

## Procedural Background/History

RECEIVED  
JUL 24 2024  
S.C. SUPREME COURT

On August 6, 2008, the home of Mrs. Helen Beach was broken into at about 3:00 AM. Shortly thereafter, Deputy Dennis Compton arrived in response to an alarm that was activated and subsequently reported by an "ADT" Alarm Specialist to Law Enforcement. Soon after his arrival at the scene of 699 Sunflower Drive, he was shot and killed. There was little to no evidence for Law Enforcement to go on as it related to physical or forensic evidence. They had no fingerprints or DNA, eyewitnesses, video footage or anything. This difficulty prompted the community to ask for help from anybody to help solve the crime. After about a week, there was a \$10,000.00 reward posted for anyone with evidence that would lead to a conviction in this matter as an incentive. Consequently, Law Enforcement was bombarded with a massive wave of leads reporting either "So and so" did the crime, or "So and so" told the witness they committed the crime. These types of leads ran up to over 300, Procuring hundreds of arrests between August 6, 2008 and September 5, 2008. The first person of interest that came into focus was Shane Robertson. On August 13, 2008, Agent Sean Harley of the South Carolina Law Enforcement Division, received information from Rhonda Meyers that her nephew "Bubba" heard Shane planning the burglary and that Sidney Beach said he and Shane were going to hit Mrs. Beach's home because she would not be there for the weekend. Sidney Beach is Mrs. Beach's nephew. This was lead # 142 as referenced by the Lead sheets documented and provided by the 17<sup>th</sup> Circuit solicitor's office as part of petitioner's Rule 5.

Next, on August 14, 2008, Johnathan Richardson told agents that Shane Robertson told him the day before, that Clint Crosby and Beatty Hogan committed the burglary and that Clint Crosby shot Deputy Compton. Shane further admitted that he stayed in the car while the crime was being committed. This was lead # 202. On August 14, 2008, Crystal Tye advised agents that she heard Kevin Wynn brag about shooting the Deputy. By this time agents had leads that Kevin Wynn had told two (2) different people that same thing. Lead # 222. On August 7, 2008, Beatty Hogan took a polygraph test and deception was indicated to the following questions: 1.) Did you shoot that man? No., 2.) Did you shoot that man on Sunflower Road? No., and 3.) Do you know for sure who shot that man? No. This was lead # 235. That same day Shane Robertson took a polygraph, where deception was indicated in the following questions: 1.) Did you shoot that man? No., 2.) Were you present when you shot that man? No., and 3.) Are you deliberately withholding information about who shot that man? No. Lead # 239. Based on this, the investigation really started to focus on these two guys because police had at least 50 witnesses saying that they either heard one, the other, or both of these guys admit that they committed the crime. A guy named Dustin Powell was telling inmates in the County Jailhouse that he committed the murder, but when he was questioned by agents he said he did not do the crime. He further told agents that he did admit to people that he committed the crime

but was only looking for attention so he could talk about his pending charges. Lead # 157. On August 28, 2008, Patty Thurston told Agent Sean Harley (SLED) that on August 16, 2008, Jelanie Aiken called her and admitted that he shot Deputy Compton and wanted her to come pick him up. Lead # 313.

On August 22, 2008, Billy Green provided agents with information that Applicant admitted to killing the Deputy. He said that Applicant told him via text messages. The text that Billy Green offered agents was a vague message that stated: "Motherfuckaz was on a 'jux' and he showed up with a gun in hand and Motherfuckaz did what they had to do." Lead # 300. There is no evidence that law Enforcement ever confirmed these messages to have come from a phone that belonged to Applicant. There was, however a series of exculpatory messages that were allegedly exchanged between Green and Applicant, specifically where Green asked Applicant: "I don't know if I was dreaming or not, but did you say you killed that Cop?" To which Applicant's response was allegedly: "I don't know what you're talking about, but you don't need to be texting that to my phone." Agents then took photos of these texts and admitted them into evidence. After that, Green was instructed by law Enforcement to wear a wire to Applicant's residence in order to obtain more information about Applicant's alleged admission.

Green did have a conversation with Applicant while wearing the recording device, but he did not question Applicant about the murder. Green did advise agents that Applicant told him that he had (2) Shotguns and a bulletproof vest that he "robbed" from a military guy. Soon afterward, Jermar Sanders, a close friend of Green told Police that Applicant told him he committed the crime with Travis Harris. He also informed agents that he seen Applicant with a camouflage shotgun.

