All right. I  
22 will take that under -- take this under advisement,  
23 and I will let you know my decision, and I will  
24 review everything that's been submitted.

25 (Whereupon, the within hearing was

1 concluded at 1:30 p.m.)

2 (\*This transcript may contain quoted material.

3 Such material is reproduced as read or quoted by the

4 speaker.)





# Spartanburg Communications / 9-1-1

PO Box 5666, Spartanburg SC 29304

Phone (864) 596-2050



www.spartanburg911.org

**LCS110328043012**

Incident Type - TSTOP (TRAFFIC STOP)

Report# LCS110328001450

Caller Information

Initiate Date / Time - Monday, March 28, 2011 1:04:59PM

Location - 7300 I85 N

Beat - 23 Area - NO Community - SPARTANBURG COM

Time	Unit	Audit Entry	Console
13:05:00		Disposition #1 46:SETTLED BY OFFICER	06 44
13:05:00		Status CHANGED FRM- I TO- A	06 44
13:05:00		Incident Initiated By: CS/LAMKIN, TIFFANY	06 44
13:05:00		BROWN HUY	06 44
13:05:00	T23	TSTOP	06 44
13:05:00	T23	USA 7300 I85 N	06 44
13:06:10		OQ Information: Reply ID: 5825506 Date: 2/4/2011	06 44
13:06:10		12:05:58	06 44
13:06:11		Attachment:	06 44
13:06:11		Reply Text: SPTCC206 NLETS 1616004978	06 44
13:06:11		CC750120110328 13:05:30	06 44
13:06:11		00D7A820110328 13:05:31	06 44
13:06:11		RR GAGBI0051	06 44
13:06:11		10:05 03/28/2011 13341	06 44
13:06:12		10:05 03/28/2011 59000 SC042013P	06 44
13:06:12		*1616004978	06 44
13:06:12		TXT	06 44
13:06:12		GEORGIA REGISTRATION AND TITLE INFORMATION SYSTEM	06 44
13:06:12		RESPONSE BASED UPON:	06 44
13:06:13		LIC/AAA9240 LIT/ LIY/ LIENS:	06 44
13:06:13		ATTENTION:	06 44
13:06:13		VEHICLE DETAIL RESPONSE	06 44
13:06:13		VIN: 5NMSG3AB1AH376780 2010 HYUNDAI	06 44
13:06:13		SANTA FE MP GRN	06 44
13:06:13		TITLE NO: 777660100954002	06 44
13:06:14		PURCHASE DT: 20100324	06 44
13:06:14		CUSTOMER ID: 1100182943 DOB:	06 44
13:06:14		EAN HOLDINGS LLC	06 44
13:06:14		906 E PONCE DE LEON AVE TAX	06 44
13:06:14		COUNTY: GWINNETT	06 44
13:06:14		DECATUR GA 30030-2708	06 44
13:06:15		CURRENT PLATE NO: AAA9240 CAT: AA ISSUE DT:	06 44
13:06:15		20110222 VALID DT: 20120331	06 44
13:06:15		DECAL NO: 18758875 REGISTRATION STATUS: ACTIVE	06 44
13:06:15		INSUR: UNKNOWN INSURANCE STATUS	06 44
13:06:15		ENTERPRISE LEASING CO OF GEOR	06 44
13:06:15		PRIOR PLATE NO: AAA9240 CAT: AA ISSUE DT:	06 44
13:06:16		20100405 VALID DT: 20110331	06 44
13:06:16		DECAL NO: 08076772	06 44
13:06:16		*END OF MESSAGE*	06 44
13:10:37		OQ Information: Reply ID: 5825514 Date: 2/4/2011	06 44
13:10:37		12:10:58	06 44
13:10:37		Attachment:	06 44
13:10:37		Reply Text: SPTCC206 NLETS 1616004979	06 44



# Spartanburg Communications / 9-1-1

PO Box 5666, Spartanburg SC 29304

Phone (864) 596-2050

www.spartanburg911.org

13:10:37	CC753E20110328 13:10:30	06	44D
13:10:38	00D7AA20110328 13:10:30	06	44D
13:10:38	DR GAGBI0051	06	44D
13:10:38	10:10 03/28/2011 13400	06	44D
13:10:38	10:10 03/28/2011 59128 SC042013P	06	44D
13:10:38	*1616004979	06	44D
13:10:38	TXT	06	44D
13:10:39	NAME: STEPHENO J ALSTON	06	44D
13:10:39	RESIDENCE ADDRESS: [REDACTED] DR NW: ROME GA 30165	06	44D
13:10:39	COUNTRY: UNITED STATES	06	44D
13:10:39	DATE OF BIRTH: [REDACTED]	06	44D
13:10:39	HEIGHT: 507	06	44D
13:10:39	WEIGHT: 220	06	44D
13:10:40	EYE COLOR: BROWN	06	44D
13:10:40	GENDER: MALE	06	44D
13:10:40	*** DRIVER LICENSE DETAILS ***	06	44D
13:10:40	DRIVER AUTHORIZATION ID: [REDACTED]	06	44D
13:10:40	JURISDICTION AUTHORITY CODE: GA	06	44D
13:10:40	ISSUE DATE: 2011-03-09	06	44D
13:10:41	EXPIRATION DATE: [REDACTED]	06	44D
13:10:41	DRIVER LICENSE PERMIT QUANTITY: 0	06	44D
13:10:41	DRIVER LICENSE COMMERCIAL CLASS CODE: C	06	44D
13:10:41	DRIVER LICENSE NON-COMMERCIAL CLASS: MOTOR VEHICLES	06	44D
13:10:41	WITH GVWR LESS THAN 26,001 POUNDS AND ALL VEHICLES NOT	06	44D
13:10:41	INCLUDED WITHIN CLASSES A, B, AND M	06	44D
13:10:42	DRIVER LICENSE NON-COMMERCIAL CLASS CODE: C	06	44D
13:10:42	LICENSED COMMERCIAL DRIVER INDICATOR: N	06	44D
13:10:42	DRIVER LICENSE COMMERCIAL STATUS: DISQUALIFIED(CDL)	06	44D
13:10:42	LICENSED NON-COMMERCIAL DRIVER INDICATOR: N	06	44D
13:10:42	DRIVER LICENSE NON-COMMERCIAL STATUS: VALID	06	44D
13:12:04	REQ ANOTHER UNIT NON PRIOR	06	44
13:12:32	Recommended Units Unit1: B01 Unit2: B03 Unit3: Unit4: Unit5:	04	70
13:12:34	B03 TSTOP	04	70
13:12:34	B03 USEN 7300 I85 N	04	70
13:19:22	105 TSTOP	06	44
13:19:22	105 USEN 7300 I85 N	06	44
13:20:25	B03 TSTOP	04	70
13:20:25	B03 USA 7300 I85 N	04	70
13:29:49	105 TSTOP	06	44
13:29:49	105 USA 7300 I85 N	06	44
13:58:43	B03 TSTOP	05	30
13:58:43	B03 USCL	05	30
14:04:05	RB G AAA9240	04	70
14:04:17	RB PAGED	04	70
14:08:36	RB EN ROUTE ETA OF 30 MINUTES	04	70
14:12:48	T23 TSTOP	06	44
14:12:48	T23 USEJ 1095	04	70
14:14:13	105 TSTOP	04	70
14:14:13	105 USCL	04	70
14:21:15	T23 TSTOP	04	70
14:21:15	T23 USJ 1095	04	70
14:21:16	T23 TSTOP	04	70
14:21:16	T23 USJ 1095	04	70
14:23:48	T23 Report Number LCS110328001450	04	70



# Spartanburg Communications / 9-1-1

PO Box 5666, Spartanburg SC 29304

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513

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14:23:55	T22	TSTOP	04	70D
14:23:55	T22	USA 7300 185 N	04	70D
14:27:45	T22	TSTOP	04	70D
14:27:45	T22	USCL	04	70D
14:52:40		Disposition #1 41:ARREST MADE REPORT FILED	06	44D
14:52:40		Disposition #1 CHANGED FRM- 46:SETTLED BY OFFICER TO- 41:ARREST MADE REPORT FILED	06	44D
14:52:40		Status CHANGED FRM- A TO- C	06	44D
14:52:40	T23	TSTOP	04	70D
14:52:40	T23	USCL	04	70D
14:52:40	T23	D	04	70D
14:52:40	T23	Replaced dispostion: 46 with disposition: 41	04	70D

# Spartanburg Sheriff's Office

## Incident / Offense Report

8045 HOWARD ST SPARTANBURG SC 29303 -- (864)503-4500

Law

Number 11031450

Nature Traffic Stop

Address I-85 North @ 73 mile marker

City Spartanburg

State SC

Zip

Contact

Phone

When Reported 13:11:00 03/28/2011  
(HH:MM:SS MM/DD/YYYY)

Misc. Info.

