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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Patrick Cleburne Fant III, Circuit Court Judge

Appellate Case: 2024-000474

David Stalk …….. Petitioner,

v.

The State of South Carolina ……..…. Respondent.

APPENDIX
Volume II of II

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A. Yes, sir.
Q. Was he taking steps?
A. Yes, sir.
Q. Were his eyes open?
A. I couldn't tell.
Q. At some point did you notice anything about him?
A. When we were in the house I noticed he had a big bump on his head and it was bleeding a little bit.
Q. Stop. What part of his head?
A. Like towards the back.
Q. Bleeding a little bit?
A. Yes, sir.
Q. Anything else?
A. No, sir.
Q. Where was he when he was in the house? Anthony.
A. He sat on the chair next to the door when you first walk in.
Q. Is that the one that I showed you a little bit ago when we talked about the front door?
A. Yes, sir.
Q. Again, I'm bouncing around. State's Exhibit Number 24. Well, what chair did Anthony sit in?
A. That chair.
Q. What happened next?
A. She told me to go get him a rag so she can try to help

TESTIMONY OF PHILLIP HALL

Q. What date does it bare?
A. February 6th of 2013.
Q. Other than the stuff that's filled in is it the same form that you referred to as the State's Exhibit Number 64 from 2/5 of '13?
A. Yes, sir, it is.
Q. Any difference in the form at all?
A. Other than the dates -- the forms are the same.
Q. Who was present -- first of all, about what time of day was the 2/6 of '13 process going on?
A. It was 11:54 in the morning, a.m.
Q. Who was present on 2/6 of '13?
A. Captain Grant.
Q. Was the 2/6 of '13 also in two different parts?
A. Yes, sir, it was.
Q. And when you say Captain Grant, you're talking about male or female?
A. Male.
Q. With the city police department?
A. Yes, sir.
Q. Let's go ahead and explain this to the jury, who is Scott Grant?
A. Scott Grant is my immediate supervisor, he is the captain over special operations.
Q. Who is Kristen Grant?

A. That is his wife who is a SLED agent for South Carolina.

Q. Why is she involved in a Lancaster Police Department homicide investigation?

A. She is one of this district's investigators.

Q. So you and Scott Grant on 2/6.

A. Yes, sir.

Q. Let's go through it. Tell the jury what you did with Mr. Stalk on 2/6 of '13 concerning his Miranda rights.

A. Same situation, applied --

THE COURT: Is this in evidence?

MR. BARFIELD: No, let me move it into evidence. Your Honor, at this time I offer the Miranda form from 2'6 of '13 as State's 75 (sic).

MR. GRIER: No objection.

THE COURT: State's 65 in evidence without objection.

(The Miranda form was received as State's 65.)

Q. I have handed you State's Exhibit 65. Describe for the jury what you did with respect to Mr. Stalk's constitutional rights on 2/6 of '13.

A. Again we fill out this form, put his name on top, asked him what year he completed his school, he advised 10th. I asked him if he was under the influence of any drugs or alcohol, he said no. I asked him could he read or write the English language, he said yes and I indicated it by marking

it on the paper here. Again, it happened on February 6th at 11:54 a.m. I advised him of his rights. I said, "You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk with a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer one will be appointed to represent you before any questioning if you wish. You can decide at anytime to exercise these rights and not answer questions or make any statements." And I asked him, "Do you understand each of these rights I've explained to you, and having these rights in mind are you willing to talk to us at this time?" And again, I read on his waiver of his rights, it says, "I have read the statement of my rights and understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me, no threats or coercion of any kind have been used against me." Again, I had him initial each one of his Miranda to the left, at the bottom he signed it under the waiver of rights, and I signed this form.

Q. And what time did Mr. Stalk sign the waiver forms?

A. 11:58.

Q. All right. The same series of questions about 2'6 of '13 as I asked you about 2/5 of '13. First of all, was

there any -- other than the way he was dressed and where he had spent the night before, was there any change in Mr. Stalk's physical condition that you could tell?

A. Not that I could see.

Q. Again, did he have any injuries to him or complain of any discomfort from a physical standpoint?

A. No, sir.

Q. Was he restrained in any fashion on 2/6 of '13?

A. He was.

Q. How was he restrained then?

A. He had on a belly belt. We just put chains on the -- instead of being handcuffed like this he had a belly chain or a belly belt what we call it.

Q. Were his hands restrained?

A. To his side, yes, sir.

Q. Were his feet restrained?

A. I believe he had leg shackles on as well.

Q. Could he walk under those circumstances?

A. He could.

Q. Could he run under those circumstances?

A. Short strides if he would have tried.

Q. Any other restraints used on him?

A. No, sir.

Q. Did he at any time ask you -- again, same questions. Did you have any problem understanding him?

A. I did not.
Q. Did he appear to have any problem understanding you?
A. He did not.
Q. Did he ask any questions of you concerning his constitutional rights?
A. He did not.
Q. Did he say or do anything to make you believe he did not understand his constitutional rights?
A. No, sir, he did not.
Q. Did he invoke any of his constitutional rights, the right not to talk, the right to have a lawyer, the right to talk to a lawyer before he talked?
A. No, sir.
Q. At any time during the conversations with him on 2/6 of '13 did he in the middle of it say, "I'm done, I want a lawyer, I don't want to talk," anything like that?
A. No, sir.
Q. Okay. Did he waive his rights and talk to y'all on 2/6 of '13?
A. Yes, sir, he did.
Q. Did anybody promise him anything on 2/6 of '13 to get him to talk?
A. No, sir, we did not.
Q. Did anybody threaten him with anything on 2/6 of '13 to get him to talk?

A. We did not.
Q. Did anybody again use coercion or terrible trickery or anything to get him to talk?
A. No, sir, we did not.
Q. Did he -- about how long were y'all talking to Mr. Stalk on 2/6 of '13?
A. I think that day was probably about 42 to 50 minutes later.
Q. You have told us who was present. Did anybody pull out any gun, pull out any baton or do anything of a violent nature to set things off with Mr. Stalk?
A. No, sir, we did not.
Q. Did Mr. Stalk make any requests on 2/6 of '13?
A. He did.
Q. Let's go ahead and get into this, we'll get some detail about it later. Well, let me ask you this first, 2/5 and 2/6 of '13, did you end up -- were written statements produced as a result of interviews on 2/5 and 2/6 of '13 by David Stalk?
A. Yes, sir, they were.
Q. Were video recordings produced as a result of the interviews with Mr. Stalk on 2/5 and 2/6?
A. Yes, sir, they were.
Q. Who else none -- was anybody non-law enforcement present on 2/6 of '13?

conversation and come back and start over, any of that going on on any of these interviews?

A. I know on 2/6 he requested a cigarette.

Q. We'll get to that in a little bit.

A. But other than that everything else was recorded.

Q. Well, let's get to that. Did -- I think that's how we got into the Tucker thing, Stalk asked for Tucker. Did Stalk ask for anything else that day other than a cigarette, we'll talk about the cigarette in a minute. Do you remember if he asked for something to drink or eat that day?

A. I don't remember. I think he may have asked for a bottle of water or some drink, I can't remember.

Q. Did he ask for a cigarette that day?

A. He did ask for a cigarette, yes, sir.

Q. Had you started smoking between 2/5 and 2/6?

A. I did not.

Q. Was there a smoker in the house that day?

A. There was.

Q. Who was it?

A. Mr. Tucker.

Q. Did Stalk get his cigarette on 2/6?

A. He did.

Q. We'll get into that in more detail. Did Stalk ask for anything else that y'all denied him that day?

A. As far as I know I do not believe so.

Q. Did he ask to contact anybody else on 2/6 other than Tucker?

A. No, sir.

Q. Did he ever say, "I don't want to talk anymore," or, "I want a lawyer," or anything like that?

A. No, sir, he did not.

Q. Let's go back to 2/5 of '13, part two of the discussion on 2/5 of '13. Okay. What was the subject matter of part two of the discussion with Mr. Stalk on 2/5 of '13? What were y'all talking to him about?

A. We were interviewing him about the murder at 715 Saint Paul Street.

Q. Generally speaking in that interview, was there any admission by Stalk that he had any involvement in the death of Kevisis Anthony?

A. No, sir.

Q. Was there as a result of that interview -- well, let me just go ahead with these. Did the 2/5 of '13 discussion produce a written statement, part two?

A. Yes, sir.

Q. I'm going to hand you a piece of paper, actually a document, with several pages stapled together. Can you identify what that is?

A. This is the statement form that we use at the police department when we do a written statement.

babysit and they was going to have a sleepover, because we was supposed to go get their food and bring them something to eat.

Q. Now, did you take any of the children down to Ketta's?

A. Uh-huh. I took my two, I took my -- at the time my son was ten, at the time my girl was five, my nephew was ten and my niece was two.

Q. About what time did you take them down there, do you recall?

A. We took them down there, it was like a little after 8:00.

Q. Okay. Now, what are those children's names?

A. , , and .

Q. Okay. Well, did you take ?

A. No, David took . He took first and when I got finished doing what I was doing I took the other three.

Q. Did you see David earlier that day?

A. Yeah, I had seen David earlier.

Q. Did you see him at Ketta's?

A. No.

Q. Where did you see him earlier in the day?

A. At .

Q. What was going on?

A. He was fixin' to take a bath. He said he was going to

A. Yes.

Q. Okay. And is it accurate to say that that is where David laid his head most nights?

A. Every other night, because he had started going with Ketta so he wasn't at my house like he used to be.

Q. So he was either at your house or Ketta's house?

A. Or either at my Aunt Shell's house, it was between us three.

Q. That's fine. And tell me your aunt's real name, what's her name?

A. Michelle Stalk.

Q. Michelle Stalk? Okay. Where did Michelle live?

A. She lives right at my back door in Heath Circle.

Q. And your house is just a little ways from Ketta's house, right?

A. Uh-huh.

Q. And Michelle's house. You've got to say yes or no. Nobody is picking on you but you've got to say yes or no because he's got to type it up.

A. Okay. Yes.

Q. All of y'all live right there together kind of.

A. Yes.

Q. When you got called and went to Ketta's house the night of the killing --

A. Uh-huh.

A. I go through a bunch of phones, just by breaking them at work or losing them or something.

Q. Okay. Well, how about this [illegible] (sic) telephone that you had, did you have that phone? Did you have a phone with that number at one point?

A. Yes, sir, at one point in time I did.

Q. Okay. And --

THE COURT: What's that number? ?

MR. GRIER: I said .

Q. Did you have a phone number -- did you ever have a phone number of .?

A. Yes, sir, that's correct.

Q. Okay. Do you recall when you last had that phone number?

A. No, sir, I can't recall. It has been awhile.

Q. Well, prior to January 26th of 2013, do you recall having that number?

A. No, sir.

Q. You don't remember it prior to January 26, 2013, having a prior -- before that date did you have that number?

A. Yes, sir.

Q. Okay. And you -- do you know what happened to the phone with that number?

A. Yes, sir. The phone was like -- when I was taking a shower one day I set the phone in the sink, it had water in

the bathtub, I guess it messed up the battery or whatever.
Q. What told you that that phone was messed up?
A. In the back like if it got water damage or something you look at it, it got like a little white strip in the back and the strip turned pink, you know what I'm saying, and the phone was messed up with water damage.
Q. Is there a way to fix that?
A. No, sir.
Q. Did you try?
A. Yes, sir. I let the phone dry out and it just kept -- I would charge it up, the whole charge would be like 30 minutes or so but it would keep cutting off so I got rid of it, I threw it away.
Q. Where did you throw it away at?
A. At Ketta's house.
Q. Is that where you took the shower that it got messed up?
A. That's correct.
Q. All right. How long after it got messed up was it that you threw it away?
A. I would say like two days later, something like that.
Q. Did you get emotional during your interview on February 6th, 2013?
A. Yes, sir.
Q. Okay. Why did you get emotional?

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

December 29, 2015

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lancaster County

The Honorable R. Knox McMahon. Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAVID STALK,

APPELLANT

APPELLATE CASE NO. 2014-000166

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in denying Defense counsel's objection to suppress Defendant's inculpatory statement?

A. The Court should have suppressed the Appellant's statement as involuntary because it was elicited as a result of:

1. An implied promise by law enforcement for reward in the form of a granted bond

2. Threats by law enforcement in the form of repeated recitations of amount of time he faced on an unrelated charge;

3. Law enforcement's threat to Appellant's sister regarding her potential arrest and/or removal of her children from her care by the Department of Social Services.

STATEMENT OF THE CASE

On January 16, 2013, Kelvisus Anthony ("The Victim"), was shot during an alleged armed robbery, and subsequently died on January 28, 2013. (R. pp. 1-2). In May of 2013, David Stalk ("The Appellant") was charged with the murder of the Victim. Armed Robbery & Possession of a Deadly Weapon during the Commission of a Violent Crime. (R. pp. 2-3). On January 14, 2014, the Appellant intended to enter a guilty plea to the charge of manslaughter, but prior to the adjudication, he changed his mind. Instead the Appellant elected to go forward on all three charges in a jury trial in the Court of General Sessions in the County of Lancaster, before the Honorable R. Knox McMahon. (R. pp. 3-4). Three days later, he was found guilty on all three charges and sentenced to forty-five (45) years on the murder charge, twenty (20) years for the attempted armed robbery, and 5 (five) years on the weapons charge, to run concurrent. (R. p. 458, lines 11-18). At trial, Mark Grier ("Defense Counsel") of the Lancaster Public Defender's Office raised a number of defenses and objections to the State's allegations, including assertions that: (1) Appellant had not been properly Mirandized; and (2) Appellant's confession was coerced. (R. pp. 127-128).

ARGUMENTS

The Circuit Court Erred in Failing to Suppress Involuntary Confession Made by Appellant.

The trial court should have suppressed the Appellant's confession as it was elicited involuntarily as the result of coercive tactics used by law enforcement. This Court should reverse the trial court's finding of guilty on all counts and remand this case for a new trial.

A. The trial court should have suppressed the Appellant's confession because the statement was made following a promise of leniency, express or implied, by law enforcement, and is thus involuntary and should be inadmissible at trial.

The Appellant argues that he made a false and involuntary confession to the crime of murder as a result of coercive interrogation tactics on the part of the investigating officers. (R. p. 195, lines 3-4). While the record reflects that the Appellant did voluntarily waive his *Miranda* rights, he did so as a result of alleged improper promises and threats made by the interrogating and Lead Investigator. (R. p. 59, lines 6-19). He claims that these improper tactics included an explicit promise to assist in obtaining a bond on an unrelated charge, repeated recitations of sentences he could face on an unrelated charge, as well as an implicit promise that the bond would be obtained if he confessed to the murder. (R. p. 55, lines 1-5). As a result of these coercive tactics, in the form of both promises and threats, the Appellant argues that this inculpatory confession was not voluntary, and per *Miranda* should have been suppressed at trial. *Miranda v. Arizona*, 384 U.S. 436 (1966). As a result, Appellant requests that this matter be remanded to the circuit court for a new trial.