Acting on this information from Green and Sanders, Investigator Angela Stallings of the Colleton County Sheriff's Office drafted a warrant affidavit to search Applicant's home. She got the warrant signed by Magistrate Travis Avant on September 5, 2008. There was also an active warrant for Burglary 1<sup>st</sup> degree (I-862031) and Probation violation. The Burglary warrant was issued by a Magistrate B. Ray Woodard on September 5, 2008 and was in reference to a burglary that occurred at 805 Church Hill Rd, the same burglary the search warrant of Applicant's home was for. Accordingly, Sled, Colleton County Sheriff's Dept., Walterboro Police Dept., and Colleton County Probation, Parole and Pardon Simultaneously executed all three warrants at Applicant's residence.

Applicant was home when Law Enforcement engaged his residence and he was informed of the nature of the search/Arrests that was

being executed. Applicant was then subdued without consequence. Applicant witnessed Law Enforcement begin searching his home as they removed a television and other evidence from his home before he was transported to the Colleton Annex station to await an interrogation. Meanwhile, as the search of Applicant's home was underway, his girlfriend Carllessa Prioleau was contacted by Law Enforcement at work and informed to come home because she was the tenant of the apartment and they were conducting a search. When she arrived, Prioleau was given a copy of the search warrant as she communicated with Law Enforcement while they were searching her home. Next, Prioleau was asked for consent to search Applicant's vehicle. There is conflict as to whether or not Prioleau actually gave consent, but it was ultimately ruled to be voluntary by the trial court.<sup>(1)</sup>

About an hour or two later, Applicant was questioned about the items found in his home and vehicle, specifically the television from his home among other things. Agents utilized this evidence in order to elicit cooperation by specifically confronting Applicant it and Applicant subsequently admitted guilt and provided an inculcation. The inculcation led agents to two co-defendants whom also gave inculcations and became witnesses against Applicant. Lastly, the inculcation by Applicant led agents to the whereabouts of the "murder weapon". Consequently, Applicant was charged with 4 counts

Of burglary 1<sup>st</sup> degree, Murder and burglary 2nd degree. Applicant was subsequently indicted and bound over to General Sessions Court to stand trial.

At some point Boyd Young, Esq., became counsel for Applicant and because the state filed notice to seek the Death Penalty, Andrew Carroll was also appointed as Co-Counsel. Counsel met with Applicant often and discussed many strategies and defenses. Counsel went over discovery with Applicant and soon developed a strategy of defense regarding the search warrant for Applicant's home, the inculpatory statements and Applicant's girlfriend's consent to search Applicant's vehicle. Counsel advised Applicant that they would conduct a Franks Proceeding to challenge the validity of the search warrant; they would conduct a hearing pursuant to Jackson v. Denno to challenge the voluntariness of the inculpatory statement; and they would conduct a hearing to challenge the voluntariness of Applicant's Girlfriend's consent. At the conclusion of this proceeding, the trial court specifically asked my counsel would they like to do oral arguments or would they rather to submit briefs. Both parties agreed to do briefs. After the submission of briefs, the trial court ruled that the search warrant for Applicant's home lacked probable cause, so the search was unlawful. The court further suppressed all evidence that came from Applicant's home. As it relates to Applicant's inculpatory statement, the trial court ruled

that it was voluntarily given, with no further determination, and ultimately ruled it was admissible. Regarding the consent given by Applicant's girlfriend, the trial court ruled that the consent was voluntarily given, with no further determination, and ruled to be admissible. No other challenges were made regarding these pieces of evidence and the admissibility of these pieces of evidence was not considered in any other way by the trial court.

As soon as these rulings came down by the trial court, the state advised Applicant's counsel that he had 24-hours to plea guilty to all charges or he was going to be forced into a Death Penalty trial. This time-sensitive plea deal was for a life sentence, without Parole. Trial Counsel advised Applicant to plea guilty because Applicant was facing Death and because Trial Courts rulings were unfavorable, Counsel seen no other viable defense for the Applicant. Though he didn't want to, Applicant eventually accepted the plea based on Counsel's advice. Applicant did not appeal the Plea conviction. However, Applicant did timely file a PCR Application and alleged Ineffective Assistance of Counsel on August 22, 2012. An evidentiary hearing was conducted by the Honorable Judge Deadra Jefferson at the Beaufort County Judicial Center on August 30, 2013. Applicant was present at the hearing and was represented by Jeffrey M. Butler, esq. Ashleigh R. Wilson, esq, of the