Occurred Start 13:11:00 03/28/2011  
(HH:MM:SS MM/DD/YYYY)

Occurred End 13:11:00 03/28/2011  
(HH:MM:SS MM/DD/YYYY)

VNI Issued No

Responsible Gilbert D

Agency SHERIFF'S OFFICE

Area TRACT 23

Offense(s) Drugs, Trafficking

Circumstance(s) No Bias

LOC-Highway, Road, Alley

MO Zones

23

Observed Traffic Offense

Clearance Cleared by Responding Officer

Disposition Cleared Adult Arrest

Disposition Date 03/28/2011

Case(s)

DEFENDANT'S EXHIBIT ID  
1  
3/18/13 SH

Georgia



DRIVER'S LICENSE

DL NO. [REDACTED] DOB [REDACTED]  
CLASS: G EXP: 04/23/2011  
STEPHENO J ALSTON  
[REDACTED] OR NW  
ROME GA 30195 2381  
FLOYD  
Restrictions: A End NONE  
Iss: 03/09/2011  
Sex M Eyes BRO  
Hgt 5-07 Wgt 220  
DD [REDACTED]

SPARTANBURG COUNTY SHERIFF'S OFFICE

WARNING

FIRST NAME <i>Stepheno</i>		MIDDLE NAME <i>J</i>		LAST NAME <i>Alston</i>	
STATE LICENSE# <i>AP</i>			DRIVERS LICENSE NO [REDACTED]		
RACE <i>B</i>	SEX <i>M</i>	DATE OF BIRTH [REDACTED]		AGE <i>37</i>	
LOCATION <i>85</i>			DATE <i>3-28</i>	TIME <i>1311</i>	
VEHICLE LICENSE NO [REDACTED]	STATE <i>GA</i>	VEHICLE MAKE <i>Hyundai</i>	YEAR <i>2011</i>	CHECKED BY <i>DC [REDACTED]</i>	
ISSUED BY <i>DC [REDACTED]</i>			RANK <i>DEP 4</i>	BADGE NO <i>37</i>	

NATURE OF CONTACT

- SPEEDING
- DISREGARDING TRAFFIC SIGNAL
- FAILURE TO DIM LIGHTS
- NO RIGHT OF WAY
- IMPROPER BACKING
- DEFECTIVE EQUIPMENT
- IMPROPER LIGHTS
- IMPROPER PASSING
- IMPROPER TURN
- DRIVERS LICENSE VIOLATION
- DISREGARDING STOP SIGN
- VEHICLE LICENSE VIOLATION
- OTHER (SPECIFY) *Have to register license*



This warning is being issued to you for a violation of the South Carolina Code of Laws. If you are unsure about the nature of the violation, feel free to ask the officer any questions in order to clarify the situation. If necessary, procure and study a copy of the South Carolina Drivers Handbook.

1930

025815

*[Handwritten scribbles]*

*470.92*

PLAINTIFF'S EXHIBIT 2  
*Alston*  
4-20-22 AP

STATE OF SOUTH CAROLINA )	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG )	FOR THE SEVENTH JUDICIAL CIRCUIT
)	
)	
Stepheno Alston, #357159, )	Case No.: 2018-CP-42-03680
Applicant, )	
)	
v. )	<b>ORDER OF DISMISSAL</b>
)	
State of South Carolina, )	
Respondent. )	
_____ )	

This matter comes before this Court by way of Applicant’s post-conviction relief application filed October 22, 2018. Respondent made its return on February 25, 2019, requesting an evidentiary hearing be convened. An evidentiary hearing was held at the Spartanburg County Courthouse. Susannah Ross, Esquire, represented Applicant. Assistant Attorney General Chelsey Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Trial Counsel Andrew Johnston and Appellate Counsel Lara Caudy, Esquires, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of proof of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice. Findings of fact and conclusions of law are set forth below.

**Procedural History**

Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. Applicant was indicted at the June 2011 term of the Spartanburg County Grand Jury for trafficking in cocaine (2011-GS-42-03090). Andrew J. Johnston, Esquire represented Applicant, and J. Edward Hunter, Esquire, of the Seventh Circuit Solicitor’s Office, prosecuted the case. On March 18, 2013, a trial proceeded in Applicant’s absence before the Honorable J. Derham Cole and a jury. The jury found Applicant

0211

guilty as indicted on March 19, 2013. Judge Cole at that time sealed sentence to be imposed later. On September 19, 2013, Applicant appeared before Judge Cole for imposition of the sentence. Judge Cole sentenced Applicant to imprisonment for a term of twenty-five years.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by Lara M. Caudy, Esquire, who raised the following issues:

1. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer did not have reasonable suspicion or probable cause to stop Appellant's car for a traffic violation thereby illegally seizing Appellant in violation of the Fourth Amendment?
2. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop?
3. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where Appellant's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

The parties proceeded to oral arguments on May 6, 2015. Applicant was represented by Appellate Counsel, and Christina C. Bigelow, of the South Carolina Attorney General's Office, represented Respondent. By unpublished opinion decided July 29, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Applicant petitioned for rehearing, which was denied by order filed September 15, 2015.

On October 26, 2015, Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari on all three issues. The State filed its return on November 24, 2015. The Supreme Court of South Carolina granted certiorari by order dated July 18, 2016. The parties proceeded to oral arguments on December 14, 2016. Applicant was again represented by Appellate Counsel Caudy, and Mark R. Farthing, Esquire, of the South Carolina Attorney

General's Office, represented Respondent. By opinion issued March 7, 2018, the Supreme Court affirmed the Court of Appeals opinion as modified. *State v. Alston*, 422 S.C. 270, 811 S.E.2d 747 (2018). The remittitur was issued on March 27, 2018. Applicant thereafter filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari on October 1, 2018.

#### Summary of Relevant Facts

Shortly before 1:00 p.m. on March 28, 2011, Master Deputy Donnie Gilbert of the Spartanburg County Sheriff's Office was monitoring traffic on Interstate 85 when he observed the driver of a brownish-green Hyundai Santa Fe with a Georgia license tag travelling in the middle lane of the three-lane highway. (Tr. 17-18, 160-61, State's Ex. #2 (Recording of Traffic Stop)). When the vehicle passed by his location, its driver drove onto the dotted line dividing the middle lane from the far-left lane before swerving back into the vehicle's lane of travel. (Tr. 18-19, 49-50, 161-62). In response, Deputy Gilbert began pursuing the vehicle in order to initiate a traffic stop and observed its driver "drift" onto the dotted dividing line several more times. (Tr. 18-19, 161-62). Deputy Gilbert then moved into position behind the vehicle and activated his patrol vehicle's blue lights, and the driver of the vehicle quickly pulled over to the side of the roadway. (Tr. 19, 162).

Thereafter, at approximately 12:54 p.m., Deputy Gilbert approached the vehicle from the passenger side and immediately noticed the luggage stowed in the back of the vehicle had been covered with a blanket, which the officer perceived to be suspicious as he had not typically seen covered luggage in the "thousands" of routine traffic stops he had conducted during his lengthy law enforcement career. (Tr. 14-15, 21, 45-46, 159-60, 163-64). He further noticed multiple personal keys had been placed on the rental company key ring associated with the vehicle, which

the officer perceived to be abnormal and recognized through his training and experience as a tactic designed to “personalize” the vehicle to mask the fact it was a rental. (Tr. 27, 164-65).

After approaching the vehicle, Deputy Gilbert made contact with the driver and lone occupant of the vehicle, Applicant. (Tr. 21, 178). When he did so, Applicant immediately asked him why he was stopped in a defensive manner, which the officer also perceived to be abnormal considering the fact most people he had stopped waited for him to explain the basis for the stop. (Tr. 16-17, 112, 122; State’s Ex. #2). Deputy Gilbert then asked Applicant for his driver’s license, and Applicant provided the officer with a license indicating he was from Rome, Georgia, which Deputy Gilbert knew was close to Atlanta, Georgia, a major hub of criminal activity. (Tr. 22, 75-76, 163). Immediately after that, Deputy Gilbert asked Applicant if he had had anything to drink and explained he stopped his vehicle because he had observed him hit the dotted dividing lane with his tires several times. (Tr. 23, State’s Ex. #2). The officer then asked Applicant for the paperwork associated with the vehicle, and Applicant quickly provided a rental agreement to Deputy Gilbert. *Id.* Upon receiving the rental agreement, deputy Gilbert reviewed it and noticed the vehicle was rented by a third-party female renter two days earlier in Cartersville, Georgia, Applicant was listed as an authorized driver of the vehicle, no smoking was permitted in the vehicle, and the vehicle was only authorized to be driven in Georgia, Tennessee, Kentucky, Virginia, and West Virginia. (Tr. 25-26, 79, 168-69, 174-75; State’s Ex. 14). Based on the facts he knew through his training and experience third-party rentals were commonly associated with criminal activity and female renters were frequently used by criminal organizations to allay law enforcement suspicions coupled with the fact the rental vehicle was not authorized to be driven in South Carolina, Deputy Gilbert became more concerned and suspicious. (Tr. 25-27, 169, 207-08). The officer then asked Applicant to step out of the vehicle

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just over two minutes after initiating the stop. (State's Ex. #2).

When Applicant exited the rental vehicle, Deputy Gilbert noticed a residential air freshener had been stowed in the vehicle's driver side door pocket, which was suspicious to the officer based on the facts it was an air freshener designed for a home instead of a vehicle, it was unusual for air fresheners to be placed in rental vehicles, and he was aware through his training and experience air fresheners were commonly used to mask odors, including the odor of drugs. (Tr. 28-30, 88-89, 170, 173-74). The officer then asked Applicant about the rental agreement, spoke with him about his travel plans, and asked him about the status of the license while preparing a warning citation. (Tr. 30-31, State's Ex. #2). Additionally, Deputy Gilbert called Applicant's license information into dispatch, and dispatch reported Applicant's license was valid roughly six minutes into the stop. (Tr. 59, State's Ex. #2).

During Deputy Gilbert's conversation with Applicant, Applicant reported he had left Georgia that morning for Newark, New Jersey, was travelling there to bring his depressed mother home for Mother's Day and intended to stay in New Jersey for "about a week or so." (Tr. 30-32, 176, 182, State's Ex. #2). However, the officer perceived Applicant's responses to be a "red flag" as Applicant's reported travel plans were not consistent with the length of the rental period, Mother's Day was roughly a month and a half away, and the rental agreement did not authorize travel to New Jersey. (Tr. 31-32, 39-40). Deputy Gilbert then continued to question Applicant while preparing the warning ticket and, during the questioning, Applicant acknowledged he was responsible for everything in the vehicle after initially stalling and stating he had no idea whether anyone else had access to the rental vehicle, which Deputy Gilbert perceived to be another "red flag." (Tr. 37, 41-42, 66, 179, 183-84, State's Ex. #2). Furthermore, Applicant claimed he worked at a clothing store to support his six children before providing the

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ages of seven children, which further raised the officer's suspicions based on Applicant's stressed manner of delivery and the inconsistency of Applicant's statements. (Tr. 38-39, 181, State's Ex. #2).