The determination as to whether or not a custodial statement is voluntary, and thus admissible in court is made in a pre-trial evidentiary hearing based on a preponderance of the evidence. *Jackson v. Denno*, 378 U.S. 368 (1964). The requirements for voluntariness are set forth in *Miranda*, which holds that "to render a statement admissible the proof must be adequate to establish that the accused was not involuntarily impelled to make a statement." *Miranda* at 462. At trial, the State has the burden of proving that the statement was given voluntarily, and they must do so to the jury beyond a reasonable doubt. *State v. Von Dohlen*, 322 S.C 234, 471 S.E.2d 689 (2007). The pre-trial decision is based on "whether it was knowingly, intelligently, and voluntarily given under the totality of the circumstances." *State v. Peake*, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987) *citing State v. Rabon*, 275 S.C. 459, 272 S.E.2d 634 (1980). The Appellant argues that the State failed to meet its burden in both the evidentiary hearing and in the jury trial, and thus requests the Court to remand this case for a new trial.

"Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion." *State v. Arrowood*, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct. App. 2007) *citing State v. Baccus*, 367 S.C. 41, 625 S.E.2d 216 (2006). The Appellant believes that such an error was committed in the admittance of his confession, because the voluntariness of the statement was overborne by the police's interrogation practices. While such a standard is indeed a high threshold, courts are much more likely to find such an error occurred when it comes to evaluating the admissibility of confessions in cases where such a statement served as the primary evidence for conviction. In *Arizona v. Fulminante*, the court

recognized that convictions hinging on a defendant's confession are unlike others that might have relied on forensic evidence or eyewitness testimony, citing "the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless." 499 U.S. 296 at 323 (1991). Thus, it is entirely proper for this Court to find that the trial court's ruling of admissibility of Appellant's statement was more than harmless error, and thus order a new trial to ensure Appellant's Constitutional rights are not violated.

The Appellant argues that the offer to assist in obtaining a bond induced him to make an involuntary and false confession that should not have been admitted at trial. (R. p. 54, line 23). When a statement is given based on inducement by coercive tactics it is deemed involuntary, and thus inadmissible in a court of law. *State v. Rochester*, 301 S.C. 196, 391 S.E.2d 244 (1990). However, to be rendered involuntary, the statement must be "so connected with the inducement as to be a consequence of the promise," such that the defendant's will was "overborne." *State v. Arrowood*, 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2007). Appellant maintains that this is exactly the case in this matter, as he only confessed to involvement based on promises made by the interrogating officer that included assisting him with obtaining a bond on an unrelated charge. (R. p. 54, line 23). In this case, the Appellant concedes that he waived his rights under *Miranda*, but even a statement given following the voluntary waiver of rights will not survive judicial scrutiny if it can be shown that such a statement was obtained by coercive means. *Id.* at 366, 442.

The Supreme Court of South Carolina addressed coercive interrogation techniques and involuntary confessions, where the appellant, after waiving her rights and

providing statements denying her involvement in the crime, was repeatedly presented with threats by interrogating officers. *State v. Osborne*, 301 S.C. 363, 392 S.E.2d 178 (1990). Specifically, she was told that she could be charged with "withholding evidence" if she did not provide an account that "fit the facts." *Id.* at 364, 179. The Court found that any statement given after such a threat, even if *Miranda* rights had been waived, would be deemed involuntary and inadmissible at trial. *Id.* at 367, 180. Appellant asserted, "that even though she was advised of her *Miranda* rights, these statements were coerced because of these threats." *Id.* at 365, 179.

Similarly, in this case, the Appellant also made an initial statement after waiving his rights where he denied involvement in the murder. (R. p. 19, line 1). It was only after he was denied bond on a different charge, and interrogated a second time, that he "confessed" in an attempt to placate law enforcement. (R. p. 47, lines 14-15). Finally, as in *Osborne*, during the interrogation process, Appellant was presented with the fact he face a number of years in prison on another charge. (R. p. 265, 21-25). The factual similarities between *Osborne* and the case at bar signifies that this is the case law that should be applied in this matter. As a result, the inculpatory statement that followed from coercive tactics should have been suppressed at trial.

In *Arrowood*, the defendant challenged the admissibility and voluntariness of his confession arguing that officers coerced him into making a statement by promising to drop unrelated charges. Additionally he alleged that officers promised to help him obtain a low bond on the charge he faced, and that they used a polygraph machine coupled with the statement that it would be in his "best interest to tell the truth." *State v. Arrowood*, 375 S.C. 359, 652 S.E.2d 438 (Ct. App. 2007). The Court of Appeals found in favor of

the State because the officers testified they limited their promises to help by stating that all they could do was tell the judge that the defendant cooperated. *Id.* at 368, 443. The conflicting testimony was resolved in favor of the State, as "the officers' offer to attest to Arrowood's cooperation did not constitute promises of leniency." *Id.*

The Court distinguished their finding from that in *State v. Peake,* where it was found that a promise of leniency induced an involuntary confession from the defendant. 291 S.C. 138, 352 S.E.2d 487 (1987). In that case, a confession was made after officers promised not to seek the death penalty if an inculpatory statement were made. *Id.* at 138, 488. This case is factually closer to *Peake* than *Arrowood* as the officer's testimony is not in direct conflict with that of the defendant's, as it was in *Arrowood*'s.

The Leading Investigator concedes that he did more than promise to tell the judge that Appellant was cooperative. He actually agreed to help Stalk get a bond. (R. p. 42, lines 6-17). Specifically, Lead Investigator testified that "I knew our judge wouldn't be able to do anything with the murder charge," but he never says the same of the accessory charge, the offense on which he promised to help the Appellant. (R. p. 41, lines 20-24). When asked by defense counsel if he would characterize his communications as having "committed yourself to speaking on behalf of Mr. Stalk?" he answered, "I would say yes." (R. p. 50, line 1). While this exchange on its face alone may not seem egregious enough to warrant the subsequent confession involuntary, the conversation between Appellant and Lead Investigator must be analyzed under the "totality of the circumstances." *Peake* at 139, 488 (1987). When evaluated under this standard, it is clear that the Court could find Appellant's confession was obtained involuntarily, and thus should have been suppressed at trial.

B. Threats or promises made to family members of a suspect are equally impermissible under Miranda, and may be considered when determining the voluntariness of a confession or statement made in the wake of learning of this threat.

There is evidence that when looking for the Appellant, the Lead Investigator threatened the Appellant's sister with arrest herself and the involvement of Social Services with her children. (R. p. 324, lines 9-23). The Court addressed this issue directly in *State v. Corns*, 310 S.C. 546, 426 S.E.2d 324 (Ct. App. 1992), where the question at bar was specifically "whether the trial judge erred in admitting oral statements...because the statements were made involuntarily...to threats regarding his family." *Id.* at 548, 325. They held that such statements should be suppressed, as threats to a family member of the interrogated were just as "coercive" as threats made directly to the defendant himself. *Id.* The similarity between the method of intimidation in *Corns* is almost identical to those alleged to have been made in this matter, specifically the threat made by the officer to the defendant that "he could take out a warrant for his wife, that his wife could be put in jail and that his children could be taken by D.S.S." *Id.* at 550, 326.

Appellant's sister contends that similar threats were made to her when the Lead Investigator visited her home, repeatedly and without warning, in search of her brother. (R. p. 324, lines 16-18). While the threat was made to her directly, rather than the Appellant, the Appellant likely was aware of these threats, as he resided with his sister and her children, and thus was a household member just as the defendant was with his wife in *Corns*. Additionally, Appellant's sister claims that the Lead Investigator told her he could help obtain a bond for the Appellant if she was able to produce him or reveal his whereabouts. (R. p. 323, line 5-7). Further, she testified, "that's when he say something about social services would get involved with me. He said something else about I can go

to jail for accessory for or after," after repeatedly accusing her of lying about knowing where her brother was located. Thus, under *Corns*, these threats are also considered coercive in evaluating whether or not the Appellant's confession was voluntary.

CONCLUSION

For the reasons stated, this Court should reverse the circuit court's findings, and remand the matter for a new trial.

Respectfully submitted,

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This 29th day of December, 2015.

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SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Final Brief complies with South Carolina Court of Appeals Rule 211(b), to wit: the final brief is identical to the brief previously served under Rule 208, except the references in the initial brief are revised to indicate where the material appears in the Record on Appeal; and the party has corrected obvious typographical errors and misspellings which were contained in the initial brief. No other changes have been made.

December 29th, 2015

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable R. Knox McMahon, Circuit Court Judge
Appeal Case No. 2014-000166

THE STATE

RESPONDENT,

V.

DAVID STALK

APPELLANT.

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APPELLANT'S STATEMENT OF ISSUE ON APPEAL

Did the trial court err in failing to suppress Appellant's confession because it was made involuntarily?

1) The Court should have suppressed the Appellant's statement as involuntary because it was elicited as a result of improper coercive tactics, including:

1. The confession was elicited following promises made by law enforcement to assist the Appellant in obtaining a bond on an unrelated charge;

2. Appellant made involuntary statement following repeated recitations of the amount of time he faced on an unrelated charge;

3. Law enforcement threatened Appellant's sister with the possibility of arrest and/or the removal of her children by the Department of Social Services.

RESPONDENT'S COUNTERSTATEMENT OF ISSUE ON APPEAL

1. Whether the trial court abused its discretion in admitting Appellant's February 6, 2013 statement in which he admitted to shooting the victim during an attempted robbery when the trial court's determination that the statement was voluntarily given is supported by the record because there is no evidence of police coercion and the totality of the circumstances supported the trial court's finding?

2. Whether the trial court abused its discretion in admitting Appellant's February 6, 2013 statement when Appellant's argument that the statement was rendered involuntary as a result of coercive pressure relating to Appellant's possible sentence on unrelated accessory after the fact charges was not preserved for appellate review and there is no evidence to support a finding that law enforcement attempted to use those charges coercively?

3. Whether the trial court abused its discretion in admitting Appellant's February 6, 2013 statement when Appellant's argument that the statement was rendered involuntary as a result of threats made by law enforcement against Appellant's sister and her children was not preserved for appellate review and there is no evidence to support a finding that those threats were made or that Appellant was aware of any such threat when he gave the statement?

STATEMENT OF THE CASE

On January 13-17, 2014, Appellant David Stalk ("Appellant") was tried by a jury for the murder of Kevivis Anthony, attempted armed robbery, and possession of a firearm during the commission of a violent crime. Appellant was tried in the Lancaster County Court of General Sessions before the Honorable R. Knox McMahon, Circuit Court Judge. Mark Grier represented Appellant. The State was represented by Solicitor Douglas Barfield of the Sixth Judicial Circuit Solicitor's Office.

On January 17, 2014, Appellant was convicted of murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime. (Tr. 766; R. p. 457). He was sentenced to forty-five years confinement for the murder conviction, twenty years confinement for the attempted armed robbery conviction, and five years confinement for the possession of a weapon during the commission of a violent crime conviction, all to be served concurrently. (Tr. 787; R. p. 458). Before this Court is Appellant's direct appeal of his convictions. Appellant requests this Court reverse his convictions and order a new trial. The State respectfully requests this Court deny Appellant's appeal and affirm his convictions.

STATEMENT OF FACTS

On January 26, 2013, Appellant shot the victim, Kevisis Anthony, in the head. The victim died two days later as a result of anoxic encephalopathy, brain death due to a laceration of the brain that was due to a gunshot wound to the head. (Tr. 250-51, 255, 265; R. pp. 148-49, 150, 158).

Eric Huddleston, one of Ketta Evans'[1] neighbors, testified that on January 26, two children came to his house and asked if their mother could use his phone. (Tr. 274-75; R. pp. 163-64). Huddleston testified that he went with the children and allowed their mother, who he later learned was Ms. Evans, to use his cell phone. (Tr. 275-76, 283-86; R. pp. 164-65, 172-75). He also testified that he received a return phone call around 8:15 p.m. (Tr. 280-81; R. pp. 169-170). He further identified the Evans' house as the one where he took his phone so the mother could use the phone. (Tr. 283, 286; R. pp. 172, 175).

Sylvia Stover, who also lived near Ketta Evans, testified that on January 26, three children came and asked to use her cordless house phone. (Tr. 287-88; R. pp. 176-77). She noted that she did not get the phone back until it was returned by law enforcement later. (Tr. 288; R. p. 177). Stover noted that she heard gunshots about five or ten minutes after she let the children take her phone. (Tr. 290; R. p. 179).

Quinshun Evans, Ketta's oldest son, testified he recalled Appellant being at the house on January 26. (Tr. 299; R. p. 186). Quinshun noted that his brothers and sisters were at the house, and other children were there. Id. One

[1] Ketta Evans and Appellant were dating at the time of the shooting. (See Tr. 529; Supp. R. p. 18).

of those other children was Appellant's daughter. Id. Quinshun testified that Appellant was at the house, and he was having a discussion with Ketta. (Tr. 297, 300; R. pp. 184, 187). Quinshun recalled Appellant went out the side door in the kitchen that leads out to the carport. (Tr. 301-02; R. pp. 188-89). A couple of minutes after Appellant left, Quinshun heard three gunshots. (Tr. 303; R. p. 190). Quinshun indicated the shots sounded like they were coming from under the carport. (Tr. 303; R. p. 190). Quinshun looked out the blinds after the shots, and he saw a man lying on the sidewalk in front of the yard. (Tr. 304; R. p. 191). When Quinshun went outside the help the victim, Quinshun saw the victim's car under the carport. (Tr. 305; R. p. 192). Quinshun testified that he and his mother helped the victim off the ground and brought him inside the house. (Tr. 305-08; R. pp. 192-95). Quinshun also gathered all of the victim's belongings that had scattered in the yard, and he placed them inside a knit cap. (Tr. 307-08; R. pp. 194-95). They also used a rag to help the victim clean up as he had a bump on his head that was bleeding. (Tr. 308-10; R. pp. 195, 196; Supp. R. p. 8). Ketta and Quinshun then took the victim to the hospital driving the victim's car. (Tr. 310-11; R. pp. 196-97)

The victim was later flown to the Carolinas Medical Center in Charlotte, NC. (Tr. 199, 248, 250; R. pp. 112, 147, 148).

Law Enforcement Investigation

A call from a cellphone number later associated with Appellant was received by 911 at approximately 9:41 p.m. on January 26. (Tr. 169, 406, 468, 553; R. pp. 92, 243, 300, 337). The caller indicated that someone had been

shot on Pleasant Hill Street. (Tr. 171; R. p. 93). Law enforcement was later dispatched to St. Paul Street in Lancaster. (Tr. 174-75; R. pp. 96-97). They were specifically dispatched to what was later determined to be Ketta Evans' house. (Tr. 175-76, 179; R. pp. 97-98, 101). At the house, they found five children. (Tr. 176-77; R. pp. 98-99).

Outside of the house, law enforcement found a can of Lime-A-Rita, a toboggan hat, a pack of Newport cigarettes, a red lighter, two silver Cigarillo packs, a metal watch, and a cellphone cover. a broken cellphone, vomit, and what appeared to be fresh blood in the driveway. (Tr. 186-87, 212-13, 225, 369-70; Supp. R. p. 4; R. pp. 104, 120-21, 133, 214-15). Six fired .380 caliber cartridge casings were found under the carport at Ketta Evans' house. (Tr. 217-22; R. pp. 125-30). Inside of Ketta Evans' house, law enforcement located a blue wash cloth with apparent blood on it. (Tr. 228; Supp. R. p. 5). A cordless phone that was later determined to belong to Sylvia Stover was also located inside the house. (Tr. 229, 287-91, 375; R. pp. 136, 176-80, 220).