South Carolina Attorney General's office represented the state. On January 15, 2014, Judge Jefferson issued an order Denying Relief and dismissing Applicant's PCR application for Post-Conviction Relief. PCR Counsel then filed a notice of Appeal with the Colleton County Clerks office, but it was never received by the South Carolina Court of Appeals. No further action was taken by either party. Applicant then filed a Petition for a Writ of Habeas Corpus (5:16-cv-00038-DCN). Respondent filed a motion for summary judgement and specifically advised the District Court that Applicant had a remedy available to him in the state court since Applicant raise a claim in his Petition that his PCR Counsel failed to file an appeal following an order denying relief, issued by Judge Jefferson. After consideration U.S. Magistrate Judge Kaymani D. West issued a Report and Recommendation, filed on August 31, 2016, recommending that Respondent's motion for summary judgement be granted. On September 29, 2016, U.S. District Judge David C. Norton granted Respondent's motion for summary judgement and dismissed petition without prejudice, pending exhaustion of state-court remedies. Applicant then filed a PCR application alleging that PCR Counsel failed to file a Perfected Appeal following a PCR court order denying relief, pursuant to Austin v. State 305 S.C. 453 (2016-CP-15-1572). On August 20, 2020, Judge Jefferson granted the PCR application pursuant to Applicant's Austin claims.

Judge Jefferson specifically found that a belated appeal was warranted. Appellate Counsel Taylor Gilliam of the South Carolina Commission of Indigent Defense was appointed to represent Applicant. Whereupon Counsel requested transcripts from initial PCR and was advised that the transcripts were destroyed because the retention period of 5 years Pursuant to rule 607 of the SCRPC had long passed. Counsel then filed a motion with the South Carolina Supreme Court to hold the PCR Appeal in Abeyance and a motion to Reconstruct the Post-Conviction Relief proceeding (Appellate Case # 2020-001279), On January 11, The Supreme Court issued an order granting Applicants motion on March 9, 2021. Counsel, Taylor Gilliam, ended up transferring to another legal profession and the undersigned Counsel was appointed to represent Applicant in the PCR reconstruction, which was completed on November 9, 2023. Out of that reconstructed record arises the appeal to this Court which contains a Johnson brief, filed by Breen Stevens, the undersigned Counsel of representation for Applicant. With that, Applicant respectfully submits his written brief Pursuant to Johnson in addition to the one claim that was submitted by the undersigned Counsel.

## Questions For this Court

1.) Was the Reconstructed Record adequate for meaningful appellate review despite the missing testimonial portions of the record as well as the Summary, speculative and inconsistent nature of the record?

2.) If this Court finds that the Reconstructed Record is adequate for meaningful appellate review, are the findings within the PCR Court order controlled by an error of clearly established constitutional law?

## Question # 1

Applicant contends that the reconstructed record is not adequate for meaningful appellate review because portions of witnesses' testimony are missing. For starters, Applicant would note that the Court vehemently indicated throughout the course of the reconstruction proceeding that its Order was a direct reflection of its notes. Applicant does not dispute this; However, Applicant contests that though the reconstructed record may be based on the Court's notes and the Order, they only indicate the evidence that was elicited by the AG during its direct and cross examination of each witness. The Court's notes and Order does not in any way reflect any testimonial evidence that was elicited by PCR Counsel during its direct and cross examination. (Transcripts pg. 116 Lines 13-15). This is why the record is so indicative of many differences in the recollection between the Court, PCR Counsel, and Applicant. Applicant testified to the facts surrounding the thoroughness of trial Counsel's investigation, at the initial PCR, and at the reconstruction. Applicant also concisely testified about duress, how He felt it applied to

his case, and the specific advice that trial Counsel gave Him regarding duress. However, the reconstruction Court indicated that it was sure questions were asked regarding the thoroughness of trial Counsel's investigation, but its not recreating. (Transcript pg 117 Lines 23-25). The reconstruction Court also gave the erroneous instruction that the purpose of reconstruction is not to do the PER all over again, but to merely provide the underlying basis for the Courts order. (Transcript pg. 82 Lines 15-20). Based on these two opinions of the reconstruction court, its safe for this court to infer that the reconstruction Court was not concerned with any evidence relating to the thoroughness of trial Counsel's investigation, even though the PER Court order made a specific finding that trial Counsel conducted a proper investigation, and were thoroughly competent. in their representation. The Court's only position was to have evidence in the reconstructed record about duress. Applicant contends that it would be prejudice for this Court to disregard any and all testimony within this record that demonstrates the thoroughness of trial Counsel's investigation, especially since