Based on the factors he had observed while preparing the warning ticket, Deputy Gilbert decided to ask Applicant for consent to search the vehicle and did so roughly sixteen minutes into the stop after another officer arrived at that location and just after he finished preparing the warning citation. (Tr. 40-42, 71, 75, 183-88, State's Ex. #2). In response to the request, Applicant indicated he was "just trying to figure out what this [was] about," and the officer informed Applicant he was simply asking a question. (Tr. 42, 186, State's Ex. #2). At that point, Applicant informed the officer he could search the vehicle. *Id.* Deputy Gilbert then explained to Applicant he could refuse to provide consent, and Applicant again affirmed the officer could search the vehicle. (Tr. 42-43, 186-87, State's Ex. #2). After Applicant had twice provided consent, Deputy Gilbert moved towards the vehicle, but he elected to return to Applicant and ensure he was providing consent for the search. (Tr. 43, 187, State's Ex. #2). During their ensuing conversation, Alston indicated the officer was the one providing consent as opposed to himself, and Deputy Gilbert quickly replied that statement was incorrect. (Tr. 43, 74, 187; State's Ex. #2). The officer then again asked for consent to search, and Applicant once again clearly affirmed the officer was permitted to search the vehicle. (Tr. 43, 187, State's Ex. #2).

Once he was certain he had Applicant's consent, Deputy Gilbert began searching the rental vehicle and started his search with the covered luggage stowed in the vehicle's rear area. (Tr. 44, 188-89, State's Ex. #2). As he was conducting the search, Captain Randy Hollifield of the Spartanburg County Sheriff's Office arrived at the scene and began assisting with the search and, shortly thereafter, the captain located two vacuum-sealed packages containing a white

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powdery substance hidden in a space near the steering column of the vehicle. (Tr. 45, 189-90, 212-17, State's Ex. #2). Applicant was then quickly placed under arrest, and the white powdery substance found in the rental vehicle was later confirmed to be over four hundred grams of cocaine. (Tr. 192, 226).

**Current Action Before this Court**

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of trial counsel, in that:
  - a. "Applicant was deprived effective assistance of counsel when trial counsel failed to adequately and properly apprise/advise the Applicant with regards to pretrial, trial and other court proceedings related to Applicant's criminal charges."
    - i. "Specifically, Applicant alleges, and will prove given fact development proceedings, that attorney Andrew Johnston failed to inform the Applicant that his criminal case would be called for trial on March 18, 2013. As a result of counsel's failure to apprise Applicant about criminal court proceedings/scheduling, the Applicant believed that he could depart the courthouse on March 18, 2013, and return at a later date."
    - ii. "From the beginning of the case, it had been both Applicant and counsels understanding that Applicant would either enter into plea negotiations and eventually plead guilty to a charge for reduced sentence if counsel was not successful with pending motion to suppress evidence seized during traffic stop and search of Applicants rental vehicle. Applicant was led to believe by attorney Johnston that the suppression hearing would be conducted prior to and separate from and trial or guilty plea hearing being commenced. And that counsel was confident that a plea agreement would be reached in Applicants case."
  - b. "Applicant was deprived effective assistance of counsel when attorney Johnston failed to properly object, preserve for appellate review and address the courts decision to proceed with Applicants criminal case in absence of the Applicant. Consequently, as a result of counsels deficient performance, the Applicant was tried in his absence and deprived of his constitutional right to be present at critical criminal proceedings."
 

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Applicant contends that counsel should have, but did not, request a continuance of the proceedings at that juncture to allow counsel to contact Applicant and have him appear before the Court. Counsel knew, or should have known—based on previous occasions and

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talking with Applicant that day—that Applicant had left the courthouse headed back to Georgia.”

- ii. “Although there was some discussion among attorneys and the Court about Applicants possible whereabouts and his apparent communications with bail bondsman, the trial court failed to make the requisite factual determination and/or otherwise comply with law/rules governing trials *in absentia*, [*State v. Jackson*, 228 S.C. 94, 341 S.E.2d 375 (1986)]. Notably, counsel did request a continuation at this point on March 19, 2013; however, that was an exercise in futility since the court had previously issued a bench warrant for Applicant’s arrest and decided to try Applicant in his absence. At no time did counsel object to the courts determination that a motion *in limine* represents the beginning of defendants jury trial, per se. Consequently, the Applicants criminal proceedings were manifestly prejudiced.”
- c. “Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts impermissible amendment to indictment.”
  - i. “At the close of the prosecutions case defense counsel moved for directed verdict arguing that the prosecution had failed to prove all elements of charges as alleged in the indictment against Applicant (Tr. 229-30). In response to defense counsels argument, the trial court directed the prosecution to amend/redact the indictment to remove all means of violating trafficking statute except those elements related to weight of controlled substance and the bringing into state clause (id p231-32).”
  - ii. “Counsel should have objected to the trial courts amendment of indictment which prejudiced Applicants criminal proceedings by broadening the reach of indictment and removing elements of offense as originally charged by grand jury. [*Cf. Bailey v. State*, 392 S.C. 422, 709 S.E.2d 671 (2011); *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002)].”
- d. “Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts failure to ensure that all the trial court evidence went into the jury room with jurors during their deliberation process.”
  - i. “During the Applicant’s traffic stop/search video was introduced as evidence. This particular video evidence portrayed scenes that Applicant contends were favorable to his defense. When it was time for the jury to begin its deliberation the videotaped evidence was supposed to go back with the deliberating jury, however, due to an oversight on the part of the prosecutor, the videotaped evidence was not with the deliberating jury. (Tr. pp 273).”
  - ii. “Ineffective for not being diligent and thorough in his research in having all the facts of Applicants case and information that was critical to Applicants suppression hearing.”
  - iii. “Andrew Johnston couldn’t have reviewed the Discovery Package, had

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he done so he would have seen that applicant's traffic stop was called in at 13:05 and was cleared at 13:10. At this point Applicant was clear to go, but instead of returning applicants paperwork and have Applicant sign the warning ticket, Officer Gilbert put it in his pocket (warning ticket) and continued to question Applicant and then called for backup at 13:12. At this time Applicant was seized and without probable cause. The exclusionary rule forbids this and it triggered Applicants Fourth Amendment rights to be free from unreasonable search and seizures. Andrew Johnston never pushed for an answer to find out why Officer never completed the traffic stop which was initiated, its purpose in the first place and to clearly define the officers job."

- f. "Ineffective assistance of counsel for not proving to the court that there was no way possible the Applicant's consent was voluntary and it was Applicants Due Process right to make the state show that his consent was actually voluntary."
  - g. "Ineffective assistance of counsel for not bringing plea agreement to Applicant attention which was offered on Thursday, November 1, 2012 at 1:33 pm. Applicant was aware of a plea in the range of 7-25 years but was not advised of a plea in the range of/ or a negotiated 12 years. A plea was what Andrew Johnston was asked to get only if he felt that the case could not be won. Applicant would like to question why he was not made aware of a 12 year plea and now has a 25 year sentence."
2. Ineffective assistance of appellate counsel, in that:
- a. "Applicant alleges appellate counsel was ineffective for not briefing and presenting to the South Carolina Court of Appeals trial error issues that were preserved for appellate review or warranted appellate court consideration as plain error analysis. In particular, Applicant would cite the following issues not briefed or argued on direct appeal:"
    - i. "Whether the trial court erred when it denied counsels request for a continuance of trial on March 19, 2013, and proceeded to try Applicant *in absentia*?"
    - ii. "Whether the trial court erred in its determination that Applicant had willfully and knowingly waived his right to be present at trial and tried Applicant *in absentia*?"
  - b. "Finally, Applicant would allege that appellate counsel failed to effectively identify, present and argue facts and case law to support the issues presented on appeal (ie, illegal traffic stop and seizure of drugs). There were facts established as part of the record on appeal that appellate counsel failed to adequately present and argue."
3. "Applicant was deprived of his right to be present at all critical stages of criminal proceedings as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, applicable to the State of South Carolina by and through the 14<sup>th</sup> Amendment, US Const.; South Carolina State Constitution Article I, Section 3, 14; *State v. Fairey*, 646 S.E.2d 445 (SC 2007).
- a. "Applicant would reallege and state as supporting facts those set forth

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above[.]”