A projectile jacket was recovered from the area near the windshield wiper of the victim's car. (Tr. 195, 202-03, 230; R. pp. 108, 115-16, 137). Also, there appeared to be other gunshot related defects to the vehicle. (See Tr. 195, 201-02, 229-31, 232-34; see R. pp. 108, 114-15, 136-38, 139-41). A fired projectile was recovered from a rear speaker in the victim's car. (Tr. 233-34; R. pp. 140-41). A fired projectile was also removed from the victim's head during the autopsy. (Tr. 272; Supp. R. p. 7).

Law enforcement was able to determine that the six .380 shell casings cartridge cases recovered from underneath the carport were fired by the same gun. (Tr. 350, 353; R. pp. 201, 204). It was also determined that the bullet jacket recovered from near the victim's vehicle's windshield wiper was consistent with having been loaded into a .380 caliber cartridge. (Tr. 356; R. p. 205). The projectile recovered from the speaker of the victim's car was too damaged to determine its caliber. (Tr. 233-34, 356-57; R. pp. 140-41, 205-06). The projectile recovered from the victim's head was consistent with bullets fired in some .380 cartridges. (Tr. 359-60; R. pp. 208-09). The SLED firearms analyst also determined that the general rifling characteristics of the projectile reflected that it was fired by a Hi-Point firearm. (Tr. 360; R. p. 209).

Appellant's Statements to Law Enforcement

Appellant was arrested on February 5, 2013 for charges relating to a home invasion that occurred on January 22, 2013. (Tr. 371; R. p. 216). Investigator Hall, the lead investigator in the case, testified that Appellant was interviewed on February 5. (Tr. 388; R. p. 233). Hall testified that he recalled there may have been some discussion with Appellant about a bond for the charge relating to the home invasion. (Tr. 386; R. p. 231). Hall noted that no promises were made to get Appellant to talk, and no threats of physical violence or legal problems were used. (Tr. 386; R. p. 231). He also indicated that no coercion was used against Appellant. (Tr. 386; R. p. 231). Hall testified Appellant denied having any involvement in the murder during the February 5 interview. (Tr. 400, 401-07; Supp. R. pp. 16; R. pp. 238-44).

Hall further testified that he was informed Appellant wanted to talk with officers again on February 6. (Tr. 390; R. p. 235). Hall noted that during this interview, Lynn Tucker, Appellant's employer and friend, was present at Appellant's request. (Tr. 397-98, 409; R. pp. 236-37; 246). During the interview on February 6, Appellant admitted that he was the one who shot the victim. (Tr. 411-16; State's Exhibit 69; R. pp. 248-53). Appellant indicated that his intention was to rob the victim. (Tr. 411; State's Exhibit 69; R. p. 248). Appellant stated that he was standing behind Evans' house when the victim came to the carport. (Tr. 411; see State's Exhibit 69; R. p. 248). He also testified that he did not know the victim, and he thought the victim was Evans' friend. (Tr. 411; see State's Exhibit 69; R. p. 248). Ms. Evans had used a neighbor's phone to call the victim to have him stop by her house. (Tr. 411; see State's Exhibit 67, 69; R. p. 248). Appellant asserted that he had only intended to rob the victim because he and Evans needed money, and he was advised by Evans that the victim had money because he was involved in selling marijuana. (Tr. 412; see State's Exhibit 67, 69; R. p. 249).

Hall stated that Appellant admitted that when the victim arrived, he parked under the carport. (Tr. 413; see State's Exhibit 69; R. p. 250). Once the victim made it to the side door of the house, Appellant came around from the back of the house wearing a black hoodie, a black mask, and black pants. Id. Appellant had a gun in his hand, and he looked at the victim and said "You know what time it is." (Tr. 413; see State's Exhibit 69; R. p. 250). He told the victim not to run, but the victim took off running anyway. Id. Appellant stated he shot at the victim

one time, and then he shot at him three more times. Id. The victim fell to the ground. Id. Appellant stated that he was trying to shoot the victim in the leg to get him to the ground so that he could rob him. Id. Appellant did not admit to robbing the victim; he did not complete the robbery because he did leave with any of the victim's property. Id. Appellant stated that after he fired the shots, he got scared and ran behind the house. (Tr. 413; see State's Exhibit 69; R. p. 250).

Hall further relayed that in the statement, Appellant stated he jumped over a creek, used his cell phone to call 911, informed the dispatcher that there was a shooting on Pleasant Hill Street, and requested the dispatcher send an ambulance. (Tr. 414; see State's Exhibit 69; R. p. 251). Appellant stated that he threw the phone down after the call and took off running again. Id. When he later realized he had the gun in his hand, he threw the gun into the woods. Id.

Hall testified that Appellant did take law enforcement to where he discarded the cell phone and the gun. (Tr. 415-16; R. pp. 251-53). They were unable to locate either item. (Tr. 416; R. p. 253). During the defense's case, Hall also indicated that Appellant told him that he had used a Hi Point .380 pistol. (Tr. 611; R. p. 361).

Appellant's Defense

Appellant presented testimony from several witnesses to support his defense. James Johnson testified Appellant was at his house sometime shortly after 9 p.m. on the day of the shooting. (Tr. 490; R. p. 307). Johnson indicated Appellant talked with Lynn Tucker and then later left. (Tr. 490; R. p. 307).

Johnson recalled seeing Appellant return ten to fifteen minutes later. Id. Johnson later noted Appellant stayed approximately ten to fifteen minutes the first time, and approximately twenty to thirty minutes the second time. (Tr. 495; R. p. 310). Crystal Johnson, James' wife, testified she saw Appellant at the house some time after 10 or 11 p.m. (Tr. 497; R. p. 312). She noted that Appellant was not at the house when she arrived home from a party. (Tr. 496; R. p. 311). She also indicated that she thought Appellant came to the house twice after she got home. (Tr. 499; R. p. 313).

Tawana Stalk, Appellant's sister, testified that she last saw Appellant on January 26 when he left her house to take his daughter to Ketta Evans' house. (Tr. 523; R. p. 320). She noted that was around 6 p.m. (Tr. 523; R. p. 320). Tawana testified that she did hear from Appellant later that evening when he told her to go get their children from Evans' house.[2] (Tr. 524; R. p. 321). Tawana stated that when she got home later that night, she found Appellant sleeping in the bed. (Tr. 524; R. p. 321). She indicated that she did not get home until around 1 a.m. or 1:30 a.m. (See Tr. 532, 535; R. pp. 328, 331).

Lynn Tucker, Appellant's friend and employer, testified he saw Appellant at the Johnsons' house on January 26. (Tr. 559; R. p. 338). Tucker thought Appellant had left the house after about thirty minutes, but he saw Appellant again later that evening. (Tr. 559, 561; R. pp. 338, 340). The second time he saw Appellant, he thought Appellant stayed around for about an hour. (Tr. 559, 562; R. pp. 338, 341). Tucker could not say that Appellant was at the house or

[2] Ketta Evans was watching Tawana's three children and Appellant's daughter that evening. (Tr. 521; Supp. R. p. 17).

had left the house because he did not know where Appellant was when he was not in the room with Tucker. (See Tr. 560-62; R. pp. 339-41).

Appellant also testified in his defense. He denied shooting the victim and denied knowing anything about shooting the victim. (Tr. 628, R. p. 376). Appellant also denied making the 911 call. (Tr. 622; R. p. 370). He also denied that he had the cell phone that was associated with the number that made the 911 call on January 26. (Tr. 619-21; Supp. R. pp. 19-20; R. p. 369). He claimed that the version of the story he gave police was what Ketta Evans told him her son did on the night of the shooting. (Tr. 626; R. p. 374). Appellant asserted that he gave law enforcement a false confession. Id.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING APPELLANT'S FEBRUARY 6, 2013 STATEMENT INTO EVIDENCE. THE TRIAL COURT'S DETERMINATION THAT THE STATEMENT WAS VOLUNTARILY GIVEN BY APPELLANT IS SUPPORTED BY THE RECORD; THERE WAS NO EVIDENCE TO SUPPORT A FINDING THE APPELLANT'S WILL WAS OVERBORNE BY ANY COERCIVE ACTIVITY BY LAW ENFORCEMENT; AND APPELLANT'S SECOND AND THIRD CONTENTIONS THAT THE STATEMENT WAS COERCED ARE UNPRESERVED AND UNSUPPORTED BY THE RECORD.

Discussion at the Pre-Trial Hearing

A Jackson v. Denno[3] hearing was held in this case on January 13, 2014. At issue was the admissibility of Appellant's statements to law enforcement given on February 5 and February 6, 2013. (See Tr. 63-124, 127-136; R. pp. 5-76).

At issue is Appellant's statement given on February 6, 2013.

During the Jackson v. Denno hearing, Investigator Phillip Hall of the City of Lancaster Police Department testified that Appellant was initially arrested on February 5, 2013 for accessory after the fact for a burglary that had been committed on January 22, 2013. (Tr. 66-69; R. pp. 8-11). Appellant gave two statements on February 5, 2013. The first statement related to the home invasion on January 22, and the second statement was in regards to the murder in this case. (Tr. 70; R. p. 12). During those interviews, Appellant did not admit to committing any crimes. (Tr. 77; R. p. 19).

Hall testified that he next saw Appellant on February 6, 2013. (Tr. 81; R. p. 23). Appellant had a bond hearing on the accessory after the fact charge, and after the bond hearing he had indicated to Sgt. Small that he wanted to talk about

[3] Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

his case while he was at the Municipal Justice Center for the bond hearing. (Tr. 81-2; R. pp. 23-24). Hall testified that Appellant was brought to the investigation section of the Lancaster Police Department on February 6. (Tr. 82; R. p. 24). He was wearing an orange jump suit at the time. (Tr. 82; R. p. 24). Hall also indicated that Appellant's employer, Lynn Tucker, was present at the interview. Hall testified that Appellant had asked for Tucker to be present for the interview. (Tr. 83; R. p. 25).

Hall testified that he reviewed the Miranda warnings with Appellant that morning. (Tr. 86; R. p. 28). He noted that he determined how old Appellant was and how far along he had progressed in school. Id. According to Hall, he started the review of the Miranda warnings at 11:54 a.m. Id. Appellant indicated that he understood his rights, initialed beside each right on the waiver form, and waived his rights at 11:58 a.m. (Tr. 87; R. p. 29). Hall testified that Appellant did not appear to not understand his rights, and he further did not appear to have any problems understanding Hall. (Tr. 87-88; R. pp. 29-30).

Hall further testified that Appellant had no physical injuries; he did not appear to be sick or complain of any physical maladies or discomfort. (Tr. 89; R. p. 31). No threats of violence were made against Appellant. (Tr. 89; R. p. 31). Hall testified that Appellant only asked that Tucker be present, and Hall did not recall Appellant asking to speak with either his mother or his child's mother. (Tr. 90; R. p. 32). Appellant did ask for a smoke break. (Tr. 90; R. p. 32). Hall indicated that Appellant did state that if he were allowed to smoke a cigarette, he would tell them what they wanted to know. (Tr. 91; R. p. 33). Appellant was

allowed to smoke, and after his smoke break, he did give a statement about the homicide. (Tr. 91; R. p. 33). Hall testified that no promises were made to get Appellant to talk, and no coercion was used to get Appellant talking about the homicide. (Tr. 91; R. p. 33). During this interview, Appellant admitted his involvement in the shooting. (Tr. 93; R. p. 35).

Hall noted that there was questioning about his co-defendant Ketta Evans, some questioning about a 911 call, a telephone Appellant had, and the gun that was used. (Tr. 96-7; R. pp. 38-39).

During cross-examination, Hall acknowledged that Appellant had given a false confession regarding the home invasion that was the basis for the accessory after the fact charge. (Tr. 98-99; R. pp. 40-41). Hall also noted that he did indicate that he would talk with the judge about bond on the accessory after the fact charge, but the decision on bond was left up to the judge. (Tr. 99; R. p. 41).

> I told him that we would talk with the Judge on the accessory part and that's left up to the Judge. All we can say is say, "Yeah, he came up here on his own free will and accord," or we had to do this, this and this to help him, and all of that is presented to the Judge and it's the Judge's decision at that time. We can't tell people, "Yeah, I am gonna talk to a judge and get you out of here." All we can say is we'll talk to the Judge for you.

(Tr. 99, l 23 – 100, l 5; R. p. 41, l 23 – 42, l 5). Hall further testified that he did talk with the judge on his behalf at the bond hearing. (Tr. 100; R. p. 42). He further indicated that he did not tell Appellant that he would get him a bond on the accessory charge. Id. Hall also noted that he and Appellant did not have a discussion about Appellant getting bond during the smoke break. (Tr. 104; R. p.

46). Hall noted that he would not have said anything that would have implied that he could get him bond, and that he would have only have said that it was up to the judge whether Appellant would get bond. (Tr. 104; R. p. 46).

Hall did not remember have any discussion with Appellant about bond on the murder charge. (Tr. 107; R. p. 49). Hall noted that he told Appellant that the city judge could not have done anything about a bond on the murder charge. (Tr. 107; R. p. 49). He also indicated that he could speak to the judge as far as the accessory charge. (Tr. 107; R. p. 49). Hall remembered saying good things about Appellant at the bond hearing, and saying that Appellant was a good fellow. (Tr. 107; R. p. 49). Hall also noted that his statements at the bond hearing was not the result of some obligation from the interview. (Tr. 108; R. p. 50).

During the Jackson v. Denno hearing, Appellant testified he remembered being taken into custody on February 5, he recalled giving statements about the home invasion. (Tr. 110-12; R. pp. 52-54). Appellant testified that he recalled there being a discussion during his first interview regarding the homicide about Hall seeing if Appellant could get a bond. (Tr. 112; R. p. 54). Appellant claimed that Hall stated he would make sure Appellant got a bond hearing, and that he would talk to the judge. (Tr. 112-13; R. pp. 54-55). Appellant testified that he took that as meaning he would get a bond hearing, Hall would talk with the judge, and Appellant would get a bond. (Tr. 113; R. p. 55). Appellant also claimed it was false that he requested to talk with Hall on February 6. (Tr. 113; R. p. 55). Appellant testified that he went to a bond hearing, bond was denied, and before

Appellant was taken back to the detention center, he told Smalls that he would like to talk with Hall. (Tr. 113; R. p. 55). Appellant also claimed that he asked Hall about getting bond before they started recording. (Tr. 115; R. p. 57). Appellant denied understanding his Miranda rights. (Tr. 115; R. p. 57). Appellant also testified that on February 11, he spoke with Hall again. (Tr. 117; R. p. 59). He told Hall that the statements he gave were false, and the only reason he gave those statements was because Hall had said he would help Appellant get a bond. (Tr. 117; R. p. 59).

During cross-examination, Appellant admitted that he did understand his Miranda rights. (Tr. 118-19; R. pp. 60-61). Appellant also acknowledged that everything he told law enforcement in the statements he wanted to say. (Tr. 120; R. p. 62).

Investigator Hall was recalled to the stand, and he testified Appellant did meet with him again on February 11, and Appellant did recant his statements. (Tr. 122; R. p. 64). Hall noted that after he said that, Appellant indicated he wanted his lawyer, so the discussions ceased. (Tr. 124; R. p. 66).

When the Jackson v. Denno hearing continued on January 14, Appellant argued that his statement was involuntary because it was induced by the prospect of receiving a bond.