the Court made this specific finding in its Order. Any disregard of this evidence would impede this Court from determining whether or not the PER Court's Order was supported by any evidence of probative value, or controlled by an error of law. Both Charlene Fields and Travell Green testified at the initial PER that they heard Applicants co-defendant either threaten him or admit that Applicant was acting under his threat of death. The distinct purpose of these two witnesses' testimony was to demonstrate to the PER Court that there was evidence of coercion/duress. Thus, the relevant inquiry of the Court was supposed to be was there enough evidence to support a duress instruction. The way the PER Court worded the summary of testimony regarding these two witnesses was a sterilized version meant to persuade any appellate court reviewing Applicant's duress claim that there was not enough evidence to support a finding that there was a reasonable probability that Applicant was entitled to a duress instruction in a subsequent trial. The testimony of Charlene Fields and Travell Green is missing from the reconstructed record and this prejudices Applicant because without their specific testimony

this Court cannot give an adequate determination regarding the probative value of the complete testimony of these witnesses. Due to the lack of any notes from PCR Counsel regarding which specific questions and answers were elicited during his direct and cross examinations, the reconstruction court was compelled to allow evidence to be proffered into the record. In doing so, the Court concisely demonstrated the acknowledgement of the necessity for the proffer. In essence, if the Court had a complete record of every specific question asked and every specific answer given, there would have been no need to allow any proffers. For the sake of specificity, the Court could have read every single question of Counsel and every single answer by the respective witnesses, into the record. Indeed, this would have tempered any misconstruction of the reconstructed record. The allowance of the proffer demonstrates the Courts lack of certitude in its "notes". This lack of certainty opens the door wide to speculation. And this Court does not entertain any level of conjecture within a reconstructed record. Ultimately, Applicant contests that if this Honorable Court finds that any portion is missing from this

record, either by voiding the proffers of Applicant and trial Counsel's testimony, or by agreeing that the direct examination of Charlene Fields and Travell Green is non-existent, or both, then it must find that this record is not adequate for meaningful appellate review. Proof that the reconstructed record is missing portions alone will not suffice to have a new proceeding granted. In order to have a new proceeding granted pursuant to a reconstructed record, Applicant must point to a specific claim the Court would be impeded from reviewing adequately without the alleged missing portion of the record.

Ladson v. State 373 S.C. 320 (2007). Applicant also con-

tests that the record cannot be considered in part. Since this is not the original record, if any portion of the record is unreliable, then the entire reconstructed record is inadequate, and a new proceeding is warranted.

Ladson specifically addresses bare-bones testimony, conflicts between parties about the context of witness

testimony, the length of time between the original proceeding and the reconstruction and the Courts reluctance to speculate about ambiguous portions of the reconstructed record. Applicant asserts that if this Court does not consider Applicant's testimony within this reconstructed record this will prejudice Applicant, if it does not also find that the record is not adequate for meaningful appellate review. The time-span between the original PCR and the reconstruction in Applicants case was about 10 and a half years. It would be impossible to find that this extremely long lapse of time serves in the favor of adequate reconstruction. The record has so much conflict regarding the testimony of all the witnesses except the two that were not present to testify and even then, there's still a conflict, especially with what PCR Counsel recalled was testified about. The mass majority of the record will cause this Honorable Court to have to speculate, especially regarding what to consider and not consider about these witnesses testimony. Applicant feels that

this record meets all of the same prejudicial findings that this Court made within Ladson. Applicant cannot Challenge all of the findings of the PER Court's Order based on this record, especially the question of whether or not trial counsel was deficient for failing to pursue an exclusionary rule determination because Applicants Statements to police were the fruit of an unlawful Search, then trial counsel advised Applicant to plea guilty because there was no viable defense. All of the testimony about trial counsels thoroughness in their investigation by Applicant clearly indicates that there was an available defense for Applicant. Again, without this testimony, this claim cannot be addressed by this court.

## Question # 2

The PCR Courts order makes a specific finding that all of Applicant's Trial Counsel's testimony was credible and Applicant's testimony, along with his mother, Charlene Fields and Travell Green's testimony was not credible. The Court found that Counsel adequately conferred with Applicant and was thoroughly competent in their representation. The Court found that Counsel's representation did not fall below an objective standard of reasonableness. Lastly, the Court found that Counsel demonstrated the normal degree of skill, knowledge and professional judgement and representation that are expected of attorneys who practice criminal law in South Carolina State v. Pendergrass 239 S.E 2d 750 (1977).

## Pretrial 4<sup>th</sup> Amendment Issues

Counsel testified that they discussed all possible defenses with Applicant and after weighing the worst and best case scenarios of these possibilities they decided it was best to advise Applicant to plea guilty because after the unfavorable pretrial Denno determination by the trial court, Counsel did not recognize any other possible defense available to Applicant. Based on this assessment,

Counsel advised Applicant to plea guilty.