On July 6, 2021, Applicant, through PCR Counsel, filed an amendment alleging:

1. Ineffective assistance of counsel:
  - a. Failure to move to suppress the evidence based on both the 4<sup>th</sup> Amendment and the US Constitution’s prohibition against unreasonable search and seizure without a search warrant supported by probable cause and Article I, Sec. 10 of the S.C. Constitution prohibition against unreasonable search and seizure without a search warrant supported by probable cause and unreasonable invasions of privacy.
  - b. Failing to argue that the communications report shows purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its initial purpose. The timeline of the stop shows the car registration and Alston’s drivers license cleared around six minutes after the initial stop, at which point Officer Gilbert called for non-priority backup. By around eight minutes into the stop you can see on the video that the warning ticket is filled out which shows the purpose of the stop is complete at that point. See State’s Exhibit #2, DVD, at 1:03:03. Because counsel failed to argue this point, the Court’s reasoning was based on the false narrative that the purpose of the stop was completed fourteen minutes into the stop when officer Gilbert tears the long-completed ticket off the pad upon the approach of the backup unit.
  - c. Failing to argue that the pat down and continued questioning of Mr. Alston after the warning ticket and the purpose of the stop were completed was a nonconsensual unconstitutional extension of the duration of the stop. Officer Gilbert testified that he never returned the Applicant’s license or gave him the warning ticket and conceded that Applicant was not free to leave during the time before the officer requested consent to search the vehicle.
  - d. Failing to argue that if Officer Gilbert truly had a reasonable suspicion of a serious crime, he would have requested a priority backup unit, which he specifically did not.
  - e. Failing to argue that the Officer violated S.C. Code Section 56-7-35 by not giving the warning ticket to Applicant at the time of the stop.
  - f. Failing to argue that the warning ticket was discoverable exculpatory evidence in the Applicant’s case that the State failed to produce in violation of *Brady* and Rule 5.
  - g. Failing to request a continuance after a bench warrant was issued in the case or object to a trial in absence arguing that his ability to effectively try the case hinged on Applicant’s presence and that given the serious nature of the charge with its mandatory sentence fundamental fairness and due process required allowing a continuance.
  - h. Failing to convey a plea offer of a negotiated twelve years.
2. Ineffective assistance of appellate counsel for failing to argue that the video and transcript show the purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to support the basis for his

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suspicion of criminal activity to justify his extending the scope of the stop beyond its final purpose. The timeline of the stop shows the car registration and Alston's drivers license cleared around six minutes after the initial stop, at which point Officer Gilbert called for non-priority backup. By around eight minutes into the stop you can see on the video that the warning ticket is filled out which shows the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03. Because counsel failed to argue this point, the Court's reasoning was based on the false narrative that the purpose of the stop was completed fourteen minutes into the stop when officer Gilbert tears the long-completed ticket off the pad upon the approach of the backup unit.

3. Violation of Due Process rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States & Art. 1 Sec. 3 of the South Carolina Constitution amounting to the denial of a fair trial.

On April 15, 2022, Applicant, through PCR Counsel, filed an amendment, listing other allegations, consisting of:

1. Ineffective assistance of trial counsel for failure to prepare a pretrial memorandum moving to suppress the evidence.
2. Ineffective assistance of appellate counsel for failure to argue the holding in *Rodriguez v. United States* that a police stop exceeding the time needed to handle the matter for which to stop was made violates the Constitution's shield against unreasonable seizures which was decided April 21, 2015, before the Applicant's case was heard.

At the PCR hearing, Applicant proceeded forward on the allegations listed in his amended applications as well as:

- I. Ineffective assistance of counsel for:
  - a. failure to challenge the indictments.
  - b. Failure to properly notice Applicant of his trial.
  - c. Failure to challenge the consent of the search.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

#### Summary of the Testimony

##### ***Applicant Testimony***

Applicant stated that he was involved in a traffic stop that turned into a drug

investigation. He stated that he was not present in the courtroom because of a miscommunication. He stated that his Due Process Rights were violated. He stated that Counsel did not get the timeline on the stop correct. He stated that there was no proper notice of why he got pulled over and never saw the ticket. He stated that the stop was prolonged. He stated he was filling out the ticket and remembered the questions on the video being asked. He stated he heard about him getting the report off the driver's license. He stated that he assumed he heard about a package seven minutes into the stop. he stated that the ticket was filled out after eight minutes, but the officer kept asking questions. He stated that the officer asked to search the vehicle and that there was an issue regarding consent to the search. He stated that the officer held him on scene. He stated he wanted to know why the vehicle was searched. He stated that the officer knew the license was valid. He stated that Counsel should have objected to the indictment. He stated that Counsel was ineffective for failure to ask the Court take judicial notice of a case.

On cross-examination, Applicant stated he only knew about a plea deal, not a trial. He stated that he thought he was only there for roll call. He stated that the factors cited for the prolonged stop were two sets of keys on the key chain and a rental agreement that did not list South Carolina taken out in his girlfriend's name. Additionally, Applicant stated he told the officer he was visiting his mother for Mother's Day when it was March and that he told the officer he had six children but listed seven names. He stated he reviewed all discovery beyond the citation. He stated he consented to the search because he was intimidated. He stated he was given a citation almost two hours later. He stated he did not see a reason why the stop was extended. He stated he did not feel free to leave.

*Trial Counsel*

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Trial Counsel testified he became involved in the case on April 4, 2011. He stated

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Applicant resided in Georgia at the time. He testified that they spoke about the case on several occasions and talked about the charges, offers, and discovery. Trial Counsel testified that it is his general practice to go through the discovery with his client, page by page. He stated he does not generally give his clients a copy of the discovery unless asked to do so. He stated that if he had a copy of the warning ticket he would have given it to Applicant. He testified that the citation was entered into evidence, based on the transcript.

He stated that Officer Gilbert belonged to a particular unit but was essentially on I-85 looking for out of state license plates being used in drug activity. Trial Counsel argued that the stop was insufficient from the beginning and that the driving was not illegal. He also testified that this was a prolonged detention and that he argued the subsequent consent and search was done during a prolonged, unlawful detention. He stated he does not agree with the reviewing courts' conclusions.

Trial Counsel testified that the legal ruling on the suppression issue was not particularized but based upon the totality of circumstances. He stated that the officer made it difficult to determine the ending of the stop and that the officer seemed to be stalling. He stated that the officer used the process of writing the ticket to start asking questions as a part of a fishing expedition. He stated that he thought that if the officer intentionally delays the conclusion of the stop, it should be considered. He stated that he never told Applicant he could leave on roll call day and that he was number one on the trial docket. He stated that once the judge knew Applicant left the courthouse, he did not have an option to continue the case. He stated he did not know if Applicant knew he could be tried in his absence. He stated that he was not familiar with the concept of priority versus regular police backup. He stated he did not think the officer failing to give Applicant a ticket would have changed anything.

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On cross-examination, Trial Counsel stated that South Carolina has a specific provision in its constitution addressing the right to privacy. He stated that the officer was stalling for time. He stated that the stop should end when the purpose of the stop is complete. He stated that there is ambiguity in the term "complete." He stated that he did not remember knowing the time when getting Applicant's credentials identified. He stated he should have cross-examined the witnesses on the CAD report. He stated that the blue lights were activated as a pretext for the stop. He stated he did not see an issue with the delay between the blue lights and dash camera coming on. He stated that non-priority backup was called.

On re-direct, he stated that there were several minutes of stalling. He stated that the South Carolina Supreme Court determined the stop concluded at the fourteen-minute mark. He stated he did not know the difference between priority and non-priority backup.

#### *Appellate Counsel*

Appellate Counsel testified that when she assumes an appellate case, she orders a transcript, reads it thoroughly, and marks all motions and objections. She stated that she raised a Fourth Amendment issue and an issue concerning lack of voluntary consent. She stated that both the South Carolina Court of Appeals and Supreme Court affirmed the convictions. She stated she argued that the office was stalling until a drug dog arrived. She stated she argued the fifteen-minute mark was the end of the stop. She stated that she argued pursuant to *Rodriguez v. United States* and submitted a supplemental authorities letter concerning the case.

On cross-examination, she testified that she did not recall when her timeline was. She stated that she did not have the CAD report and thought it may have made a difference. She testified that the Supreme Court of South Carolina stated there was one minute of unlawful detention. She stated that the reasons the officer listed in justifying the prolonged stop were

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largely not accepted by the Supreme Court.

On re-direct, she testified that the purpose of the stop was complete once the license was run, and the rental agreement reviewed. She stated she argued that the officer was engaging in stalling tactics. She stated that the Supreme Court had to look at the standard of review of giving a high amount of deference to the trial court.

**Findings of Fact and Conclusions of Law**

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Spartanburg County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

***Ineffective Assistance of Counsel***

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

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Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. See also Rule 71.1(e), SCRPC ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland*, 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so 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. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "only in the rarest case" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

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The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

***Failure to Move to Suppress***

Applicant claims Counsel was ineffective for failure to move to suppress the evidence based on both the 4<sup>th</sup> Amendment and the US Constitution's prohibition against unreasonable search and seizure without a search warrant supported by probable cause and Article I, Sec. 10 of the S.C. Constitution prohibition against unreasonable search and seizure without a search warrant supported by probable cause and unreasonable invasions of privacy. However, Counsel did move to suppress the evidence pre-trial, and this request was denied. Counsel was reasonable in his argument and is not deficient for being unsuccessful in his motion to suppress. This Court has not been presented with any new evidence that, if argued in the motion, would have led to a different result. Accordingly, relief is denied.

***Failure to File Pre-Trial Brief***

Applicant claims Counsel was ineffective for failure to prepare a pre-trial brief regarding the constitutionality of the stop and search. This Court finds Counsel acted reasonably in electing to present his argument orally instead and fails to see how Applicant was in any way prejudiced on this ground. Accordingly, relief is denied.

***Failure to Argue Communications Report***

Applicant claims Counsel was ineffective for failure to argue that the communications

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report reflected that the purpose of the stop was complete at the eight-minute mark. Counsel did argue that the stop was prolonged in a way that violated Applicant's Constitutional rights. He was not deficient for failure to argue this exact point and this Court finds that failure to argue this point did not prejudice Applicant. Accordingly, relief is denied.

***Failure to Argue Prolonged Stop***

Applicant claims Counsel was ineffective for failure to argue that the pat down and search were a result of the prolonged stop. Counsel did argue that the stop was prolonged in a way that violated Applicant's Constitutional rights. He was not deficient for failure to argue this exact point and this Court finds that failure to argue this point did not prejudice Applicant. Accordingly, relief is denied.

***Priority Backup***

Applicant claims Counsel was ineffective for failure to argue that if the officer had reasonable suspicion, he would have requested a priority backup. This Court finds Counsel's argument reasonable and declines to find him deficient. This Court also finds that this argument would not have impacted the outcome of the motion or trial.