> That's right. Your Honor, I think there's abundant evidence that Mr. Stalk's voluntariness was overcome by the prospect of receiving a bond in which he'd been presented, number one, as to the voluntariness of it. And I believe that would be the principle issue, he was -- if you heard in the very first video he asked is he going to be able to get out and the testimony from Officer Hall was that he had told him that he would say good things about him, not that he promised him, but I believe all in the totality of the

> circumstances created the prospective of Mr. Stalk receiving some assistance in getting a bond were he to make a statement. We know that he's -- and I think the State concedes that he did make an untruthful false confession previously on another matter, the matter was a very serious charge, likewise we are here today about an even more serious charge. And I think in the totality of the circumstances that his voluntariness was overcome and therefore that any Miranda statements would therefore not have been voluntary and therefore should be suppressed on that ground. And secondly I think you basically told me what my argument was, I think, yesterday, and the real issue is you had already apprehended what my argument would be and would anticipate it would be, that there is a break in the continuity between the first statement on February 6th and the second statement on February 6th, that the Miranda statement and the filling out the form and all of those procedures that had been in anticipation of the statement were accomplished in one phase of that sitting, and then there was a break in the continuity and there would have been another need for an additional Miranda warning before that second statement on February 6th was made. The mere saying you have been Mirandized doesn't mean that it has been done, and I submit that it wasn't done and therefore that second statement should be suppressed.

(Tr. 127, l 15 – 128, l 23; R. p. 67, l 15 – 68, l 23). In response, the State argued that no promises were made to Appellant, and the statement reflects that it was given voluntarily.

> Your Honor, first of all I would argue that there was certainly no promise by Lieutenant Hall to do anything for Mr. Stalk other than what he normally does for a defendant on a bond matter, tell the Judge whatever he knows about the case and the defendant. I would also argue that the general tenor and tone of the conversations that you saw on the clips that you put into evidence as Court's Exhibits yesterday clearly show a willing participant in Mr. Stalk to the conversations and questions and answers that were engaged in between him and the law enforcement officers. There's no great tension between them in anything that we have put up so far. There's no argument about whether he is going to talk or not going to talk. There's no -- it just doesn't get heated. It's basically a normal conversation although about an abnormal topic I would suppose. Concerning the break in the interrogation or the questioning or whatever we want to call it, I think if you look at the times on the tapes the best I recall it's a ten minute break from the

> end of the first segment on February 6th to the beginning of the second segment on February 6th. Also, Your Honor, the break was requested by the defendant, not something suggested by law enforcement. He said, "You let me have a smoke and I'll tell you everything you need to know." That's exactly what they did. They came back in, Lieutenant Hall or Captain Scott Grant, I can't recall which, basically talked about Miranda again and asked Mr. Stalk, as best I recall, if he understood that he still had those same rights and continued the questioning only after he affirmed that he was good to go and was willing to talk to them. I don't think there's anything on the statements -- anything about the statements that suggest they were involuntarily made, made on the promise, made on threat, made under coercion and I think they should be admitted.

(Tr. 128, l 25 – 130, l 8; R. p. 68, l 25 -70, l 18).

In regards to the statements made on February 6, 2013, the trial court stated as follows:

> The testimony then that -- on the 6th he was brought over for a bond hearing. The officer testified, Lieutenant Hall testified clearly, "I tell him I'll talk to the Judge," that's clearly not a promise, probably an officer can't go to a bond hearing without talking to the Judge. It doesn't say what he's going to say. But, you know, obviously you get that indication from the 5th, what little bit I saw on the 5th and the 6th and that there was no contention, there was no animosity so to speak, there was no high pressured – no pressure between the officer and Mr. Stalk, in that regard both of them on the 5th and the 6th. Now, on the 6th the testimony is that I believe the officer said he -- it was Officer Smalls indicated to him that Mr. Stalk wanted to see the officer, wanted to speak to him, then he wanted to speak to Mr. Lynn Tucker, and Mr. Tucker who he, Mr. Stalk, was employed by. The testimony is not clear to the Court as exactly who called Mr. Tucker, whether an officer called, Mr. Stalk called or they both called at different times, but at any rate Mr. Tucker is present in the interview room. The first part of the interview on there we see the officer readvising Mr. Stalk of his Miranda rights again, that would be Court's Exhibit Number 5, and Court's Exhibit Number 2. Number 2 is the written document entitled suspect's rights and Miranda warnings. First page, David Stalk, school, no alcohol, read and write, all the rights are initialed. Again, seven initials are to the left of each right. The waiver of right is signed by Mr. Stalk, signed by the lieutenant in the presence of Mr. Tucker. Mr. Stalk indicates I have read this statement of my rights, it was also stated to him verbally. I understand what my rights are. I am

willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me. Thereafter follows a two page written statement. First page of the written statement again has the advisement of rights at the top, it's initialed twice by Mr. Stalk. The third and final page of this document initialed twice, signed by Mr. Stalk, witnessed by Lieutenant Hall and Captain Grant, I believe it is. That Court's Exhibit 5, the first part of the statement of the 6th is about three minutes, it's a little over three minutes. Obviously it both speaks and views for itself, I guess, but Mr. Tucker and Mr. Stalk are in there for a few moments by themselves. The officer comes in, advises him of his rights and he initials and then he says something about smoking a cigarette, and the officer says, "Well, I don't smoke, I don't have cigarettes." And either Mr. Stalk indicates that Mr. Tucker smokes or Mr. Tucker indicated that Mr. Tucker smokes and he said, "Look, let me smoke a cigarette and I will tell you whatever I know," and they take a break. And if you follow the counter that's 16:50 -- or 6:58, I believe, and then they return back on camera at 7:08 and he then begins talking. And I don't see that as a break. The testimony is the officer goes out with him while he's smoking. I'm sure he's not allowing an individual that's in a jumpsuit, that is shackled, that's clear, to go out and just smoke a cigarette with a citizen non-law enforcement without maintaining custody and control of him that entire time, so I don't take that as a break. That's no more a break than if Mr. Stalk said, "I need to use the restroom," and the officer escorted him to the restroom and stood outside of the stall while he used the restroom, walked him back and then I don't know of any case that says you would have to re-Mirandize him at that point. So that is a continuation. And clearly after he gives the statement and the officer goes through and says, "Look, I want to make sure -- I tried to keep up with you typing, I want to go back through it and ask you specific questions." And Mr. Stalk answers him again. The officer presents the document to him and he says, "Look, read over it before, you know, make sure I got it right," and he reads over it. And there's no threat, there's no promises, clearly he is given Miranda. The standard that I must apply at this point - - and I would also address Court's Exhibit Number 7. Court's Exhibit Number 7, of course, is the video tape of the 11th. Again, you see the officer advising him of his rights, going through his rights. And after he advises him of his rights, initials it -- well, I don't see that document up here. He advised him of his rights and then the officer – and Mr. Stalk said, "Well, I don't want to sign my rights, I want a lawyer." And the officer says, "Well, I can't talk to you, I can't answer you." And he said, "Well, I just wanted to say something about the

> statement that I gave before." And I took that into consideration also. And I also take into consideration his age, his intelligence, I take into consideration that during the giving of the confession that he had a supportive friend in there with him. Law enforcement would not have been required to notify a third party, just a third party that is not an attorney. He never asked for an attorney on the 5th or on the 6th. He asked on the 11th and the officer immediately shut down the questioning at that time. And both the 6th and the 11th were both defendant initiated contacted, they were not initiated by the officer. So citing State versus Parker and the fact that I'm only looking at it based on the preponderance of the evidence, I think it was clear that he was properly mirandized and that the statement was given freely and voluntarily of his own free will and accord and it is thus admissible in this case.

(Tr. 131, l 21 – 135, l 21; R. p. 71, l 21 – 75, l 21).

The statements from February 6, 2013 were admitted into evidence as State's Exhibits 68 and 69 subject to Appellant's prior objections. (Tr. 418-19; R. pp. 255-56). The written statement was admitted as State's Exhibit 67, also subject to the prior objection. (Tr. 409; R. p. 246).

Standard of Review

The trial judge determines the admissibility of a statement upon proof of its voluntariness by a preponderance of the evidence. State v. Arrowood, 375 S.C. 359, 365, 652 S.E.2d 438, 441 (Ct.App.2007) (citing State v. Washington, 296 S.C. 54, 55, 370 S.E.2d 611, 612 (1988); State v. Smith, 268 S.C. 349, 354, 234 S.E.2d 19, 21 (1977)). "If admitted, the jury determines whether the statement was freely and voluntarily given beyond a reasonable doubt." Arrowood, 375 S.C. at 365, 652 S.E.2d at 441.

> The test of voluntariness is whether a defendant's will was overborne by the circumstances surrounding the giving of a confession. Dickerson v. U.S., 530 U.S. 428, 434, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). When considering the voluntariness of a statement, the court and jury should consider "not only the crucial

> element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health." Withrow v. Williams, 507 U.S. 680, 693, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (omitting internal citations). Misrepresentations of evidence by police, although a relevant factor, do not render an otherwise voluntary confession inadmissible. Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969). "Coercion is determined from the perspective of the suspect." [State v.] Miller, 375 S.C. [370,] 386, 652 S.E.2d [444,] 452 [(Ct.App.2007)].

State v. Goodwin, 384 S.C. 588, 601, 683 S.E.2d 500, 507 (Ct. App. 2009). "A statement may be held involuntary if induced by threats or violence, or if obtained by any direct or implied promises, or if obtained by the exertion of improper influence." State v. Register, 323 S.C. 471, 478, 476 S.E.2d 153, 158 (1996) (citing State v. Rochester, 301 S.C. 196, 391 S.E.2d 244 (1990)). A statement induced by a promise of leniency is involuntary only if so connected with the inducement as to be a consequence of the promise. State v. Peake, 291 S.C. 138, 139, 352 S.E.2d 487, 488 (1987).

Factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006); State v. Von Dohlen, 322 S.C. 234, 242, 471 S.E.2d 689, 695 (1996); Reed v. Becka, 333 S.C. 676, 685, 511 S.E.2d 396, 401 (Ct.App.1999). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." Arrowood, 375 S.C. at 366, 652 S.E.2d at 442; State v. Preslar, 364 S.C. 466, 472, 613 S.E.2d 381, 384 (Ct.App.2005). Accordingly, the appellate courts are "bound by fact findings in response to motions preliminary to trial when the findings are supported by the evidence and

not clearly wrong or controlled by error of law." Reed, 333 S.C. at 685, 511 S.E.2d at 401 (citing State v. Amerson, 311 S.C. 316, 320, 428 S.E.2d 871, 873 (1993)). When reviewing a trial judge's ruling concerning voluntariness, the appellate court does not re-evaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial judge's ruling is supported by any evidence. State v. Saltz, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001).

I. The trial court did not abuse its discretion in admitting Appellant's February 6, 2013 statement into evidence. The record supports the trial court's determination that the statement was freely and voluntarily given, and that it was not the result of any improper coercion.

Appellant asserts he was coerced into giving the February 6, 2013 statement by promises that he would receive bond if he cooperated with law enforcement. His argument is not supported by the record. Looking at the totality of the circumstances, the trial court's determination that Appellant's statement was voluntary is supported by the record.

First, the length of the interrogation supports a finding the statement was given voluntarily. On February 5, 2013, Appellant gave two interviews. The first interview, which was in regards to accessory after the fact to first degree burglary and to armed robbery charges, lasted approximately forty-five minutes. Appellant was also interviewed for two hours regarding the charges in this case. (Tr. 70; see Defense Exhibit 2; R. p. 12). On February 6, 2013, the interview lasted approximately an hour, including a ten minute smoke break. (Tr. 88, 93; see State's Exhibits 68, 69; R. pp. 30, 35). The briefness of the interviews

support a finding the statement given on February 6 was voluntary. See State v. Myers, 359 S.C. 40, 47, 596 S.E.2d 488, 492 (2004) (finding interrogations that lasted no more than a few hours supported finding statement was voluntary); Saltz, 346 S.C. at 135, 551 S.E.2d at 252 (finding interrogation lasting six to seven hours did not render statement involuntary).

The interview location also supports a finding Appellant's statement was voluntary. Appellant was interviewed in Investigator Hall's office. He was not subjected to harsh conditions. During the interview, he was provided with a smoke break, and he was allowed to have a friend in the interview as support. Further, the interviews were not continuous. The interviews on February 5 began at approximately 3:18 p.m., and were over within three hours. (Tr. 71-74; R. pp. 13-16). Appellant was not interviewed again until 11:54 a.m. on February 6th, and that interview lasted only approximately an hour. (Tr. 86-88; R. pp. 28-30).

Appellant's maturity supports the trial court's finding that the statement was voluntary. At the time the statement was given, Appellant was twenty-three years old. (Tr. 73, 86; see State's Exhibits 66, 67; R. pp. 15, 28). He had a tenth grade education, and he indicated to the investigators that he could read and write the English language. (Tr. 73, 86, 383; State's Exhibit 68, Defense Exhibit 2; R. pp. 15, 28, 228). There was no testimony or evidence reflecting Appellant was not in good physical condition or mental health.

Finally, there was no evidence reflecting any police coercion overbore Appellant's ability to give a voluntary statement. First, there is no evidence there was coercive actions taken by law enforcement to induce Appellant's statement.

While Appellant contends there was an implicit promise of bond in exchange for the statement, that assertion is not supported by the record. During the Jackson v. Denno hearing, Investigator Hall testified that law enforcement did not promise Appellant anything in exchange for information about the homicide. (Tr. 76, 91; R. pp. 18, 33). The video of the interview from February 6 reflect that no promises were made regarding bond. Hall also testified that he never promised Appellant that he would receive bond, but Hall did indicate that he would talk speak on Appellant's behalf with the judge regarding bond on the accessory charge. (Tr. 100; R. p. 42). Hall noted that he never said that Appellant would get bond because that would be up to the judge to determine. (Tr. 99-100; R. pp. 41-42). Hall also stated that he did speak on Appellant's behalf at a bond hearing. (Tr. 100, 107-08; R. pp. 42, 49-50). In the video of the second part of the February 6 interview, Hall indicated that he wanted to be able to speak on Appellant's behalf and let a judge know that he was cooperative, forthcoming, and showed remorse. (See State's Exhibit 69).

Overall, there was no promise of leniency made in the form of a promise of bond. Respondent submits that the situation presented here is akin to that presented in Arrowood. In Arrowood, officers categorically denied they promised to assist the defendant by having some charges dropped, securing a low bond, and having other charges run concurrently. Arrowood, 375 S.C. at 368, 652 S.E.2d at 443. "Instead, the officers insist the only 'help' they offered Arrowood was to testify in court that he cooperated with the investigation." Id. The Court of Appeals found the statement was voluntarily given because offers to attest to

cooperation with law enforcement did not constitute promises of leniency. Id. The Court of Appeals noted the defendant "produced his statements in the mere 'hope' of leniency based on his cooperation, rather than as the consequence of promises." Id. at 369, 652 S.E.2d at 443. To the extent there was any conflict as it relates to Investigator Hall's testimony as to what was said and Appellant's testimony as to what was said regarding bond, it was within the trial court's purview to determine which version of the facts was correct. See Arrowood, 375 S.C. at 369, 652 S.E.2d at 443; State v. Howard, 296 S.C. 481, 492, 374 S.E.2d 284, 290 (1988). Appellant has not shown that the trial court's determination was not supported by the record. This argument should be denied and dismissed. His convictions should be affirmed.

II. Appellant's statement was not rendered involuntary by alleged repeated recitations of the amount of time he faced on an unrelated charge.