A plea must represent an intelligent choice among the alternative courses of action available to defendant Kolle v. State 386 S.C. 578 (2019). This means that a plea must be the most effective course of action in contrast to a defendant waiving his Constitutional rights. In Kolle, the PER Court ruled that his trial counsel was deficient for advising him to refuse a plea offer by the State and for failing to conduct a proper investigation that would have procured evidence to prove to the trial court that law enforcement lied to a magistrate about having probable cause to search his property. As a result, at a proceeding pursuant to Franks v. Delaware, the trial court ruled that the search was lawful and that the evidence was admissible. Once the defense received the unfavorable pre-trial ruling, counsel then advised Kolle to plea guilty. At the PER hearing, Kolle testified that counsel failed to get the call/dispatch logs, among other evidence that would have disproved law enforcement's contention that they had probable cause. The court held that had counsel retrieved those documents, there was a reasonable probability that the outcome of that Franks proceeding would have been different. In other words, the court's ruling was that because Kolle made a prima facie showing that there was a reasonable

Probability that the evidence (call/dispatch logs) that wasn't used at the Franks, but could've been used, was persuasive enough to make the trial judge find the warrant/search to be unlawful and suppress the fruits of the search, there was a reasonable probability that the outcome of his trial would've been different.

At Applicant's PER hearing, he testified that he was arrested and searched, witnessed the search, was taken to be interrogated, confronted with evidence from the search, then he made an inculpatory statement. He testified that counsel conducted a Franks and Denno proceeding. He testified that the trial court ruled that the search was unlawful and suppressed the evidence recovered from Applicant's home. However, the trial court ruled that the inculpatory statement was voluntary and thus, admissible. When asked by counsel (PER) was he advised by trial counsel of the exclusionary rule, Applicant's response was no. On direct examination, trial counsel testified that he conducted a Franks, a Denno and nothing more. Counsel also testified that he advised Applicant to plea guilty because Applicant had no viable defense. Applicant concedes that trial counsel did an outstanding job of proving that the search warrant lacked probable cause and having the trial court suppress the evidence that was recovered from Applicant's home. However,

trial counsel failed to challenge that the Burglary 1<sup>st</sup> arrest pursuant to warrant # I-862031 was not supported by any level of probable cause whatsoever. Trial counsel also failed to make any connection between the unlawful search and/or arrest and the consent given by Applicant's girlfriend, Applicant's inculpatory statement, nor the derivative fruits of Applicant's inculpatory statement, which were Michael Way, Travis Harris, and the alleged "murder" weapon. Applicant contends that although did get some evidence suppressed as the fruit of the unlawful search, Counsel should have used that unlawful act to challenge the abovementioned evidence as being the fruit of that unlawful act. Had Counsel done this, there is a reasonable probability that all the evidence in Applicant's case would have been suppressed and Counsel would have been able to make an argument that the state lacked Probable Cause to justify Applicant's detention; So the outcome of Applicant's trial would have been different.

State v. Cannon 250 S.C. 437 (1967)

A statement following an unlawful search must be found to not be the product of the unlawful search. A voluntariness finding alone by the trial court is too general. State v. Cannon 250 S.C. 437 (1967). Testimonial evidence is no less fruit of an illegal act of the

government than any other evidence. U.S. v. Ceccolini 435 U.S. 268 (1978).

This type of evidence includes, but is not limited to, Confessions, live-witness testimony and third-party Consents. The burden is on the defense to establish a casual connection between an illegal act of the government and the evidence it seeks to have Suppressed. U.S. v. Shetter 665 F.3d 1150 (2011), U.S. v. Hastings 685 F.3d 124

In Cannon, there was a search that was ruled invalid by the trial court. The evidence from his home was Suppressed. Next the trial court conducted a Denno proceeding and the confession that followed the unlawful search of his home was ruled to be voluntary and thus, admissible. Cannon appealed and claimed that the trial courts ruling was deficient because his confession should have been excluded because it was the "fruit" of an unlawful search. The Supreme Court held that a voluntariness determination alone is too general. The Court remanded the proceeding back to the trial court with the specific instruction to determine whether his confession was or was not the "fruit" of the unlawful search. When any kind of evidence is discovered following an illegal act of the government, a defendant must be afforded the determination by the trial court that the evidence is not the product of the illegal act. This mandatory determination is pursuant to the Exclusionary Rule Doctrine, which is a Court-made prophylaxis

meant specifically for deterring willful, blatant governmental violations of defendant's constitutional rights.