***Failure to Give Warning Ticket***

Applicant claims Counsel was ineffective for failure to give him the warning ticket on the scene. This Court declines to find that this affected the outcome of the motion to suppress, and relief is denied accordingly.

***Failure to Argue Ticket was Discoverable Exculpatory Evidence/Brady***

Applicant claims Counsel was ineffective for failure to argue the ticket was discoverable exculpatory evidence. This Court finds Counsel's argument at the motion to suppress hearing and at trial was reasonable and declines to find deficiency. This Court also finds that this

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argument would not have impacted the results of the proceedings. Accordingly, relief is denied.

***Plea Offer***

Applicant claims Counsel was ineffective for failure to convey a plea offer. Applicant candidly testified that he knew about the plea. Accordingly, relief is denied without merit.

***Failure to Request Continuance***

Applicant claims Counsel was ineffective for failure to request a continuance. Counsel credibly testified that the judge was unwilling to continue the case because Applicant was at the courthouse and then left, seemingly knowing he was slated for trial that day. This Court finds that even if Counsel requested a continuance, it would not have been granted. Accordingly, relief is denied.

***Failure to Notice Applicant of Trial***

Applicant claims he was not properly noticed regarding his trial. This Court finds this argument impracticable given his presence in the courthouse that day and Trial Counsel's testimony. Accordingly, relief is denied.

***Failure to Challenge Indictments***

Applicant is alleging he is entitled to PCR relief because there were "flaws in the indictment process." Challenges to the indictment must be raised before a jury is sworn in. S.C. Code Ann. § 17-19-90 (2003). If non-jurisdictional defects apparent on the face of the document are not raised before then, they are waived. *Hooks v. State*, 353 S.C. 48, 577 S.E.2d 211, (2003), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005); *State v. Young*, 243 S.C. 187, 133 S.E.2d 210 (1963). Sufficiency of indictment is found when the offense is stated with enough specificity that the court knows what judgment to announce and the defendant knows what he has to answer to and whether he can plead acquittal or conviction

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upon it and whether it apprises defendant of offense that is intended to be charged. *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) citing *State v. Wilkes*, 353 S.C. 462, 465, 578 S.E.2d 717, 19 (2003).

This Court has been provided with no evidence that the indictments were deficient. This is substantiated by Counsel's credible assertion that he saw no issues with the indictments. Further, even if issues existed, challenges to the indictment have been waived. Accordingly, relief is denied on this ground.

***Failure to Argue Consent to Search was not Given***

Applicant claims Counsel was ineffective for failure to secure consent to the search. The record reflects that Applicant consented to the search. (Tr. 74-75). Counsel acted reasonable in choosing another argument that had a greater chance of success: the prolonged stop. Further, this Court finds that this argument would not have been successful and, thus, Applicant suffered no prejudice. Accordingly, relief is denied.

***Ineffective Assistance of Appellate Counsel***

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). "Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Applicant must show appellate counsel's performance was deficient, and he was prejudiced by the deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990).

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Appellate counsel has a professional duty to choose among potential issues according to

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their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476. 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .”)).

When a claim of ineffective assistance of counsel is based upon neglecting to file a merits-based brief, Applicant must show that appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably competent attorney would have found one non-frivolous issue warranting a merits brief, and that the issue identified would have won on appeal. *Id.* at 288.

#### ***Failure to Argue Stop***

Applicant claims that Appellate Counsel was ineffective for failure to argue that the video and transcript show the purpose of the stop was completed at minute eight before officer Gilbert had established many of the facts he cited to support the basis for his suspicion of criminal activity to justify his extending the scope of the stop beyond its final purpose. This Court finds Appellate Counsel’s argument was reasonable and Counsel was not deficient as a result. This Court also fails to find that had Appellate Counsel argued Applicant’s version of the argument, a different result would have been reached. Accordingly, relief is denied.

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***Failure to Argue Rodriguez***

Applicant claims Appellate Counsel was ineffective for failure to argue pursuant to *Rodriguez v. United States*. Appellate Counsel credibly testified that she submitted a supplemental authority letter to the appellate court, citing this case. Accordingly, this claim is denied and dismissed without merit.

***Due Process Violations***

Applicant claims Due Process Violations occurred. It is this Court’s understanding that all Due Process violations were encompassed in previous allegations addressed above.

**Conclusion**

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry’s written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel’s assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant’s behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

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JUDGE BURT  
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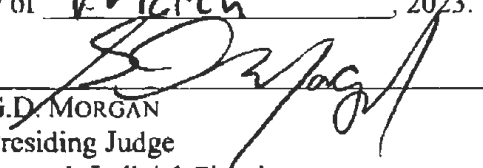
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**IT IS THEREFORE ORDERED:**

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 16<sup>th</sup> day of March, 2023.

  
 \_\_\_\_\_  
 G.D. MORGAN  
 Presiding Judge  
 Seventh Judicial Circuit

Spartanburg, South Carolina.

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 SPARTANBURG, SOUTH CAROLINA

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CEP

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2018-CP-42-0368
COUNTY OF SPARTANBURG	)	
	)	
STEPHENO ALSTON, #357159	)	
APPLICANT,	)	MOTION TO ALTER OR AMEND
	)	THE JUDGMENT
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

---

COMES NOW the Applicant and hereby moves pursuant to Rule 59(e), SCRCP, to alter or amend the judgment of this Court filed on April 3, 2023. The Applicant takes issue with the findings of fact and conclusions of law set forth resulting in the denial of post-conviction relief in his case. He further argues that even if each allegation does not amount to ineffective assistance of counsel standing alone, the cumulative effect of counsel's errors was deficient and prejudiced the Applicant to the degree that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 386 S.E.2d 624, 625 (1989); Green v. State, 351 S.C. 184, 197, 569 S.E.2d 318 (S.C. 2002)

The Order of Dismissal fails to adequately address Applicant's exhibits one, two and three: the CAD or traffic stop report, warning citation, and video in light of the testimony presented at the PCR hearing. (See Ex. 1). The Applicant argued that the CAD report showed that his driver's license was cleared by dispatch six minutes into the stop. This is confirmed by the video of the stop which then showed that eight minutes into the stop the fully completed warning citation was visible in the video at marker 1:03:03. The

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 IN THE COURT OF COMMON PLEAS  
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citation was entered as Applicant's exhibit two for comparison as it is the same ticket as seen in the video.

Applicant argued that trial and appellate counsel adopted the wrong timeline finding that the purpose of the stop was complete fourteen minutes into the stop when the video shows Officer Gilbert actually tear the citation off the pad rather that minute eight when the warning ticket becomes was seen to be completed. Trial and Appellate counsels' testimony at the PCR hearing did not contravene the Applicant's argument regarding the timeline. Trial counsel testified that he did not, but should have use the CAD report in his argument admitting that it would have supported his argument that the officer was stalling. He said he had not seen the portion of the video showing the ticket was filled out at minute eight. Appellate counsel said that she did not have the CAD report and thought it may have made a difference in the case.

The findings regarding "Failure to Move to Suppress" and "Failure to Argue Prolonged Stop" do not account for the new evidence found in three exhibits presented by the Applicant. (Order, pp. 17 &18) "Failure to Move to Suppress" does not address the fact that in his motion to suppress, trial counsel failed to mention South Carolina's more stringent privacy protection offered by Article I, Sec. 10 of the S.C. Carolina Constitution. "Failure to Argue Prolonged Stop" does not address that trial counsel failed to argue that the video of the stop showed the officer continued to question the Applicant after the warning ticked was completely filled out and the purpose of the stop was completed.

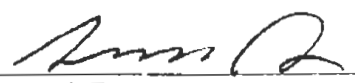
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For the foregoing reasons, as well as those argued in the Applicant's *pro se* attachment, the Applicant requests the presiding Judge G.D. Morgan to alter or amend the Order of Dismissal filed on April 3, 2023. (See Ex. 2)

Respectfully submitted,

  
\_\_\_\_\_  
Susannah Ross  
Attorney for the Applicant  
333 E. Coffee Street,  
Greenville, SC 29601  
(864) 242-0029

Greenville, South Carolina  
This 7 day of April, 2023.

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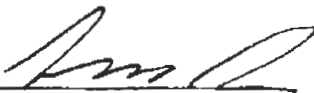
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	CASE NO. 2018-CP-42-0368
COUNTY OF SPARTANBURG	)	
	)	
STEPHENO ALSTON, #357159	)	
APPLICANT,	)	
	)	CERTIFICATE OF SERVICE
	)	
VS.	)	
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
RESPONDENT.	)	

---

1. I am the attorney for the Applicant in the above-captioned matter.
2. Regular communication by mail exists throughout the state of South Carolina and this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Notice of Appeal** on the above-captioned matter on the following person by electronic mail to:

**MJameson@scag.gov**

**Office of the Attorney General  
PCR Division  
P.O. Box 11549  
Columbia, SC 29211**

  
Attorney for Defendant

This 7 day of April, 2023

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SPARTANBURG COUNTY  
SOUTH CAROLINA

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STATE OF SOUTH CAROLINA  
COUNTY OF Spartanburg

Date 4-20-22

Case # 2018-CP-42-3680

EXHIBITS

Plaintiff(s) Stephens Alston

vs. Defendant(s) State of SC

<u>Plaintiff's</u> EXHIBITS	EXHIBITS	COURT'S EXHIBITS
1 traffic stop report	1.	1
2 citation	2	2
3 video	3	3
4	4	4
5	5	5
6	6	6
7	7	7
8	8	8
9	9	9
10	10	10
11	11	11
12	12	12
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19	19	19
20	20	20

Court

Clayton Payne

Clerk: Tungai M. S. J. Jr.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG	)	FOR THE SEVENTH JUDICIAL CIRCUIT
	)	
Stepheno Alston, #357159	)	Case No.: 2018-CP-42-0368
Applicant,	)	NOTICE OF MOTION AND
	)	Rule 59(e), SCRPC
	)	MOTION TO ALTER AND/OR AMEND
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
Respondent.	)	
_____	)	

EX 2

COMES NOW, the Applicant in the above-captioned matter pursuant to Rule 59(e), South Carolina Rules of Civil Procedure, hereby giving Notice of Motion, and moves for an order amending and/or altering the Order of Dismissal signed by the Honorable G. D. Morgan, Seventh Judicial Circuit on 23 day of march, 2023 referencing the above-captioned matter and the evidentiary hearing convened in this matter on April 20, 2022.