In his second argument on appeal, Appellant contends that his statement was rendered involuntary because it was induced by statements regarding the number of years he faced in prison on an unrelated accessory after the fact to burglary charge for which Appellant was arrested on February 5, 2013. Appellant is not entitled to relief upon this claim. First, this argument was not presented to the trial court, and is thus not preserved for appellate review. Second, this argument is without merit. There is no evidence to support the allegation asserted in this argument as law enforcement did not discuss potential sentences for the accessory after the fact charges with Appellant during the interviews regarding the charges stemming from this case.

A. Appellant's argument is not preserved for appellate review.

Appellant contends the trial court erred in finding Appellant's statement was voluntary because it was induced by "threats" regarding the time he faced on another charge. (Initial Brief of Appellant at p. 7-8; R. pp. 482-83). Respondent submits this argument was not made to the trial court. At the Jackson v. Denno hearing, Appellant presented two arguments regarding the voluntariness of the statement by Appellant. First, he argued that the statement was induced by a promise that Appellant would receive bond on the accessory after the fact charge for giving a statement. Second, Appellant contended that he should have been advised of his rights again after the smoke break between the first and second parts of the interview conducted on February 6, 2013. Appellant did not complain

that his statement was somehow induced by a fear regarding the amount of time he faced on the accessory after the fact charge. The trial court also never ruled on this argument. Since Appellant did not present this argument to the trial court, and it was not ruled upon by the trial court, it is not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see Goodwin, 384 S.C. at 603, 683 S.E.2d at 508 (issue regarding statement that was not raised at trial not preserved for appellate review); State v. Jones, 392 S.C. 647, 654, 709 S.E.2d 696, 700 (Ct. App. 2011) (finding argument regarding involuntary statement that was not made before lower court is not preserved for appellate review).

B. Appellant's argument is without merit.

Appellant contends his statement was rendered involuntary because he was repeatedly told about the amount of time he was facing on the accessory after the fact to burglary charge for which he was arrested on February 5, 2013.

This claim is wholly without merit. First, contrary to Appellant's assertions, his case is not similar to the facts outlined in State v. Osborne, 301 S.C. 363, 392 S.E.2d 178 (1990). In Osborne, the defendant challenged two of eleven

statements she gave over a two and one-half month period. The defendant claimed the statements were coerced because the officers threatened to charge her with "withholding evidence" if she did not make a statement. Id. at 365, 392 S.E.2d at 179. In regards to the first statement, she also asserted that she was told that the first statement she challenged did not "fit the facts" and therefore she must provide another statement or face charges for withholding evidence. Id. In Osborne, both the defendant and the sheriff testified that the defendant was essentially told that she did not have to talk, but if she withheld evidence, she could be charged with a crime. Id. at 365-67, 392 S.E.2d at 179-80. The Supreme Court concluded that the State failed to meet its burden by a preponderance of the evidence that the rights were voluntarily waived. Id. at 367, 392 S.E.2d at 180.

Appellant's case is distinguishable in several respects. First, Appellant was not threatened with being charged for the accessory after the fact if he did not cooperate. To the contrary, Appellant was already charged with accessory after the fact for burglary. He was arrested for that charge, and the first interview Appellant gave on February 5 was in reference to that charge. Second, during the course of the interview on February 6, there is no mention of the possible sentence for the accessory after the fact charge. In fact, the only time any discussion regarding a possible sentence for the accessory after the fact charges occurred was during the first interview that was specifically regarding those charges. Law enforcement never made a connection between Appellant's cooperation in this case with his possible sentence(s) on other charges.

Respondent would note that Appellant never even testified that the amount of time he faced for the accessory charges led him to give an incriminating statement.

Respondent submits that any alleged pressure Appellant may have felt regarding the possible sentences he faced for the accessory after the fact charges did not stem from pressure from law enforcement. As such, any such pressure did not render Appellant's statement involuntary under the Fifth Amendment. Colorado v. Connelly, 479 U.S. 157, 170, 107 S. Ct. 515, 523, 93 L. Ed. 2d 473 (1986)("The voluntariness of a waiver of this privilege has always depended on the absence of police overreaching, not on "free choice" in any broader sense of the word."). This argument should therefore be denied and dismissed, and Appellant's convictions should be affirmed.

III. Appellant's statement was not rendered involuntary by the alleged threats made against Appellant's sister regarding a possible arrest and removal of her children by the Department of Social Services.

In his third argument on appeal, Appellant contends that his statement was rendered involuntary because it was induced by threats made by law enforcement against Appellant's sister. Specifically, Appellant contends that law enforcement threatened to arrest his sister, and law enforcement threatened to have her children taken away by the Department of Social Services. (Initial Brief of Appellant, pp. 8-9; R. pp. 483-84). Appellant is not entitled to relief upon this claim. First, this argument was not presented to the trial court, and is thus not preserved for appellate review. Second, this argument is without merit. There is no evidence that Appellant was ever informed of a threat by law enforcement against his sister and her children.

A. Appellant's argument is not preserved for appellate review.

Appellant contends that law enforcement threatened to arrest his sister, and law enforcement threatened to have her children taken away by the Department of Social Services. (Initial Brief of Appellant at p. 8-9; R. pp. 483-84). Respondent submits this argument was not made to the trial court. At the Jackson v. Denno hearing, Appellant presented two arguments regarding the voluntariness of the statement by Appellant. First, he argued that the statement was induced by a promise that Appellant would receive bond on the accessory after the fact charge for giving a statement. Second, Appellant contended that he should have been advised of his rights again after the smoke break between the first and second parts of the interview conducted on February 6, 2013. Appellant

did not complain that his statement was somehow induced by a threat or threats made regarding his sisters. The trial court also never ruled on this argument. Since Appellant did not present this argument to the trial court, and it was not ruled upon by the trial court, it is not preserved for appellate review. See State v. Johnson, 363 S.C. 53, 58, 609 S.E.2d 520, 523 (2005) (stating an objection should be sufficiently specific to bring the exact error to the trial court's attention); State v. Adams, 354 S.C. 361, 380, 580 S.E.2d 785, 795 (S.C. Ct. App. 2003); see State v. Perez, 334 S.C. 563, 565-66, 514 S.E.2d 754, 755 (1999) (issue not raised and ruled upon by trial court is procedurally barred and not preserved for appeal); see also State v. Tucker, 319 S.C. 425, 428, 462 S.E.2d 263, 265 (1995) (party cannot argue one ground below and then another on appeal); see Goodwin, 384 S.C. at 603, 683 S.E.2d at 508 (issue regarding statement that was not raised at trial not preserved for appellate review); State v. Jones, 392 S.C. 647, 654, 709 S.E.2d 696, 700 (Ct. App. 2011) (finding argument regarding involuntary statement that was not made before lower court is not preserved for appellate review).

B. Appellant's contention is without merit.

Appellant's contention that his statement was rendered involuntary by threats made to his sister is without merit. First, there is no evidence that Appellant was ever made aware of any such threat.[4] This was not a matter raised during the Jackson v. Denno hearing.

[4] Respondent submits it is questionable whether such a threat was made based upon the record in this case. The only person who testifies to such a threat being made was Appellant's sister. (See Tr. 527; R. p. 324).

Contrary to Appellant's assertions, his case is not similar to the situation raised in State v. Corns, 310 S.C. 546, 426 S.E.2d 324 (Ct.App.1992). In Corns, the Court of Appeals found the defendant's statement was involuntarily given. Specifically, the Court of Appeals noted, "[a] reading of the record as a whole with special consideration of the testimony of the officers who witnessed the oral statements leads us to the conclusion that, at the very least, the officers coerced Corns's confession on the marijuana by means of veiled threats against his family." Id. at 552, 426 S.E.2d at 327. The Court of Appeals also noted that during the interview in Corns, the defendant was told by law enforcement that "his wife could be arrested, that she could be "involved in the marijuana," and that their children could be taken from them." Id. The officers in Corns conceded they had made such threats.

The facts of Appellant's case are not analogous to those in Corns. First, the statements, the recordings of the statements, and the testimony of Investigator Hall all reflect that no threats were made against Appellant or against Appellant's sister. Appellant never testifies or indicates that he was aware of any threats made against his sister by law enforcement. The only person who testifies about the alleged threats were Appellant's sister. (See Tr. 527; R. p. 324). At no point during Appellant's interviews was there ever any mention that his sister could be arrested and her children could be taken by DSS. Since there was no testimony or evidence reflecting that Appellant was ever informed of such a threat, Appellant cannot show that his statement was improperly influenced by

such a threat. He has not shown that his statement was coerced. This claim for relief should be denied and dismissed.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court deny Appellant's appeal and affirm his convictions for murder, attempted armed robbery, and possession of a weapon during the commission of a violent crime.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

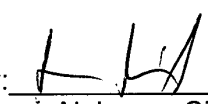
DONALD J. ZELENKA
Assistant Deputy Attorney General

ALPHONSO SIMON JR.
Assistant Attorney General
Bar No. 74713

Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

RANDY E. NEWMAN, JR.
Solicitor, Sixth Judicial Circuit
Post Office Box 607
Lancaster, South Carolina 29721

ATTORNEYS FOR RESPONDENT

By: 
Alphonso Simon Jr.

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-6305

January 19, 2016

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JAN 19 2016
SC Court of Appeals

Appeal from Lancaster County
The Honorable R. Knox McMahon, Circuit Court Judge
Appeal Case No. 2014-000166

THE STATE

RESPONDENT,

V.

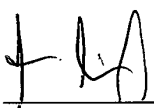
DAVID STALK

APPELLANT.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014, Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings"

This 19th day of January, 2016.



ALPHONSO SIMON, JR.
Assistant Attorney General

ATTORNEY FOR RESPONDENT

RECEIVED
JAN 19 2016
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lancaster County
The Honorable R. Knox McMahon, Circuit Court Judge
Appeal Case No. 2014-000166

THE STATE

RESPONDENT,

V.

DAVID STALK

APPELLANT.

CERTIFICATE OF SERVICE

I, Alphonso Simon, Jr., counsel for the Respondent, certify that I have served the within Final Brief of Respondent and Certificate of Compliance on Appellant by depositing three (3) copies of the same via U.S. mail, first class, postage prepaid to his attorneys of record, Raia Jane Hirsch, Esq., 1720 Main Street, Suite #301, Columbia, South Carolina 29201, and Robert M. Dudek, Esq., SCCID/Division of Appellate Defense, 1330 Lady Street, Ste. #401, Columbia, South Carolina 29201.

I further certify that all parties required by Rule to be served have been served.

This 19th day of January, 2016.

ALPHONSO SIMON, JR.
Office of Attorney General
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-6305

ATTORNEY FOR RESPONDENT

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

David Stalk, Appellant.

Appellate Case No. 2014-000166

Appeal From Lancaster County
R. Knox McMahon, Circuit Court Judge

Unpublished Opinion No. 2016-UP-341
Submitted June 1, 2016 – Filed June 29, 2016

AFFIRMED

Raia Jane Hirsch and Chief Appellate Defender Robert Michael Dudek, both of Columbia, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy Attorney General John W. McIntosh, Senior Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Alphonso Simon, Jr., all of Columbia; and Solicitor Randy E. Newman, Jr., of Lancaster, for Respondent.

PER CURIAM: David Stalk appeals his murder, attempted armed robbery, and possession of a firearm during the commission of a violent crime convictions asserting the trial court erred in failing to suppress his confession because (1) the statement was made following a promise of leniency and (2) threats or promises were made to his family. We affirm pursuant to Rule 220(b), SCACR, and the following authorities:

1. As to whether the trial court erred in denying his motion to suppress his inculpatory statement because it was elicited as a result of an implied promise to reward him in the form of a granted bond and by threats from law enforcement in the form of repeated recitations of the amount of time he faced on an unrelated charge: *State v. Simmons*, 384 S.C. 145, 162, 682 S.E.2d 19, 28 (Ct. App. 2009) (holding, in determining the voluntariness of a statement, the trial court must examine the totality of circumstances surrounding the statement and decide whether the State has carried its burden of proving the statement was given voluntarily); *State v. Miller*, 375 S.C. 370, 387, 652 S.E.2d 444, 453 (Ct. App. 2007) (finding, in a hearing to determine the voluntariness of a statement, the trial court has the opportunity to "listen to the testimony, assess the demeanor and credibility of all witnesses, and weigh the evidence accordingly"); *State v. McClure*, 312 S.C. 369, 371-72, 440 S.E.2d 404, 405-06 (Ct. App. 1994) (noting, when considering the voluntariness of a confession, the question of credibility is to be resolved by the trial court); *State v. Saltz*, 346 S.C. 114, 136, 551 S.E.2d 240, 252 (2001) ("The trial court's factual conclusions as to the voluntariness of a statement will not be disturbed on appeal unless so manifestly erroneous as to show an abuse of discretion."); *id.* ("When reviewing a trial court's ruling concerning voluntariness, [the appellate court] does not reevaluate the facts based on its own view of the preponderance of the evidence, but simply determines whether the trial court's ruling is supported by any evidence."); *id.* ("A statement induced by a promise of leniency is involuntary *only if so connected with the inducement as to be a consequence of the promise*." (emphasis added)); *State v. Arrowood*, 375 S.C. 359, 368-69, 652 S.E.2d 438, 443 (Ct. App. 2007) (holding an officers' offer to attest to the defendant's cooperation did not constitute a promise of leniency; the defendant made his statements in the mere hope of leniency based upon his cooperation rather than as the consequence of promises made to him); 23 C.J.S. *Criminal Law* § 1247 (2016) ("[A] confession is not involuntary just because a promise may have been made to the defendant. . . . In order for the confession to be held involuntary, a causal connection must be shown between the alleged promise and the defendant's decision to confess."); *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003) ("In order for an issue to be preserved

for appellate review, it must have been raised to and ruled upon by the trial [court].").

2. As to whether the trial court erred in denying his motion to suppress his inculpatory statement because threats or promises were made to a family member: *Dunbar*, 356 S.C. at 142, 587 S.E.2d at 693 ("In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial [court]."); *McClure*, 312 S.C. at 371, 440 S.E.2d at 405 (finding a police threat *to the defendant* to arrest family members *unless the defendant cooperated* could render a defendant's confession involuntary if it in fact occurred).

AFFIRMED.[1]

HUFF, KONDUROS, and GEATHERS, JJ., concur.

---

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

FORM 5

STATE OF SOUTH CAROLINA)
)
County of Lancaster)

IN THE COURT OF COMMON PLEAS

2018 CP 29 01006

David Stalk #358508)
Full name and prison number (if any) of Applicant)

v.

State of South Carolina)

APPLICATION FOR POST-CONVICTION R

2018 AUG 29 PM 1:45
CLERK OF COURT
LANCASTER SC

INSTRUCTIONS B READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Lieber Correctional Inst.

2. Name and location of Court which imposed sentence Lancaster County Court located in Lancaster S.C.

3. Name(s) of co-defendant(s) (if any) Keta Evans

4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:

(a) _____

(b) _____

(c) _____

5. The date upon which sentence was imposed and the terms of the sentence:

(a) Feb 2014 45yrs

(b) _____

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

I appealed but my appeal was denied and was never told why.