Applicant contends that he was entitled to a mandatory Exclusionary Rule determination as well. Once the trial court ruled that the Search of Applicant's home was unlawful, it was correct for Counsel to ~~do~~ conduct a voluntariness proceeding regarding the Confession. After the Denno proceeding, trial Counsel was supposed to ask the trial court to make a determination that the Confession was or was not the "fruit" of the unlawful search, which he failed to do. Whatever reason he failed to make this challenge can in no way negate the fact that this course of action was not only available, but was more importantly mandatory, in light of the facts of Applicant's case, to be pursued. In retrospect, had trial Counsel pursued this course of action, there is a reasonable Probability that all of the evidence following the unlawful Search would have been suppressed, including the Confession by Applicant, the live-witness testimony of Michael Way and Travis Harris, and the alleged murder weapon, which were all derivative fruits of Applicant's Confession. Without this evidence, the state doesn't even have probable cause to justify the ~~arrest~~ arrest for any crime in Applicant's case, so the outcome of the trial would have been different. If this Court finds that the Exclusionary Rule determination was an available course of action for Applicant, then this Court must find that

the PCR Court's order was controlled by an error of clearly established constitutional law. Particularly when the PCR Court found that trial counsel was not deficient in its representation. The PCR Court was well aware that there was an unlawful search, followed by a confession by Applicant. Any reasonable judge should know the Exclusionary Rule applies. When trial counsel testifies that he conducts a Franks, a Denno, then advises Applicant to plea guilty, it's hard to decipher how much more evidence was needed within the record for the PCR Court to lawfully conclude that the Exclusionary Rule applied and was not pursued. Contrarily, the PCR Court made a specific finding that trial counsel's pretrial representation was credible. For some reason, the order does not mention the Denno proceeding, but the court was nonetheless of the sequence of events, aware. If this Honorable Court does find that the PCR Court order is deficient, then Applicant requests that this court makes a determination that trial counsel's representation and plea advice was deficient and that Applicant did satisfy the first prong of the Strickland standard. Applicant asks that this court further makes a determination that Applicant was prejudiced by trial counsel's failure to request an Exclusionary Rule determination by the trial court. This is to say that had trial counsel pursued an Exclusionary Rule determination as a defense, there is a reasonable probability that the outcome of Applicant's trial would have been different,

thus satisfying the prejudice prong of the Strickland standard. Once this Court finds that trial Counsel was ineffective, Applicants request is that his plea be found to be unintelligently made and therefore withdrawn and that Applicant's case be remanded to the trial court for a new proceeding. Applicant is aware that the Court's holding in Cannon was based on an error by the trial court and did not specifically address whether it was Counsel's ineffectiveness that effectuated the trial court's erroneously incomplete determination. However, Applicant asserts that his utilization of Cannon is moreso to identify a localized case that expresses a finding that an Exclusionary Rule determination is a prerequisite when evidence follows an act by the government that a trial court establishes to be unlawful, before that evidence can be admissible. This, coupled with the fact that trial Counsel has a duty to establish a casual connection between the evidence and the illegal act, once the illegality has been determined by the trial court, demonstrates deficiency when he fails to do so. Courts are not expected to just assume that all evidence that follows an illegal act of the government is indeed the "fruit" of the illegal act because there are circumstances where evidence can be come at or discovered by means sufficient to purge it from the taint of the illegal act of the government. All trial Counsel had to do was inform the trial court that Applicant was questioned about the same evidence the same court ruled was the "fruit" of an unlawful search and that Applicant witnessed these items being removed from his home during the unlawful search. This would have been enough for the trial court to find that an Exclusionary Rule determination was warranted. From there,

the state would have had to prove by a preponderance of the evidence that the challenged evidence was discovered by either attenuation, inevitable discovery, or an independent source, which based on the circumstances, would have been virtually impossible to achieve. With all these things being understood by this court, Applicant respectfully submits that his plea was based on advice from trial counsel that was borne out of an embodiment of deficient representation stemming from a severe miscalculation, either by ignorance, or negligence, of the applicability of clearly established constitutional law, by trial counsel. Where trial counsel advised Applicant that he had no available defense after having not pursued the Exclusionary Rule as a defense when it clearly applied to Applicant's case was deficient, where counsel's advice was made for no other reason but to induce Applicant into accepting the 24-hour time sensitive plea offer by the state. Lastly, Applicant submits that there is no reasonable explanation that counsel can give for not pursuing the Exclusionary Rule as a defense that would undermine his deficiency, where the Exclusionary Rule is a mandatory defense when evidence derives following police misconduct, and given this fact, but for counsel's deficient advice/representation, Applicant would have insisted on going to