GROUND:

1. The Court fails to make specific findings of fact as to each issues presented, and fails to state expressly its conclusions of law relating to each issue presented as required by the Post-Conviction Relief Act, § 17-27-80 (2003) and Rule 52(a), South Carolina Rules of Civil Procedure, as shown herein below;
2. The Court further in failing to uphold its statutory duty as set forth herein, deprives the Applicant of the right to appellate review of the issues presented in the case at bar, thus flies in the face of repeated warnings and admonitions by the South Carolina Supreme Court that such failure to rule of said issues result in the issues not being preserved for appellate review;
3. The Court engages in numerous erroneous findings of fact,

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misstatement of facts and evidence, misapprehension of facts pertaining to the material issues presented; and this may be due in part to the Court permitting the attorney for the State to write its order, a practice long held to be disfavored by the South Carolina Supreme Court;

4. Finally, the Court mis-applies the relevant law to be applied to the issues;

#### ARGUMENTS

The Court employing extensive use of boiler-plate language often seen in proposed orders written by the Attorney General's Office and numerous mis-characterizations of Applicant's actual claims, disposes of each in turn, and cinches unaddressed claims by stating:

"At the PCR hearing, Applicant proceeded forward on the allegations listed in his amended applications as well as....

All other allegations raised in his initial application and amendments are deemed waived and abandoned, accordingly and will not be addressed in this order". Order of Dismissal, Page 11 of 5, Parag. 16 (emphasis added)

Thus, this treatment of the issues clearly violates §17-27-80, S.C. Code, where it is clear from the pleadings that the "Second Amended Application" dated April 15, 2021, prefaces its amendments by declaring:

"To supplement the allegations of the original application, the Applicant adds the following..."

Therefore, no issues were waived or abandoned, but merely were supplemented.

See: Second Amended Application, page 1, April 15, 2021, signed by Susannah Ross

With this as the context and sordid methodology of the Court's treatment of the issues, the Court failed to render a ruling on issues presented by the Applicant both in the original and supplemental pleadings and while testifying at the evidentiary hearing.

(A) In the Second Amended Application" submitted by PCR counsel

Susannah Ross, to the Court dated April 15, 2021, on page 2, Section 2(a), Applicant asserted Ineffective Assistance of Appellate Counsel on the basis of:

"(a) failing to argue that the video and (Spartanburg Communications Report, CAD) transcript showed the purpose of the stop was completed at minute eight..." Yet, in the Order of Dismissal, in the Court "Summary of Testimony" relating to the ineffective assistance of appellate counsel claim, the Court fails to mention even once, any testimony from appellate counsel related to the video. In fact, appellate counsel testified she did not recall the timeline and did not have the CAD report and thought it may have made a difference. Thus, as the Order of Dismissal is completely silent as to any ruling pertaining to appellate counsel's failure to argue the video, the judge failed to make specific findings of fact related to this material issue of the claim of ineffective assistance of appellate counsel;

(B) Next, in relation to the "reasonableness" prong of the test for ineffective assistance of counsel, the PCR Court fails to make specific findings of fact on the failure of appellate counsel failing to argue video as mentioned above, and thus the Order of Dismissal should be amended or altered to include a ruling on the precise issue;

(C) Additionally, in relation to the claim of ineffective assistance of appellate counsel, the Court fails to issue a ruling on the "reasonableness" of appellate's counsel failing to argue to import of the Spartanburg Communications Report (CAD), while yet the Court admits that appellate counsel testified at the evidentiary hearing:

"On cross-examination, she testified that she did not recall when her timeline was. She stated that she did not have the CAD report and thought it may have made of difference." Order of Dismissal is 14 of 5, ¶ 4 Thus, the PCR Court's order of dismissal is devoid of any finding of fact or makes clearly erroneous findings of fact, that appellate's conduct was reasonable, where appellate counsel inherited the trial court record and clearly was in possession of the CAD report which was

an integral part of the record since the jury trial and direct appeals. Moreover, the Court fails to address the "reasonableness" of appellate counsel's failure to obtain the CAD report.

In disposing of the ineffective assistance of appellate counsel claim, the Order of Dismissal clearly fails to address these central issues of material fact to the claim presented;

The Order of Dismissal only disposes:

- (1) Failure to Argue Stop,
- (2) Failure to Argue Rodriguez,
- (3) Due Process Violations

in disposing of the ineffective assistance of appellate counsel claim and this violates the requirements of §17-27-80, S.C. Code of Laws (2003) and Rule 52, SCRCP; and constitutes a misapplication of law, since the failure to apply the law to these material facts in question simply did not occur here; *Pruitt v. State*, \_\_\_ S.C. \_\_\_, 423 S.E.2d 127,128 (S.C.1992); *McCray v. State*, \_\_\_ S.C. \_\_\_, 408 S.E.2d 241,241 (S.C.1991)

(D) The Order of Dismissal is completely silent as to any ruling on the Ineffective Assistance of Trial Counsel claim, related to :

"(e) failing to argue that officer Gilbert violated S.C. Code Section 56-7-35 by not giving the warning ticket to the Applicant at the time of the stop. see Second Amended Application, dated April 15, 2021, page 2, ¶ 4

Thus, this violates the requirements of §17-27-80, S.C. Code and Rule 52(a), SCRCP;

(E) The Order of Dismissal is completely silent as to any ruling on the Ineffective Assistance of Trial Counsel claim, related to :

Impermissible amendment of the indictment, which was re-stated by the Respondent as:

"trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts impermissible amendment of indictment"

See Order of Dismissal, page 12 of 5, paragraph ¶ 1, summarizing

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Applicant's own PCR testimony on the precise issue. See also: Return, dated Feb. 25, 2019, Page 10 of 20, signed by Johnny Ellis James, Jr joining the issue. This claim was squarely raised in the post-conviction relief application dated Oct. 16, 2018, Attachments, page 11, paragraph 11(a)(3) and subsequent amendments incorporated this claim by reference. Furthermore, Applicant raised the issue while testifying at the evidentiary hearing convened on April 20, 2022. Therefore, the failure of the Court to render a ruling on this precise issue violates, §17-27-80, S.C. Code of Laws, (2003) and Rule 52(a), SCRCP. It further amounts to a misapplication of law, in that no law was applied to these material factual allegations. The only issue related to the indictments mentioned in the Order of Dismissal is simply mischaracterized and casted generally as:

"Failure to Challenge Indictments"

Order of Dismissal, page 19 of 5. Clearly the Court only refers to "flaws in the indictment process", and this does not address the specific issue of impermissive amendment of the indictment; while Applicant has made no claim as such;

(F) The Order of Dismissal is completely silent as to any ruling on the Ineffective Assistance of Trial Counsel claim, related to :

Ineffective Assistance of Appellate Counsel, as raised in the PCR application, as:

"Ineffective assistance of appellate counsel, in that:

(a) ... for not briefing and presenting...trial error issues...(i) Whether the trial court erred when it denied counsel's request for a continuance..."

See: Return, Page 11 of 20, dated Feb. 25, 2019;

The Order of Dismissal is completely silent as to this claim and its issues of material fact; thus the failure violates §17-27-80, S.C. Code (2003) and Rule 52(a), SCRCP; and furthermore amounts to a misapplication of law and erroneous finding of facts in light of the fact that no facts were examined, and no factual conclusions reached, and no law applied to these un-disposed facts;

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CONCLUSION

WHEREFORE, having set forth the foregoing matters, the Applicant respectfully moves for an order amending and/or altering the Order of Dismissal to include rulings on the precise issues raised herein, and expressly stating findings of fact and conclusions of law as to each; and for an order explicitly ruling that said issues in fact were not waived or abandoned, and in fact involve jurisdictional issues, which cannot, as a matter of law, be deemed waived, even by consent of the parties. To rule otherwise, would fly in the face of an entire body of law and jurisprudence on the precise issue of jurisdictional concepts and impermissible amendments of indictments. Finally, as to the claims discussed, there was no ruling nor analysis of material facts related to the claims, thus no finding of fact were rendered, and obviously law not applied is misapplied, on the substantive claims and collateral issues of reasonableness and prejudice.

Accordingly, a denial of the instant motion would amount to a misapplication of law in violation of the requirements of §17-27-80, S.C. Code(2003) and Rule 52(a), South Carolina Rules of Civil Procedure.

Respectfully Submitted,

Stepheno Alston This 23 date of March, 2023.

Stepheno Alston, Pro Se  
Applicant  
Lieber Correction Institution  
P.O. Box 205  
Ridgeville, South Carolina 29472

or

\_\_\_\_\_ This \_\_\_\_\_ date of \_\_\_\_\_, 2023.