8. If you answered Ayes@ to (7), list:

(a) the name of each Court to which you appealed:

i. _____

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. _____

ii. _____

iii. _____

(c) the date of each such result:

i. _____

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. _____

ii. _____

iii. _____

9. If you answered Ano@ to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) False Statements

(b) No Evidence

(c) Officers threating family

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) _____

(b) _____

(c) _____

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered Ayes@ to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. _____

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. _____

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. _____

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

_____

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? Yes

(c) your sentencing? Yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes

18. If you answered Ayes@ to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. Mark Gries, Lancaster S.C.

ii. Kathy Huggins

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Mark Gries - Public Defender

ii. Kathy Huggins - Appealant lawyer

iii. _____

19. State clearly the relief you seek in filing this application:

I'm seeking to get a time cut or a new trial, I was sentenced to 45 yrs and I don't even have a record and also this is my first time ever being in prison, I just don't think it was fair all I ask for is another chance

20. Are you now under sentence from any other court that you have not challenged?

No

Revised 3/2003

STATE OF SOUTH CAROLINA)
) VERIFICATION
County of Lancaster S.C.)

I, David Stalk, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David Stalk

David Stalk

SWORN to and subscribed before me this 21th day of August, 2018.

Lilla K. Brown (L.S.)
Notary Public

My Commission Expires: 6-20-26

APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, David Stalk, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

(1) I am the applicant in this action and I believe I am entitled to redress.

(2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

David Stalk
Applicant

David Stalk

SWORN or affirmed to and subscribed before me this 21st day of August, 2018.

Linda K. Bowman
Notary Public

My Commission Expires: 6-20-26

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508, Applicant, v. State of South Carolina, Respondent.	)	2018-CP-29-1006 **RETURN AND MOTION TO DISMISS (COUNSEL NOT REQUESTED)**

In response to David D. Stalk's (Applicant) action for post-conviction relief (PCR) commenced August 28, 2018, and amended May 26, 2020, the State makes this return and motion to dismiss as untimely.

I. Procedural History

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Lancaster County Clerk of Court. Applicant was indicted at the May 2013 term of the Lancaster County Grand Jury for murder (2013-GS-29-758), attempted armed robbery (2013-GS-29-759), and possession of a firearm during the commission of a violent crime (2013-GS-29-760). Applicant was represented by Assistant Public Defender Mark Grier, Esquire. Solicitor Douglas A. Barfield, Jr. prosecuted the case.

After a withdrawn guilty plea, Applicant proceeded to trial on January 13, 2014, before the Honorable R. Knox McMahon. After a five day trial, the jury returned a guilty verdict on all charges on January 17, 2014. Judge McMahon sentenced Applicant to concurrent terms of forty-five years for murder, twenty years for attempted armed robbery, and five years for the weapons charge. Applicant appealed.

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OF COURT
2020 OCT 23 AM 11:43
CLERK OF COURT
LANCASTER, SC

Applicant was represented on appeal by Appellate Defender Raia Jane Hirsch. Assistant Attorney General Alphonso Simon, Jr. represented the State. Applicant briefed the following issue(s) on appeal:

1. The Court should have suppressed the Appellant's statement as involuntary because it was elicited as a result of improper coercive tactics, including:
    i. The confession was elicited following promises made by law enforcement to assist the Appellant in obtaining a bond on an unrelated charge;
    ii. Appellant made involuntary statement following repeated recitations of the amount of time he faced on an unrelated charge;
    iii. Law enforcement threatened Appellant's sister with the possibility of arrest and/or the removal of her children by the South Carolina Department of Social Services

On June 29, 2016, after briefing, the Court of Appeals affirmed without oral argument pursuant to Rule 215, SCACR. *State v. Stalk*, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016). The remittitur was sent on July 15, 2016.

II. Current Application

Applicant *untimely* commenced this PCR action on August 28, 2018. In his application for PCR, Applicant asserts he is being held in custody unlawfully, alleging:

1. False Statements
2. No Evidence
3. Officers threatening family

Applicant filed an amendment to his PCR application on May 26, 2020, alleging:

1. Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.
2. Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury.
3. Counsel was ineffective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process.

Applicant requests the following relief:

> I'm seeking to get a time cut or a new trial[.] [I] was sentenced to 45 years and I barely even have a record and also this is my first time ever being in prison[.] [I] just don't think it was fair[.] [A]ll I ask for is another chance[.]"

Attached to this return and incorporated herein are the Lancaster County Clerk of Court records regarding the subject convictions, Applicant's SCDC records, the trial transcript, Applicants appellate records, the final orders of Applicant's previous PCR actions, and the records of this current PCR action.

III. Motion to Dismiss

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code (2014) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requests the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRCP (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). The State moves for summary dismissal for the following reason:

i. Statute of Limitations

Applicant's allegations should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act[1] (the Act). Specifically, the Act requires:

> An application for relief filed pursuant to this chapter ***must*** be filed within . . . ***one year after the sending of the remittitur*** . . . .

S.C. Code Ann. § 17-27-45(A) (emphasis added).

Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State,* 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Here, Applicant was convicted on January 13, 2014, and pursued a direct appeal. Applicant's appeal was remitted on July 15, 2016. The application was, therefore, due on or before July 16, 2017. This application was filed on August 28, 2018, more than *one year after* the requisite filing period expired. Accordingly, Applicant's allegations should be summarily dismissed as being untimely.

IV. Any and All Other Allegations

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this return is hereby denied.

---

[1] S.C. Code Ann. § 17-27-10 to -160.

V. Conclusion

WHEREFORE, Respondent moves to summarily dismiss the application because it is untimely.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General

By: s/Michael D. Davidson
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

October 21, 2020

8/3/2019

David Stalk #368508
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899

18/1006

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721

I'm Writing this letter on behalf of my PCR applicat
that i filed. Which was (Aug 21st 2018) I was wonde
have i been appointed a lawyer yet? And if not, wher
one be assigned to me? If anyone could provide m
any information i would greatly appreciate it. Thank
for your time and help..

FILED
CLERK OF COURT
2019 AUG -8 AM 11:18
CLERK OF COURT
LANCASTER, SC

Sincerely,

David Stalk

Nov 2, 2020

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OF COURT

2020 NOV 16 PM 2:20

CLERK OF COURT
LANCASTER, SC

18-1006

I'm responding to the letter that i received for "Conditional order of dismissal" for my PCR application Post Conviction Relief. The reason why i wasn't able to file my PCR application in the time that it was due was because at the time i was placed on (RHU-Lock up) on the date of 5/29/16 i wasn't aware that i had a certain time limit to have a PCR application turned in. To be honest after my appeal was denied i didn't no i had to file for a PCR until later on down the road. Due to the fact this is my first time ever having to deal with a situation like this and i didn't no much of any thing about Appeals, PCR's or for that matter the law in general. I was placed in RHU and at the time i didn't have accesess to be able to work on my case nor at that time did i no i had to write the Clerk of Court to receive a PCR application i thought i would receive it from the institution that i was at. But from the date i was placed on RHU. I was getting moved around from institution to institution and i wasn't getting any of my personal mail or legal mail to let me no that i had a dead line. Also at the time of me getting moved around all of my personal property somehow got misplaced well it was lost and they never was able to locate it and this had my legal mail and all of my personal belongings. I was placed at Lee Corrections on 7-11-2016 and there i did fill out a PCR application but from my understanding the Clerk of Court never received it, which i didn't no that until i had a family member

call and check to see why i haven't heard anything back about it. If there is anyway possible i could get another chance i would greatly appreciate i'm just trying to get out of this place please + Thank you...

Sincerely,

David Stalk

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508	)	2018-CP-29-1006
Applicant	)	**CONDITIONAL ORDER OF DISMISSAL**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter is before the Court by way of an application for post-conviction relief (PCR) filed by David D. Stalk (Applicant) on August 28, 2018, and amended May 26, 2020. In its return and motion to dismiss, the State requested the action be summarily dismissed as untimely. For the reasons discussed below, this court grants the State's motion and summarily dismisses this PCR action.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Lancaster County Clerk of Court. Applicant was indicted at the May 2013 term of the Lancaster County Grand Jury for murder (2013-GS-29-758), attempted armed robbery (2013-GS-29-759), and possession of a firearm during the commission of a violent crime (2013-GS-29-760). Applicant was represented by Assistant Public Defender Mark Grier, Esquire. Solicitor Douglas A. Barfield, Jr. prosecuted the case.

After a withdrawn guilty plea, Applicant proceeded to trial on January 13, 2014, before the Honorable R. Knox McMahon. On January 17, 2014, after a five day trial, the jury returned

a guilty verdict on all charges. Judge McMahon sentenced Applicant to concurrent terms of forty-five years for murder, twenty years for attempted armed robbery, and five years for the weapons charge. Applicant appealed.

Applicant was represented on appeal by Appellate Defender Raia Jane Hirsch. Assistant Attorney General Alphonso Simon, Jr. represented the State. Applicant briefed the following issue(s) on appeal:

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    ii. Appellant made involuntary statement following repeated recitations of the amount of time he faced on an unrelated charge;
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Applicant *untimely* commenced this PCR action on August 28, 2018.

CURRENT APPLICATION

Applicant *untimely* commenced this PCR action on August 28, 2018. In his application for PCR, Applicant asserts he is being held in custody unlawfully, alleging:

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2. No Evidence
3. Officers threatening family

Applicant filed an amendment to his PCR application on May 26, 2020, alleging:

1. Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.
2. Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury.
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Applicant requests the following relief:

> I'm seeking to get a time cut or a new trial[.] [I] was sentenced to 45 years and I barely even have a record and also this is my first time ever being in prison[.] [I] just don't think it was fair[.] [A]ll I ask for is another chance[.]"

Before the Court and incorporated herein are the Lancaster County Clerk of Court records regarding the subject convictions, Applicant's SCDC records, the trial transcript, Applicants appellate records, the final orders of Applicant's previous PCR actions, and the records of this current PCR action.

DISCUSSION

This Court has reviewed the pleadings, the records submitted to it by the parties, and the applicable law. Pursuant to sections 17-27-70 and -80 of the South Carolina Code, this Court informs the parties of its intent to dismiss the application based upon the following findings:

i. Statute of Limitations

This action shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act[1] (the Act). Specifically, the Act requires:

> An application for relief filed pursuant to this chapter ***must*** be filed within . . . ***one year after the sending of the remittitur*** . . . .

S.C. Code Ann. § 17-27-45(A) (emphasis added).

[1] S.C. Code Ann. § 17-27-10 to -160 (2014).

Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State,* 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this Court to "grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."

Here, Applicant was convicted on January 13, 2014, and pursued a direct appeal. Applicant's appeal was remitted on July 15, 2016. The application was, therefore, due on or before July 16, 2017. This application was filed on August 28, 2018, more than *one year after* the requisite filing period expired. Accordingly, the allegations set forth in this application shall be summarily dismissed as untimely under the Act.

CONCLUSION

Pursuant to subsection 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have, factual or legal, with the Lancaster County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Michael D. Davidson, Assistant Attorney General
PCR Division – 6th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Chester County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this ____ day of 12/0, 2020.

BRIAN M. GIBBONS
Chief Administrative Judge
Sixth Judicial Circuit

Chester, South Carolina.

ALAN WILSON
ATTORNEY GENERAL

2020 DEC 22 AM 8:57

December 17, 2020

The Honorable Jeff Hammond
Lancaster County Clerk of Court
PO Box 1809
Lancaster, SC 29721

Re: **David Stalk, #358508 v. State of South Carolina**
2018-CP-29-1006

Dear Mr. Hammond:

Enclosed please find the original **Conditional Order of Dismissal** signed by the Honorable Brian M. Gibbons, in the above-captioned case, for filing in your office. In addition, please forward proof of service and a time stamped copy back to our office for our file.

Sincerely,

s/Michael D. Davidson

Michael D. Davidson
Assistant Attorney General

MDD/em

cc: David Stalk, #358508

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

ALAN WILSON
ATTORNEY GENERAL

2020 DEC 22 PM 8:57

October 21, 2020

The Honorable Brian M. Gibbons
P.O. Drawer 580
Chester, SC 29706

Re: David Stalk, #358508 v. State of South Carolina
2018-CP-29-1006

Dear Judge Gibbons:

Enclosed please find the original proposed **Conditional Order of Dismissal** in the above-captioned case. If this Order meets your approval, please sign and return to me in the enclosed envelope, and I will forward to the Lancaster County Clerk of Court to be filed and served.

Sincerely,

s/Michael D. Davidson

Michael D. Davidson
Assistant Attorney General

MDD/em
Enclosure(s)

cc: David Stalk, #358508

REMBERT C. DENNIS BUILDING • POST OFFICE BOX 11549 • COLUMBIA, SC 29211-1549 • TELEPHONE 803-734-3970 • FACSIMILE 803-253-6283

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508, Applicant, v. State of South Carolina, Respondent.	)	Case No.: 2018-CP-29-1006 **FINAL ORDER OF DISMISSAL**

FILED
OFFICE OF CLERK
OF COURT
2021 JAN 22 AM 11:45
CLERK OF COURT
LANCASTER, SC

This matter comes before the Court pursuant to an application for post-conviction relief filed by David D. Stalk (Applicant) August 28, 2018, and amended May 26, 2020. Respondent made its Return and Motion to Dismiss on October 23, 2020, requesting the application be summarily dismissed because it was untimely.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed December 22, 2020, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is a Certificate of Service signed by the Clerk of Court, Jeff Hammond, and dated December 22,2020, serving the above-mentioned Conditional Order of Dismissal on the Applicant via depositing it in the U.S. Mail, ina an envelope with sufficient postage affixed.

Applicant has failed to respond to either the Respondent's Motion to Dismiss or this Court's Conditional Order of Dismissal. Therefore, this Court finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

1 SCA

IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's Conditional Order of Dismissal, the application for post-conviction relief is hereby denied and dismissed with prejudice.

This Court hereby advises Applicant he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal.

AND IT IS SO ORDERED this 19th **day of** January, **2021.**

EUGENE C. GRIFFITH, JR.
Chief Administrative Judge
Sixth Judicial Circuit Court

Newberry, South Carolina

State of South Carolina
County of Lancaster
David Stalk, #358508

Applicant,

VS

State of South Carolina

Respondent.

In the Court of Common Pleas
C/A NO. 2018-CP-29-01006

Amendment to Post Conviction Relief application

2020 MAY 26 AM 11:33

Come now applicant David Stalk, prose moves this court pursuant to Rule 15, South Carolina Rules of Civil Procedure for an order amending two issues to be heard on this PCR evidentary hearing. The applicant would like to show unto this Court the following:

1) Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.

2) Counsel was ineffective during jury deliberations to the answering of two questions out of six that were asked to the Court, by the jury.

3) Counsel was ineffective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process.

May 19, 2020

David Stalk

CERTIFICATE OF SERVICE

The undersigned hereby certify that he mailed the foregoing amendment to the Post Conviction Relief application to Jeff Hammond, Clerk of Court of Lancaster County this day 19th of May 2020 by depositing same in the U.S. mail.

David Stalk

FILED
OFFICE OF CLERK
OF COURT
2023 JAN -6 PM 2:59
CLERK OF
LANCASTER, SC

2023CP2900015

STATE OF SOUTH CAROLINA)
COUNTY OF LANCASTER) IN THE COURT OF COMMON PLEAS

David Stalk, 358508)
Applicant,) **APPLICATION FOR**
) **POST-CONVICTION RELIEF**
v.)
)
State of South Carolina,)
Respondent.)
)

[This application conforms to the requirements of South Carolina Rules of Criminal Procedure, Form 5]

1. David Stalk is currently incarcerated at Broad River Correctional Institute.

2. He was convicted in the Lancaster County Court of General Sessions.

3. Name(s) of co-defendant(s) (if any): Ketta Evans

4. (a) 2013-GS-29-00758, Murder;
(b) 2013-GS-29-00759, Attempted Armed Robbery; and,
(c) 2013-GS-29-00760, Possession of a Deadly Weapon During the Commission of a Violent Crime.