trial and would not have pled guilty Hill v. Lockhart 474 U.S. 52 (1985). In sum, Applicant clearly testified in this record that trial counsel did not argue any "fruit of the poisonous tree" claims at the pretrial proceeding, and clearly established constitutional law provides that this was an available course of action for Applicant (Transcripts pg 90 Lines 2-9). This Courts use of this testimony allows Applicant to effectively challenge the PER Courts credibility findings regarding trial Counsel's testimony about their pretrial investigation, which would ultimately dictate as to whether or not the Courts order was controlled by an error of law.

## Duress

In addition to the duress argument raised by Appellate Counsel on behalf of arguments for Applicant's Johnson Petition, Applicant would like to point out that if this Court finds that there is a reasonable probability that a jury instruction of Duress would have obtained in relevance to the burglary 1<sup>st</sup> charges and the Burglary 2<sup>nd</sup> charge, then this Court

must find that counsel's plea advice was deficient. Equally, if this court finds that the state was not pursuing the theory of Accomplice Liability, but, as evidenced by the plea colloquy, the state could not prove beyond a reasonable doubt which defendant was the shooter, this court should find that there never would have been a murder conviction in this case (Plea Colloquy pg. 26 Line 7-21). In a murder trial, the state has the burden of proving that the defendant has delivered a "killing blow" with malice aforethought. Because the state could not prove this, Applicant can't understand why there was ever any conversation of the death penalty in this case. In order for a felony murder conviction to obtain, the state still would have had the burden of proving beyond a reasonable doubt that Applicant delivered the killing blow in order for the death penalty to become a viability. Piggybacking Appellate Counsel's Johnson claim, Applicant reiterates that trial Counsel's plea advice was deficient because duress was a defense to the burglaries, but would like to also add that although Appellate Counsel asserts that the duress defense could

have nullified the felony murder rule inference of malice, the State more importantly would have had the impossible burden of Proving Applicant to be the gunman beyond a reasonable doubt, without any reliance of a duress defense. In short, irregardless of duress as a defense to murder, or any argument as to how the defense could have removed any malice inference in light of a successful assertion regarding the underlying felony that the murder arose from, the state could not prove that Applicant "killed" the victim, which is the first element of a murder indictment. As it relates to the remaining burglaries Applicant was indicted for, there is a reasonable probability that, based on the facts presented at the PCR proceeding, the duress instruction would have obtained, making the matter one for the jury to decide. Trial Counsel testified that he was in possession of a letter that would have ended a duress defense if it was introduced at trial (Appendix pg 217). Applicant disputes this alleged letter because for one, the state never had any knowledge, possession, or intention of using this letter in any trial as evidence against Applicant and this was a material fact regarding this letter that was never elicited as evidence at the PCR hearing. Therefore the PCR court had no evidentiary basis for finding that the alleged letter would have ended Applicants otherwise justifiable duress

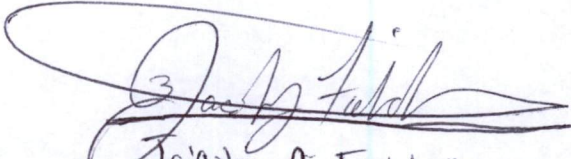
defense, when the only way the state could have come into any possession of this alleged letter is if trial counsel violated Applicant's 6<sup>th</sup> Amendment right to Attorney/client privilege. Because this alleged letter was never "evidence" against Applicant as well as the fact that the PCR Court was never apprised of the specific context of the letter within the record, it's obvious that the PCR Court's ruling was based on nothing more than mere speculation, and its erroneous opinion that a duress defense is rarely successful. The PCR Court does not ever decipher whether or not Applicant's testimony was enough to establish that a jury instruction of duress would have obtained. Furthermore, assuming arguendo that the alleged letter withstood an admissibility determination pursuant to rule 404 of the South Carolina Rules of Evidence, the state still would have had to prove that Applicant was the Author of the alleged letter beyond a reasonable doubt, which was still a matter for the jury to decide. If this Honorable Court finds that this record contains enough evidence to establish a reasonable probability that duress was applicable, then this Court must also find that the plea advice by trial counsel was deficient and that Applicant's decision to Plea did not reflect an intelligent choice among the alternatives. On the flip side of that same coin, Trial Counsel's advice that Applicant didn't have "any viable defense" (transcript pg 157 line 5-7) was also deficient advice, because all Counsel had to do was inform Applicant that because the state could not prove a