Susannah Ross  
Counsel for Applicant  
  
Susannah Ross  
Attorney for the Applicant

SPARTANBURG COUNTY  
CLERK OF COURT  
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ROSS & ENDERLIN, PA  
ATTORNEYS AT LAW

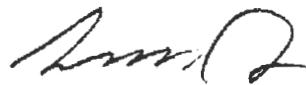
April 7, 2023

Ms. Hope Blackley  
Spartanburg Clerk of Court  
PO Box 3483  
Spartanburg, SC 29304

To Whom It May Concern:

Please find for filing the enclosed Motion to Alter or Amend. Please return a clocked copy to me by e-mail or post and forward a clocked copy to the Judge and Attorney General's office. If you have any questions or concerns, please let me know.

Sincerely,



Susannah Ross  
Attorney at Law

enclosure

cc: Megan Jameson, Esquire

AMY W. COX  
CLERK OF COURT  
SPARTANBURG COUNTY

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330 E. COFFEE ST., GREENVILLE SC 29601

PHONE: (864) 242-0029

E-MAIL: SUSANNAH@ROSSENDERLIN.COM

STATE OF SOUTH CAROLINA )  
COUNTY OF SPARTANBURG )  
Stepheno Alston, #357159, )  
Applicant, )  
v. )  
State of South Carolina, )  
Respondent. )

IN THE COURT OF COMMON PLEAS  
FOR THE SEVENTH JUDICIAL CIRCUIT

Case No.: 2018-CP-42-03680

**RETURN TO APPLICANT'S MOTION TO  
ALTER OR AMEND PURSUANT TO  
SCRPC 59(e)**

This matter comes before the Court by way of Applicant's "Motion to Alter or Amend Judgement Pursuant to 59(e),SCRPC", submitted on April 7, 2023, would respectfully submit the following:

**Procedural History**

Applicant was indicted during the June 2011 term by the South Carolina State Grand jury for trafficking in cocaine (2011-GS-42-03090). On March 18, 2013, Applicant appeared before the Honorable J. Derham Cole, circuit court judge, where he proceeded to trial before a jury. The jury found Applicant guilty as indicted on March 19, 2013. Applicant was represented by Andrew J. Johnston, Esquire. J. Edward Hunter, Esquire, of the Seventh Circuit Solicitor's Office, prosecuted the case. Judge Cole at that time sealed the sentence to be imposed later. On September 19, 2013, Applicant appeared before Judge Cole for imposition of the sentence. Judge Cole sentenced Applicant to imprisonment for a term of twenty-five years.

Applicant filed a timely notice of appeal, and a direct appeal was perfected by ~~Lara M. Gaudy~~, Esquire, who raised the following issues:

- 1. Did the court err by denying Appellant's motion to suppress evidence found in

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SOUTH CAROLINA

his vehicle where the officer did not have reasonable suspicion or probable cause to stop Appellant's car for a traffic violation thereby illegally seizing Appellant in violation of the Fourth Amendment?

2. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where the officer's continued detention of Appellant exceeded the scope of the traffic stop and constituted a seizure for purposes of the Fourth Amendment and where the officer did not have reasonable and articulable suspicion of a serious crime nor Appellant's consent to detain him beyond the scope of the traffic stop?
3. Did the court err by denying Appellant's motion to suppress evidence found in his vehicle where Appellant's consent to search was not freely and voluntarily given, and even if it was freely and voluntarily given, was invalid as an exploitation of an unlawful detention?

The parties proceeded to oral arguments on May 6, 2015. Applicant was represented by Appellate Counsel, and Christina C. Bigelow, of the South Carolina Attorney General's Office, represented Respondent. By unpublished opinion decided July 29, 2015, the South Carolina Court of Appeals affirmed Applicant's convictions. *State v. Alston*, Op. No. 2015-UP-381 (S.C. Ct. App. filed July 29, 2015). Applicant petitioned for rehearing, which was denied by Order filed September 15, 2015.

On October 26, 2015, Applicant petitioned the Supreme Court of South Carolina for a writ of certiorari on all three issues. The State filed its return on November 24, 2015. The Supreme Court of South Carolina granted certiorari by Order dated July 18, 2016. The parties proceeded to oral arguments on December 14, 2016. Applicant was again represented by Appellate Counsel Laura M. Caudy, Esquire. Mark R. Farthing, Esquire, of the South Carolina Attorney General's Office, represented Respondent. By opinion issued March 7, 2018, the Supreme Court affirmed the Court of Appeals opinion as modified. *State v. Alston*, 422 S.C. 270, 811 S.E.2d 747 (2018). The remittitur was issued on March 27, 2018. Applicant thereafter filed a petition for writ of certiorari in the Supreme Court of the United States. The Supreme Court denied certiorari on October 1, 2018.

### Current Post-Conviction Relief Action

In his current PCR application, Applicant alleges he is being held in custody unlawfully the

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following reasons:

1. Ineffective assistance of trial counsel, in that:
  - a. “Applicant was deprived effective assistance of counsel when trial counsel failed to adequately and properly apprise/advise the Applicant with regards to pretrial, trial and other court proceedings related to Applicant’s criminal charges.”
    - i. “Specifically, Applicant alleges, and will prove given fact development proceedings, that attorney Andrew Johnston failed to inform the Applicant that his criminal case would be called for trial on March 18, 2013. As a result of counsel’s failure to apprise Applicant about criminal court proceedings/scheduling, the Applicant believed that he could depart the courthouse on March 18, 2013, and return at a later date.”
    - ii. “From the beginning of the case, it had been both Applicant and counsels understanding that Applicant would either enter into plea negotiations and eventually plead guilty to a charge for reduced sentence if counsel was not successful with pending motion to suppress evidence seized during traffic stop and search of Applicants rental vehicle. Applicant was led to believe by attorney Johnston that the suppression hearing would be conducted prior to and separate from and trial or guilty plea hearing being commenced. And that counsel was confident that a plea agreement would be reached in Applicants case.”
  - b. “Applicant was deprived effective assistance of counsel when attorney Johnston failed to properly object, preserve for appellate review and address the courts decision to proceed with Applicants criminal case in absence of the Applicant. Consequently, as a result of counsels deficient performance, the Applicant was tried in his absence and deprived of his constitutional right to be present at critical criminal proceedings.”
    - i. “Applicant contends that counsel should have, but did not, request a continuance of the proceedings at that juncture to allow counsel to contact Applicant and have him appear before the Court. Counsel knew, or should have known—based on previous occasions and talking with Applicant that day—that Applicant had left the courthouse headed back to Georgia.”
    - ii. “Although there was some discussion among attorneys and the Court about Applicants possible whereabouts and his apparent communications with bail bondsman, the trial court failed to make the requisite factual determination and/or otherwise comply with law/rules governing trials *in absentia*, [*State v. Jackson*, 228 S.C. 94, 341 S.E.2d 375 (1986)]. Notably, counsel did request a continuation at this point on March 19, 2013; however, that was an exercise in futility since the court had previously issued a bench warrant for Applicant’s arrest and

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- decided to try Applicant in his absence. At no time did counsel object to the courts determination that a motion *in limine* represents the beginning of defendants jury trial, per se. Consequently, the Applicants criminal proceedings were manifestly prejudiced.”
- c. “Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts impermissible amendment to indictment.”
- i. “At the close of the prosecutions case defense counsel moved for directed verdict arguing that the prosecution had failed to prove all elements of charges as alleged in the indictment against Applicant (Tr. 229-30). In response to defense counsels argument, the trial court directed the prosecution to amend/redact the indictment to remove all means of violating trafficking statute except those elements related to weight of controlled substance and the bringing into state clause (id p231-32).”
  - ii. “Counsel should have objected to the trial courts amendment of indictment which prejudiced Applicants criminal proceedings by broadening the reach of indictment and removing elements of offense as originally charged by grand jury. [*Cf. Bailey v. State*, 392 S.C. 422, 709 S.E.2d 671 (2011); *State v. Guthrie*, 352 S.C. 103, 572 S.E.2d 309 (Ct. App. 2002)].
- d. “Applicant alleges that trial counsel was ineffective for failing to object and/or preserve for appellate review the trial courts failure to ensure that all the trial court evidence went into the jury room with jurors during their deliberation process.”
- i. “During the Applicant’s traffic stop/search video was introduced as evidence. This particular video evidence portrayed scenes that Applicant contends were favorable to his defense. When it was time for the jury to begin its deliberation the videotaped evidence was supposed to go back with the deliberating jury, however, due to an oversight on the part of the prosecutor, the videotaped evidence was not with the deliberating jury. (Tr. pp 273).
- e. “Ineffective for not being diligent and thorough in his research in having all the facts of Applicants case and information that was critical to Applicants suppression hearing.”
1. “Andrew Johnston couldn’t have reviewed the Discovery Package, had he done so he would have seen that applicant’s traffic stop was called in at 13:05 and was cleared at 13:10. At this point Applicant was clear to go, but instead of returning applicants paperwork and have Applicant sign the warning ticket, Officer Gilbert put it in his pocket (warning ticket) and continued to question Applicant and then called for backup at 13:12. At this time Applicant was seized and without probable cause. The exclusionary rule forbids this and it triggered Applicants Fourth Amendment rights to be free from unreasonable

search and seizures. Andrew Johnston never pushed for an answer to find out why Officer never completed the traffic stop which was initiated, its purpose in the first place and to clearly define the officers job.”