5. Applicant was found guilty after trial that ended on January 17, 2014, and sentenced to forty-five years' imprisonment for murder, twenty years' imprisonment for attempted armed robbery, and five years' imprisonment for possession of a deadly weapon, all to be served concurrently.

6. Applicant was found guilty after trial.

7. Applicant did appeal from the judgment of conviction and imposition of sentence.

8. (a) (i) Applicant appealed to the South Carolina Court of Appeals.

(b) (i) The Court of Appeals affirmed the conviction and sentence.

(c) (i) The Court of Appeals affirmed on June 29, 2016.

(d) (i) *State v. Stalk*, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016).

9. N/A.

10. Applicant alleges the following grounds as the bases upon which he is being held unlawfully:

    a) Applicant requests appellate review of the denial of his first PCR case.

11. Facts in Support of the grounds set out in (10).

    a) Applicant did not knowingly and intelligently waive his right to the appeal of his PCR case.

12. Prior to this application, petitioner has filed:

    a) A post-conviction relief application in State Court under South Carolina Law in Lancaster County.

    b) A post-conviction relief application in Lancaster County Court of Common Pleas.

    c) None.

    d) None.

13. List with respect to each petition, motion or application:

    a) The specific nature thereof:

        i. "False Statements"
        ii. "No Evidence"
        iii. "Officers threatening family"
        iv. "Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done by a deadly weapon"
        v. "Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury."
        vi. "Counsel was infective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process"

    b) The name and location of the Court in which each was filed:

        i. Lancaster County Court of Common Pleas

    c) The disposition thereof:

        i. PCR application was denied and dismissed with prejudice

    c) The date of each such disposition

i. January 19, 2021

e) If known, citations of any written opinions or orders entered pursuant to each such disposition:

i. *David Stalk v. State of South Carolina*, 2018-CP-29-1006, Final Order of Dismissal

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? No.

15. N/A

16. N/A

17. Petitioner was represented by an attorney for his trial and direct appeal but appeared *pro se* for his post-conviction application and amendment.

18. (a). the name and address of each attorney who represented you:

i. Mark Grier, Lancaster Public Defender's Office, 104 N Main St Lancaster, SC 29720;
ii. Raia Jane Hirsch, 1720 Main Street, Suite 301, Columbia, SC 29201; and,
iii. Robert M. Dudek, South Carolina Commission on Indigent Defense, PO Box 11589, Columbia, SC 29211

(b) the proceedings at which each such attorney represented you:

i. Trial—Mark Grier

ii. Direct Appeal— Raia Jane Hirsch and Robert M. Dudek,

19. State clearly the relief you seek in filing this application: Applicant wants to appeal the denial of his first PCR order of dismissal.

20. Are you now under sentence from any other court that you have not challenged? No.

FILED
OFFICE OF CLERK
OF COURT

2023 JAN -6 PM 2:59

CLERK OF COURT
LANCASTER, SC

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
County of Richland)

I, David Stalk, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

David Stalk

SWORN to and subscribed before me this 13th day of Dec, 2022.

Notary Public

My Commission Expires: 8/30/2026

Jeff Hammond 11/12/2021

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721
(803) 285-1581

COPY

David Stalk # 358508
Broad River Corr. Inst.
4460 Broad River Road
Columbia, SC 29210

Mr. Davis,

Your PCR Application has been filed. Enclosed is a copy of the documents for your records.

Sincerely,

Jeff Hammond
Clerk of Court

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508, Applicant, v. State of South Carolina, Respondent.	CASE NO. 2023–CP–29–00015 **RETURN** **(Counsel Retained)**

In response to Applicant David D. Stalk's *second* application for post-conviction relief (PCR) commenced on January 6, 2023, Respondent, the State of South Carolina, makes the following return[1] and moves to summarily dismiss this application as untimely, barred by the statute of limitations, and for failing to comply with the filing procedures of the Uniform Post-Conviction Procedures Act, S.C. Code Ann. § 17-27-10 *et seq.* (2014). Respondent respectfully offers the following in support of its return and motion to dismiss:

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to the Lancaster County Clerk of Court orders of commitment. In May 2013, the Lancaster County

[1] Respondent's return was due to be filed within ninety days of receipt of the application for PCR. See Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within 60 days after service of the application, if it arises out of a guilty plea, and 90 days if it arises out of a trial.") Now, having completed the returns required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court accepts these returns as timely filed. See S.C. Code Ann. § 17-27-70(a) (establishing that the Court may fix the time in which the State must respond and that "respondent shall file with its answer the record or portions thereof that are material to the questions raised in the application."); Guinyard v. State, 260 S.C. 220, 195 S.E.2d 392 (1973) (holding the trial court may extend the time for filing and that the time limit prescribed by the statute is not mandatory, but discretionary with the trial court.).

Grand Jury indicted Applicant for Murder (2013–CP–29–758), Attempted Armed Robbery (2013–CP–29–759), and Possession of a Firearm During the Commission of a Violent Crime (2013–CP–29–760). Applicant was represented by Assistant Public Defender Mark Grier, Esquire. Solicitor Douglas A. Barfield, Jr., Esquire, prosecuted the case.

After a withdrawn guilty plea, Applicant proceeded to a jury trial on January 13 – 17, 2014, before the Honorable R. Knox McMahon. On January 17, 2014, the jury found Applicant guilty on all charges as indicted. Judge McMahon sentenced Applicant to concurrent terms of forty-five years for murder, twenty years for attempted armed robbery, and five years for the weapons charge. Applicant timely appealed his convictions and sentences.

On appeal, Applicant was represented by Appellate Defender Raia Jane Hirsch. Assistant Attorney General Alphonso Simon, Jr. represented the State. On June 29, 2016, after briefing, the Court of Appeals affirmed without oral argument pursuant to Rule 215, SCACR. State v. Stalk, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016). The Remittitur was returned to the circuit court on July 15, 2016.

First PCR Action: 2018–CP–29–1006

Applicant subsequently *untimely* filed an application for PCR on August 28, 2018, in which he alleged the following grounds for relief:

1. False Statements
2. No Evidence
3. Officers threatening family

Applicant filed an amendment to his PCR application on May 26, 2020, alleging:

1. Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.
2. Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury.

3. Counsel was ineffective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process.

Applicant requested relief as follows:

> I'm seeking to get a time cut or a new trial[.] [I] was sentenced to 45 years and I barely even have a record and also this is my first time ever being in prison[.] [I] just don't think it was fair[.] [A]ll I ask for is another chance[.]"

On October 3, 2020, the State moved to summarily dismiss the application pursuant to § 17-27-70 of the South Carolina Code (2014) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. On October 9, 2020, the court issued a Conditional Order of Dismissal.[2] On January 22, 2021, the court issued the Final Order of Dismissal, informing Applicant of the dismissal and of his right to appeal, and detailing what Applicant needed to do to appeal the Final Order of Dismissal.

STATEMENT OF FACTS GIVING RISE TO CONVICTION

On January 26, 2013, Applicant shot the victim, Kevisis Anthony, in the head. The victim died two days later as a result of anoxic encephalopathy—brain death due to a laceration of the brain that was due to a gunshot wound to the head. (Tr. 250-51, 255, 265; R. pp. 148-49, 150, 158).

Eric Huddleston, one of Ketta Evans'[3] neighbors, testified that on January 26, two children came to his house and asked if their mother could use his phone. (Tr. 274-75; R. pp. 163-64). Huddleston testified that he went with the children and allowed their mother, who he later learned was Ms. Evans, to use his cell phone. (Tr. 275-76, 283-86; R. pp. 164-65, 172-75). He also

[2] For reasons unknown, on December 10, 2020, the Honorable Brian M. Gibbons signed and filed a second Conditional Order of Dismissal that was identical to the first Conditional Order of Dismissal.

[3] Ketta Evans and Applicant were dating at the time of the shooting. (See Tr. 529; Supp. R. p. 18).

testified that he received a return phone call around 8:15 p.m. (Tr. 280-81; R. pp. 169-170). He further identified the Evans' house as the one where he took his phone so the mother could use the phone. (Tr. 283, 286; R. pp. 172, 175).

Sylvia Stover, who also lived near Ketta Evans, testified that on January 26, three children came and asked to use her cordless house phone. (Tr. 287-88; R. pp. 176-77). She noted that she did not get the phone back until it was returned by law enforcement later. (Tr. 288; R. p. 177). Stover noted that she heard gunshots about five or ten minutes after she let the children take her phone. (Tr. 290; R. p. 179).

Quinshun Evans, Ketta's oldest son, testified he recalled Applicant being at the house on January 26. (Tr. 299; R. p. 186). Quinshun noted that his brothers and sisters were at the house, and other children were there. Id. One of those other children was Applicant's daughter. Id. Quinshun testified that Applicant was at the house, and he was having a discussion with Ketta. (Tr. 297, 300; R. pp. 184, 187). Quinshun recalled that Applicant went out the side door in the kitchen leading to the carport. (Tr. 301-02; R. pp. 188-89). A couple of minutes after Applicant left, Quinshun heard three gunshots. (Tr. 303; R. p. 190). Quinshun indicated that the shots sounded like they were coming from under the carport. (Tr. 303; R. p. 190). After the shots, Quinshun looked out the blinds and saw a man lying on the sidewalk in front of the yard. (Tr. 304; R. p. 191). When Quinshun went outside the help the victim, Quinshun saw the victim's car under the carport. (Tr. 305; R. p. 192). Quinshun testified that he and his mother helped the victim off the ground and brought him inside the house. (Tr. 305-08; R. pp. 192-95). Quinshun also gathered all of the victim's belongings that had been scattered in the yard and placed them inside a knit cap. (Tr. 307-08; R. pp. 194-95). They also used a rag to help the victim clean up as he had a bleeding

bump on his head. (Tr. 308-10; R. pp. 195, 196; Supp. R. p. 8). Ketta and Quinshun then took the victim to the hospital, driving the victim's car. (Tr. 310-11; R. pp. 196-97)

The victim was later flown to the Carolinas Medical Center in Charlotte, NC. (Tr. 199, 248, 250; R. pp. 112, 147, 148).

Law Enforcement Investigation

A call from a cellphone number later associated with Applicant was received by 911 at approximately 9:41 p.m. on January 26. (Tr. 169, 406, 468, 553; R. pp. 92, 243, 300, 337). The caller indicated that someone had been shot on Pleasant Hill Street. (Tr. 171; R. p. 93). Law enforcement was later dispatched to St. Paul Street in Lancaster. (Tr. 174-75; R. pp. 96-97). They were specifically dispatched to what was later determined to be Ketta Evans' house. (Tr. 175-76, 179; R. pp. 97-98, 101). At the house, they found five children. (Tr. 176-77; R. pp. 98-99).

Law enforcement found a can of Lime-A-Rita outside the house, a toboggan hat, a pack of Newport cigarettes, a red lighter, two silver Cigarillo packs, a metal watch, and a cellphone cover, a broken cell phone, vomit, and what appeared to be fresh blood in the driveway. (Tr. 186-87, 212-13, 225, 369-70; Supp. R. p. 4; R. pp. 104, 120-21, 133, 214-15). Six fired .380 caliber cartridge casings were found under the carport at Ketta Evans' house. (Tr. 217-22; R. pp. 125-30). Inside of Ketta Evans' house, law enforcement located a blue washcloth with apparent blood on it. (Tr. 228; Supp. R. p. 5). A cordless phone, later determined to belong to Sylvia Stover, was inside the house. (Tr. 229, 287-91, 375; R. pp. 136, 176-80, 220).

A projectile jacket was recovered from the area near the windshield wiper of the victim's car. (Tr. 195, 202-03, 230; R. pp. 108, 115-16, 137). Also, there appeared to be other gunshot-related defects in the vehicle. (See Tr. 195, 201-02, 229-31, 232-34; see R. pp. 108, 114-15, 136-38, 139-41). A fired projectile was recovered from a rear speaker in the victim's car. (Tr. 233-34;

R. pp. 140-41). During the autopsy, a fired projectile was also removed from the victim's head. (Tr. 272; Supp. R. p. 7).

Law enforcement was able to determine that the six .380 shell casings cartridge cases recovered from underneath the carport were fired by the same gun. (Tr. 350, 353; R. pp. 201, 204). It was also determined that the bullet jacket recovered near the victim's vehicle's windshield wiper was consistent with having been loaded into a .380 caliber cartridge. (Tr. 356; R. p. 205). The projectile recovered from the speaker of the victim's car was too damaged to determine its caliber. (Tr. 233-34, 356-57; R. pp. 140-41, 205-06). The projectile recovered from the victim's head was consistent with bullets fired in some .380 cartridges. (Tr. 359-60; R. pp. 208-09). The SLED firearms analyst also determined that the general rifling characteristics of the projectile reflected that it was fired by a Hi-Point firearm. (Tr. 360; R. p. 209).

Applicant's Statements to Law Enforcement

Applicant was arrested on February 5, 2013, for charges relating to a home invasion that occurred on January 22, 2013. (Tr. 371; R. p. 216). Investigator Hall, the lead investigator in the case, testified that Applicant was interviewed on February 5. (Tr. 388; R. p. 233). Hall testified that he recalled there may have been some discussion with Applicant about a bond for the charge relating to the home invasion. (Tr. 386; R. p. 231). Hall noted that no promises were made to get Applicant to talk, and no threats of physical violence or legal problems were used. (Tr. 386; R. p. 231). He also indicated that no coercion was used against Applicant. (Tr. 386; R. p. 231). Hall testified Applicant denied having any involvement in the murder during the February 5 interview. (Tr. 400, 401-07; Supp. R. pp. 16; R. pp. 238-44).

Hall further testified that he was informed Applicant wanted to talk with officers again on February 6. (Tr. 390; R. p. 235). Hall noted that during this interview, Lynn Tucker, Applicant's

employer, and friend, was present at Applicant's request. (Tr. 397-98, 409; R. pp. 236-37; 246). During the interview on February 6, Applicant admitted that he was the one who shot the victim. (Tr. 411-16; State's Exhibit 69; R. pp. 248-53). Applicant indicated that his intention was to rob the victim. (Tr. 411; State's Exhibit 69; R. p. 248). Applicant stated that he was standing behind Evans' house when the victim came to the carport. (Tr. 411; see State's Exhibit 69; R. p. 248). He also testified that he did not know the victim and thought the victim was Evans' friend. (Tr. 411; see State's Exhibit 69; R. p. 248). Ms. Evans had used a neighbor's phone to call the victim to have him stop by her house. (Tr. 411; see State's Exhibit 67, 69; R. p. 248). Applicant asserted that he had only intended to rob the victim because he and Evans needed money, and he was advised by Evans that the victim had money because he was involved in selling marijuana. (Tr. 412; see State's Exhibit 67, 69; R. p. 249).