gunman beyond a reasonable doubt and the state was not going to pursue Accomplice Liability, this lack of evidence was a complete defense to the murder indictment. Applicant asserts that because he was not made aware of this fact, his plea was not intelligently made and had he been aware of this prior to accepting the plea he never would have and instead would have insisted on going to trial. Under these circumstances this Honorable Court must find that trial Counsel's advice to Applicant to plea guilty because Applicant had no viable defense was deficient because had trial Counsel properly advised Applicant about the state's burden of proof/evidence regarding the murder charge, any subsequent trial would have resulted in an acquittal. Therefore, the plea to murder cannot be the product of an intelligent choice. Kolle v. State 386 S.C. 578 (2010). The PCR Court's order indicates that it reviewed the record in its entirety. The proceeding followed a plea so Applicant's sole argument was that trial Counsel's plea advice was deficient. It was important for the court to analyze all of Applicant's claims from that perspective based on the evidence presented. Based on the evidence, trial Counsel gave Applicant a two-pronged plea advisement: Duress was not a defense to murder, nor an available defense, and Applicant no available defense. Applicant contends that both prongs of this advice was deficient, and where the PCR Court made specific credibility findings that this advice was adequate, considering the evidence,

this finding was controlled by an error of clearly established law. Applicant testified that the reason he desired to go to trial and risk the death penalty was because he didn't want to give up his constitutional rights (Transcript pg. 98 Line 14-15). Applicant's determination to maintain his rights were further reasonable based on Applicant's undisputed testimonial evidence regarding the facts surrounding Applicant's arrest, the unlawful search of his home and his subsequent confession; and the fact that a "fruits" determination was never made regarding the confession. Applicant requests that because there was never an Exclusionary Rule determination prior to Applicant's acceptance of the plea, there is a reasonable probability that had Applicant insisted on going to trial, this mandatory proceeding would have been requested of the trial court by proper motion. If this proceeding would have been conducted, there is a reasonable probability that the outcome of Applicant's trial would have been different. This failure in procedure alone would prejudice Applicant if Applicant's trial counsel's advice was deficient. In conclusion, Applicant asserts that if the evidence of the record supports a finding by this court that there is a reasonable probability that a jury instruction for duress would have been warranted then plea counsel's advice in its totality was deficient. The relevant inquiry for this court however, is

Why was trial Counsel preparing Applicant for a murder conviction/trial/plea, if based on the evidence, the state couldn't prove murder? If there would have been a trial, a SODDI (Some other Dude Did it) defense would have been sufficient for an acquittal. This was the defense that was available to the murder charge and the proper advice that Applicant should have been apprized of. Instead Counsel advised Applicant had no available defense. There is a reasonable probability that the outcome of the murder would have been different. After finding deficiency, the Court must, in the first instance, determine whether, based on the evidence within the record, Applicant was entitled to an Exclusionary Rule determination. The importance of this finding is because this Court can't determine the outcome of a potential trial, notwithstanding the plea, if it's not at first confident that the evidence the state intends to use is even lawful evidence. That specific evidence being the consent given by Applicant's girlfriend to search Applicant's car after witnessing an unlawful search of her home, and the evidence found in Applicant's car; the Confession given by Applicant after he witnessed the unlawful search of his home and was confronted with the evidence physically & verbally by law enforcement; and the evidence to which law enforcement was led stemming from Applicant's Confession like Co-defendants and the "murder"

Weapon, all of which law enforcement had no knowledge of prior, to Applicant's confession. If this evidence of the record establishes a causal nexus, then there is a reasonable probability that the outcome of the Exclusionary Rule determination would have resulted in the suppression of the abovementioned evidence. Without this evidence there can be no conviction regarding any indictment in Applicant's case, had he insisted on going to trial and not had pled guilty. So either duress, the Exclusionary Rule, SODDI or all of these "viable" defenses establishes deficiency in plea counsel's advice; and once the deficiency is determined, either duress, the Exclusionary Rule, or both "viable" defenses prior to trial, but available before Applicant pled guilty, establishes a reasonable probability that the outcome of Applicant's trial would have been different, thus proving the prejudice Prong of the Strickland standard. For the foregoing reasons, Applicant requests that this Court either finds that this reconstructed record is not adequate for meaningful appellate review and grant a new PCR. Or, if the record is adequate, this Court should reverse the PCR Court order and grant Applicant a new trial.

  
Jacoby G. Fields #349115

Applicant

This 18<sup>th</sup> day of July, 2024