- f. “Ineffective assistance of counsel for not proving to the court that there was no way possible the Applicant’s consent was voluntary and it was Applicant’s Due Process right to make the state show that his consent was actually voluntary.”
  - g. “Ineffective assistance of counsel for not bringing plea agreement to Applicant attention which was offered on Thursday, November 1, 2012 at 1:33 pm. Applicant was aware of a plea in the range of 7-25 years but was not advised of a plea in the range of/ or a negotiated 12 years. A plea was what Andrew Johnston was asked to get only if he felt that the case could not be won. Applicant would like to question why he was not made aware of a 12 year plea and now has a 25 year sentence.”
2. Ineffective assistance of appellate counsel, in that:
    - a. “Applicant alleges appellate counsel was ineffective for not briefing and presenting to the South Carolina Court of Appeals trial error issues that were preserved for appellate review or warranted appellate court consideration as plain error analysis. In particular, Applicant would cite the following issues not briefed or argued on direct appeal:”
      - i. “Whether the trial court erred when it denied counsels request for a continuance of trial on March 19, 2013, and proceeded to try Applicant *in absentia*?”
      - ii. “Whether the trial court erred in its determination that Applicant had willfully and knowingly waived his right to be present at trial and tried Applicant *in absentia*?”
    - b. “Finally, Applicant would allege that appellate counsel failed to effectively identify, present and argue facts and case law to support the issues presented on appeal (ie, illegal traffic stop and seizure of drugs). There were facts established as part of the record on appeal that appellate counsel failed to adequately present and argue.”
  3. “Applicant was deprived of his right to be present at all critical stages of criminal proceedings as guaranteed by the Fifth and Sixth Amendments to the United States Constitution, applicable to the State of South Carolina by and through the 14<sup>th</sup> Amendment, US Const.; South Carolina State Constitution Article I, Section 3, 14; *State v. Fairey*, 646 S.E.2d 445 (SC 2007).
    - a. “Applicant would reallege and state as supporting facts those set forth above[.]”

Respondent made its return on February 25, 2019, requesting an evidentiary hearing. On July 6, 2021, Applicant, through PCR Counsel, filed an amendment alleging the following:

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final purpose. The timeline of the stop shows the car registration and Alston's drivers license cleared around six minutes after the initial stop, at which point Officer Gilbert called for non-priority backup. By around eight minutes into the stop you can see on the video that the warning ticket is filled out which shows the purpose of the stop is complete at that point. See State's Exhibit #2, DVD, at 1:03:03. Because counsel failed to argue this point, the Court's reasoning was based on the false narrative that the purpose of the stop was completed fourteen minutes into the stop when officer Gilbert tears the long-completed ticket off the pad upon the approach of the backup unit.

3. Violation of Due Process rights guaranteed by the Fifth and Fourteenth Amendments of the Constitution of the United States & Art. I Sec. 3 of the South Carolina Constitution amounting to the denial of a fair trial.

On April 15, 2022, Applicant, through PCR Counsel, filed an amendment, listing other allegations, consisting of:

1. Ineffective assistance of trial counsel for failure to prepare a pretrial memorandum moving to suppress the evidence.
2. Ineffective assistance of appellate counsel for failure to argue the holding in *Rodriguez v. United States* that a police stop exceeding the time needed to handle the matter for which to stop was made violates the Constitution's shield against unreasonable seizures which was decided April 21, 2015, before the Applicant's case was heard.

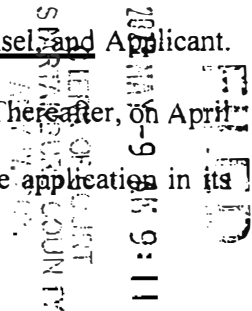
On April 20, 2022, an evidentiary hearing was convened at the Spartanburg County Courthouse.

Susannah Ross, Esquire, represented Applicant and Assistant Attorney General Chelsey Marto represented Respondent. At the PCR hearing, Applicant proceeded forward on the allegations listed in his amended applications as well as:

1. Ineffective assistance of counsel for:
  - a. Failure to challenge the indictments.
  - b. Failure to properly notice Applicant of his trial.
  - c. Failure to challenge the consent of the search.

At the hearing, testimony was taken from trial counsel, appellate counsel, and Applicant.

At the conclusion of the hearing, the Court took the matter under advisement. Thereafter, on April 3, 2023, this Court issued an Order of Dismissal denying and dismissing the application in its



entirety. On March 23, 2023, Applicant submitted a *pro se* “motion to alter or amend Order of Dismissal”. On April 7, 2023, PCR counsel Susannah Ross, Esquire, on behalf of Applicant submitted a motion to “alter or amend the judgement” along with a copy of Applicant’s *pro se* motion on Respondent. This Return follows:

**Response to Applicant’s Motion to Alter or Amend**

Applicant’s Counsel received the Court’s Order of Dismissal on April 4, 2023. Thereafter, Applicant moved to alter or amend the Order of Dismissal pursuant to Rule 59(e), SCRPC. This motion was submitted on April 7, 2023. In his motion, Applicant asserts the Court’s Order of Dismissal incorrectly denied relief for failing to adequately consider Applicant’s three exhibits and failing to specifically address allegations that were not presented at the evidentiary hearing from previous application and multiple amendments. Applicant requests this Court “alter or amend” its Order denying his application for those reasons. Applicant then goes through the issues, arguing the court simply incorrectly decided each issue. Applicant does not allege any argument was actually misapprehended by this Court, but rather, insists the Court’s rulings were erroneous and his abandoned allegations from previous applications not presented at the evidentiary hearing were not addressed in the dismissal Order. Applicant also fails to state with any specificity what he wishes to be altered or amended in the Order. Therefore, Respondent interprets Applicant’s motion to be a request for the Court to reconsider its ruling and grant post-conviction relief in Applicant’s favor. Such a request is more properly addressed through the appellate process, not a motion to alter or amend pursuant to Rule 59(e), SCRPC. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (noting the proper use of a Rule 59(e), SCRPC, motion is to preserve issues raised to but

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not ruled upon by the trial court). Therefore, Respondent submits this motion should be denied and dismissed.

Applicant alleged in his motion that the three exhibits submitted at the evidentiary hearing were not considered properly by the Court. This Court issued a detailed thirty-three page Order of Dismissal thoroughly addressing all of the claims raised by Applicant at the hearing, including the exhibits presented and Applicant’s assertions regarding them, and the Order contains the required findings of fact and conclusions of law necessary to dispense with Applicant’s allegations as required by S.C. Code Ann. § 17-27-80 and Rule 52(a), SCRCF. Accordingly, there is no need for this Court to alter or amend its Order in any way as all of Applicant’s arguments in support of post-conviction relief are preserved for appellate review. Moreover, Respondent asserts this Court fully ruled on all issues properly presented by Applicant. Specifically, the Court carefully considered the testimony from all witnesses presented and made the necessary credibility findings related to each specific issue presented to this Court.

Applicant is asserting this Court’s Order improperly failed to sufficiently address issues that were included in his application and amended applications but that he did not raise at the evidentiary hearing. No evidence, testimony or legal authority was presented at the evidentiary hearing regarding allegations formerly included in previous applications. Therefore, the Court deems it to be abandoned. “When a party provides no legal authority regarding a particular argument, the argument is abandoned and the court will not address the merits of the issue”. *Palmer v. State*, 427 S.C. 36, 47, 829 S.E.2d 255, 261 (Ct. App. 2019) (Citing *State v. Lindsay*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011)).

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As Applicant is not requesting an alteration or amendment to the Order, but rather, Applicant is asking the Court to reconsider its ruling and grant Applicant post-conviction relief, such a request is more properly addressed through the appellate process—not a motion pursuant to Rule 59, SCRCP. *See Burgess v. State*, 402 S.C. 92, 95, 738 S.E.2d 264, 265 (Ct. App. 2013). *See also Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (“Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it.”) (citing *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). Here, Applicant did not raise these previous allegations to the court at the evidentiary hearing thereby abandoning them, making it improper for the post-conviction relief court to rule on them in an Order of Dismissal.

In conclusion, this Court’s Order properly and fully addressed all allegations raised by Applicant at the evidentiary hearing. Moreover, the Order of Dismissal is properly supported by probative evidence in the record and is not premised on any errors of law. This Court should summarily deny Applicant’s motion, as nothing in the motion necessitates a hearing on said motion. Based on the foregoing, Applicant’s motion should be denied and dismissed. Additionally, as Applicant has failed to state what, if any, issues were raised but not ruled upon, Respondent requests that this motion be summarily dismissed without a hearing. *See* Rule 59(f), SCRCP (allowing a court, in its discretion, to consider a post-hearing motion based upon the motion and return submitted by the parties and the post-conviction relief file, and rule without a hearing if such a hearing will not aid the court in reaching its decision.)

**Request for Summary Dismissal of the Motion to Alter or Amend**

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WHEREFORE, having made its Return to the motion, the State requests the relief requested in the motion be summarily denied and dismissed.

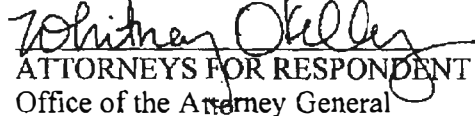
Respectfully submitted,

ALAN WILSON  
Attorney General

W. JEFFREY YOUNG  
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON  
Senior Assistant Deputy Attorney General

WHITNEY O'KELLY  
Assistant Attorney General

BY:   
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May 5<sup>th</sup>, 2023

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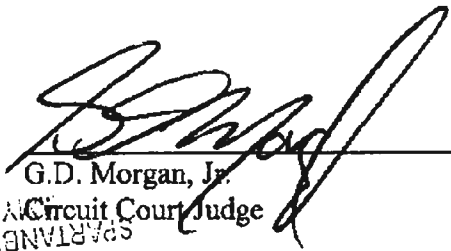
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 Stepheno Alston, #357159 )  
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 Applicant, )  
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 v. )  
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 State of South Carolina, )  
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 Respondent. )

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-42-03680

**ORDER**

This matter is before the Court on Applicant’s Motion to Alter or Amend the Judgment of this Court filed on April 3, 2023. Based on a thorough review of the file and the submissions of the parties, Applicant’s motion is hereby DENIED.




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G.D. Morgan, Jr.  
 Circuit Court Judge

June 7, 2023  
 Greenville, South Carolina

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