Hall stated that Applicant admitted that he parked under the carport when the victim arrived. (Tr. 413; see State's Exhibit 69; R. p. 250). Once the victim made it to the house's side door, Applicant came around from the back of the house wearing a black hoodie, a black mask, and black pants. Id. Applicant had a gun in his hand, and he looked at the victim and said, "You know what time it is." (Tr. 413; see State's Exhibit 69; R. p. 250). He told the victim not to run, but the victim took off running anyway. Id. Applicant stated he shot at the victim once and then at him three more times. Id. The victim fell to the ground. Id. Applicant stated that he was trying to shoot the victim in the leg to get him to the ground so that he could rob him. Id. Applicant did not admit to robbing the victim; he did not complete the robbery because he did leave with any of the victim's property. Id. Applicant stated that after he fired the shots, he got scared and ran behind the house. (Tr. 413; see State's Exhibit 69; R. p. 250).

Hall further relayed that in the statement, Applicant stated he jumped over a creek, used his cell phone to call 911, informed the dispatcher that there was a shooting on Pleasant Hill Street, and requested the dispatcher send an ambulance. (Tr. 414; see State's Exhibit 69; R. p. 251). Applicant stated that he threw the phone down after the call and took off running again. Id. When he later realized he had the gun in his hand, he threw the gun into the woods. Id.

Hall testified that Applicant did take law enforcement to where he discarded the cell phone and the gun. (Tr. 415-16; R. pp. 251-53). They were unable to locate either item. (Tr. 416; R. p. 253). During the defense's case, Hall also indicated that Applicant told him that he had used a Hi Point .380 pistol. (Tr. 611; R. p. 361).

Applicant's Defense

Applicant presented testimony from several witnesses to support his defense. James Johnson testified Applicant was at his house sometime shortly after 9 p.m. on the day of the shooting. (Tr. 490; R. p. 307). Johnson indicated Applicant talked with Lynn Tucker and then later left. (Tr. 490; R. p. 307). Johnson recalled seeing Applicant return ten to fifteen minutes later. Id. Johnson later noted Applicant stayed approximately ten to fifteen minutes the first time, and approximately twenty to thirty minutes the second time. (Tr. 495; R. p. 310). Crystal Johnson, James' wife, testified she saw Applicant at the house sometime after 10 or 11 p.m. (Tr. 497; R. p. 312). She noted that Applicant was not at the house when she arrived home from a party. (Tr. 496; R. p. 311). She also indicated that she thought Applicant came to the house twice after she got home. (Tr. 499; R. p. 313).

Tawana Stalk, Applicant's sister, testified that she last saw Applicant on January 26 when he left her house to take his daughter to Ketta Evans' house. (Tr. 523; R. p. 320). She noted that was around 6 p.m. (Tr. 523; R. p. 320). Tawana testified that she heard from Applicant later that

evening when he told her to get their children from Evans' house.[4] (Tr. 524; R. p. 321). Tawana stated that when she got home later that night, she found Applicant sleeping in the bed. (Tr. 524; R. p. 321). She indicated that she did not get home until around 1 a.m. or 1:30 a.m. (See Tr. 532, 535; R. pp. 328, 331).

Lynn Tucker, Applicant's friend, and employer, testified he saw Applicant at the Johnsons' house on January 26. (Tr. 559; R. p. 338). Tucker thought Applicant had left the house after about thirty minutes, but he saw Applicant again later that evening. (Tr. 559, 561; R. pp. 338, 340). The second time he saw Applicant, he thought Applicant stayed around for about an hour. (Tr. 559, 562; R. pp. 338, 341). Tucker could not say that Applicant was at the house or had left the house because he did not know where Applicant was when he was not in the room with Tucker. (See Tr. 560-62; R. pp. 339-41).

Applicant also testified in his defense. He denied shooting the victim and denied knowing anything about shooting the victim. (Tr. 628, R. p. 376). Applicant also denied making the 911 call. (Tr. 622; R. p. 370). He also denied that he had the cell phone that was associated with the number that made the 911 call on January 26. (Tr. 619-21; Supp. R. pp. 19-20; R. p. 369). He claimed that the version of the story he gave police was what Ketta Evans told him her son did on the night of the shooting. (Tr. 626; R. p. 374). Applicant asserted that he gave law enforcement a false confession. Id.

CURRENT APPLICATION

Applicant has now *untimely* filed his *second* application for post-conviction relief, alleging he is being held in custody unlawfully on the following grounds:

[4] Ketta Evans was watching Tawana's three children and Applicant's daughter that evening. (Tr. 521; Supp. R. p. 17).

1. "Applicant requests appellate review of the denial of his first PCR case."
    a. "Applicant did not knowingly and intelligently waive his right to the appeal of his PCR case."

Applicant seeks relief in the form of a new trial.

Attached to this return and incorporated by reference is the Lancaster County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's records from his first PCR action; Applicant's records from his direct appeal; and the records of the current PCR action. The State reserves the right to amend this Return upon receiving any relevant materials.

***Austin v. State*[5] Claim**

Applicant alleges that he is entitled to a belated appeal pursuant to Austin of his PCR action 2018–CP–29–1006 and his 2014 conviction. Respondent submits that Applicant's assertions are without merit.

Successive applications such as the one before this court are disfavored. S.C. Code Ann. § 17-27-90. In Applicant's *untimely* and *second* application for post-conviction relief, he alleges he did not knowingly and intelligently waive his right to appeal the dismissal of his *first* post-conviction relief application. Regarding PCR action 2018–CP–29–1006, inherent in this allegation is a claim that former post-conviction relief counsel was ineffective. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

[5] 305 S.C. 453, 409 S.E.2d 395 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.[6]

According to Austin, an evidentiary hearing may be conducted regarding a successive post-conviction relief application "on the issue of whether, in fact, the petitioner requested and was denied an opportunity to seek appellate review." Austin, 305 S.C. at 454, 409 S.E.2d at 396. "If the circuit court finds that the petitioner never in fact sought discretionary review, the petitioner may appeal that finding." Id. at 455, 409 S.E.2d at 396. Austin, therefore, allows an applicant to petition the Supreme Court for discretionary review of the dismissal of his initial post-conviction relief application and may do so outside of the ordinary time limits for bringing such an appeal.

In the present case, Applicant asserts that he did not knowingly and intelligently waive his right to appeal the dismissal of his *first* post-conviction relief application. However, Applicant was *pro se* in PCR action 2018–CP–29–1006 and cannot assert an Austin claim on himself. Applicant was advised in the final order of dismissal when the notice of appeal had to be filed pursuant to Rule 203, SCACR, and directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal. Any assertion that Applicant was not afforded the right to appeal PCR action 2018–CP–29–1006 is entirely without merit where Applicant

[6] Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

represented himself.

Accordingly, Respondent requests an evidentiary hearing to determine if he is entitled to Austin review of his initial post-conviction relief action.

ANY FUTURE AMENDMENTS AND INVOCATION OF DISCOVERY PROCESS

Applicant must specify any claims he intends to raise at the PCR evidentiary hearing. All claims should be made well in advance of the evidentiary hearing. Because Applicant has been appointed an attorney, the attorney, and not Applicant, is the only individual authorized to file amendments to this application. *See* Rule 11, SCRCP. *Pro se* filings will not be considered at the PCR hearing. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State pursuant to Love v. State, 428 S.C. 231, 834 S.E.2d 196 (2019), or, alternatively, the State will request a continuance in the matter. See *Love* (Kittredge, J., dissent) ("If, however, the proposed amendment . . . would truly prejudice the State, the better course of action would be to continue the matter and thus remove any possibility of prejudice resulting from the belated amendments.").

If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, the State reserves the right to move to dismiss this allegation or claim. S.C. Code Ann. §§ 17-27-10 to -160; Rule 71.1, SCRCP. See also Rules 15(a)-(b), SCRCP. The State reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to the State. See Rule 15(a), SCRCP.

Pursuant to S.C. Code Ann. § 17-27-150, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless granted leave from the Court upon a showing of good cause. Furthermore, the State requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to the State well in

advance of the evidentiary hearing. The State reserves the right to request a continuance and oppose witness testimony and exhibits that are withheld until the last minute resulting in undue prejudice to the State.

CONCLUSION

WHEREFORE, the State moves to summarily dismiss the application because it is untimely and barred by the statute of limitations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

D. RUSSELL BARLOW, II
Assistant Attorney General

By: D. Russell Barlow II
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
Post Office Box 11549
Columbia, SC 29211

July 31, 2023

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

COUNTY OF LANCASTER CASE NO. 2023-CP-29-00015

DAVID D. STALK,
Plaintiff,
-vs-
STATE OF SOUTH CAROLINA,
Defendant.

TRANSCRIPT OF RECORD

February 21, 2024
Lancaster, South Carolina

B E F O R E:

Honorable Patrick C. Fant, III, Judge.

A P P E A R A N C E S:

Ms. Elizabeth Franklin-Best
Attorney at Law
Attorney for the Plaintiff
Columbia, South Carolina

Ms. Talida Balaj
Assistant Attorney General
Attorney for the Defendant
Columbia, South Carolina

Shannon E. McGilberry, CVR-M
Court Reporter

E X H I B I T S

ITEM NO.	DESCRIPTION	ID/AD
A-1	Letter to Lancaster County Clerk of Court	9
A-2	Psychological Report	9
A-3	Lancaster County School Record	9

(REPORTER'S NOTE: All exhibits admitted during this proceeding were duly filed with the Lancaster County Clerk of Court's Office.)

* * * * * * * *

MS. BALAJ: May it please the Court?

THE COURT: Yes, ma'am.

MS. BALAJ: Talida Balaj on behalf of the State of South Carolina. This is the post-conviction relief matter of *David D. Stalk versus The State*, case number 2023-CP-29-00015, out of Lancaster County.

Applicant was indicted in the May, 2013 term by the Lancaster County Grand Jury for murder, indictment number 2013-GS-29-758; attempted armed robbery, 2013-GS-29-759; and possession of a firearm during the commission of a violent crime, 2013-GS-29-760.

Applicant was represented by Assistant Public Defender, Mark Beard and Solicitor Douglas A. Barfield prosecuted the case.

After withdrawing guilty plea, Applicant proceeded to a jury trial on January 13th through 17th, 2014, before the Honorable R. Knox McMahon.

On January 17th, 2014, the jury found Applicant guilty on all charges as indicted. Judge McMahon sentenced Applicant to concurrent terms of 45 years for murder, 20 years for attempted armed robbery and 5 years for the weapons charge.

Applicant then timely appealed his convictions and sentences and on appeal Applicant was represented by Public Defender Ray(ph) J. Burch. Assistant Attorney General

Alfonso Simon, Junior represented the State.

On June 29th, 2016, after briefing, the Court of Appeals affirmed without oral argument, pursuant to Rule 215 SCACR. The remittitur was returned to the Circuit Court on July 15th, 2016.

Applicant untimely filed his first PCR application pro se on August 28th, 2012. Applicant was not appointed counsel and Applicant did not retain counsel.

On October 3rd, 2020, the State moved to summarily dismiss the application on the basis that there was no genuine issue of material fact which would necessitate an evidentiary hearing.

On October 9th, 2020, the Court issued a Conditional Order of Dismissal. On January 22nd, 2021, the Court issued the final Order of Dismissal, informing the applicant of the dismissal and of his right to appeal and detailing what Applicant needed to do to appeal the final Order of Dismissal.

Applicant then untimely commenced this PCR action on January 6th, 2023. Applicant asserts he's being held in custody unlawfully, alleging ineffective assistance of PCR counsel, in that Applicant did not knowingly and intelligently waive his right to appeal his PCR case.

Applicant requests relief in the form of a new trial. At this time, we would request to be heard on our motion to

dismiss the application.

THE COURT: Okay.

MS. BALAJ: Your Honor, it's the State's position that Mr. Stalk is not entitled to relief pursuant to *Austin* 'cause he was advised in the final Order of Dismissal of the 30-day requirement to appeal this action and he was also advised of the filing procedures of which he needed to do in order to appeal this action and he failed to do so and, therefore, he is not entitled to relief under *Austin* as to this case.

THE COURT: Okay. Ms. Best?

MS. FRANKLIN-BEST: Hey. Good morning, Your Honor.

So I do represent Mr. David Stalk in connection with this matter. He did initially attempt to file a PCR after his direct appeal was denied. He received the initial Order of Dismissal and he followed that up with a letter to the Clerk of Court, which has the Clerk of Court's time stamp on it, Your Honor, indicating why he was unable to timely file his PCR application.

In connection with our representation of Mr. Stalk, I obtained his school records. We sought a release from Mr. Stalk. We sent the letter to the Lancaster County Public School System and they provided his records.

Contained in his records, Your Honor, are some very interesting findings. He had an educational -- a psycho-

educational report back when he was 12 years old, Your Honor, during which he was identified as having borderline intellectual functioning. He was sort of generally found to be in the fifth percentile of intellectual functioning.

As regards his reading comprehension, Your Honor, he is in the 0.08 percentile, which puts him at roughly a low second-grade level. He was diagnosed, in addition to the borderline intellectual functioning, with learning disabilities, significant learning disabilities in both reading comprehension and in mathematics.

So in short Your Honor, you know, Mr. Stalk who was sort of left to advocate for himself after -- in filing the PCR application, Your Honor, was incapable of doing so.

When he filed -- and I'm sure Your Honor realizes this, when somebody files a PCR application, the first thing that happens is the Attorney General's Office makes a determination of whether or not they're entitled to counsel. He was never given counsel, Your Honor. He was never given counsel. He was never given a hearing.

Our position, Your Honor, is that this mechanism by -- by which all of this sort of happened, that he has been denied his PCR, is in fact a violation of his rights under the American Disabilities Act, not only as applied to him in this particular case, but also just the Attorney General's position and how they are sort of the gatekeepers of counsel

for these cases, and all we're asking for, Your Honor, is the ability to appeal this, to take this issue up to the South Carolina Supreme Court. I think, you know, we could file this in Federal Court, we could have the South Carolina Supreme Court address it. I think the South Carolina Supreme Court is probably the best position to address this particular issue. I do have three --

THE COURT: The ADA -- and I apologize, but to address the ADA issue?

MS. FRANKLIN-BEST: To address the ADA issue. Well, what I want for my client is to have a PCR and so that's going to be the specific issue that I want to take up to the South Carolina Supreme Court, but I will be arguing that the procedure, as it currently exists, is violative of federal law.

I do have three exhibits, Your Honor, that I've had pre-marked. One is his letter to the Clerk of Court, asking that he be allowed to have his PCR. The second is the psychological report from the Lancaster County School District, Department of Special Services, in which he was given the WISC-III, Your Honor, and so the results of that, his IQ tests are in there, as well as acknowledgment, the diagnosis of his two different learning disabilities and then I also have sort of a third form that also just sort of, you know, reiterates that he has been diagnosed with a

learning disability and I've shown this to the Attorney General's Office and I just would like to make these three documents part of the record.

THE COURT: Sure.

MS. BALAJ: Your Honor, I would object to these copies being admitted in the record for authentication purposes. We were not provided these copies prior to today. I was able to briefly review them and there are not affidavits that would confirm that these are, in fact, school records that show Mr. Stalk actually had a learning disability.

Additionally, we are not in control of whether or not Mr. Stalk is provided counsel. The Chief Administrative Judges control that. If there was a reason that Mr. Stalk needed to be correct counsel, that would have been determined by the Chief Administrative Judge and from the record that we have, it shows that Mr. Stalk filed letters with the Clerk of Court, wrote those letters, signed them and was able to file things for his PCR. There's no reason for the State to believe that Mr. Stalk does not have -- has a learning disability that would not allow him to write these letters or send anything to the Clerk of Court.

Additionally, considering what we do have in the record of the trial, on page 780 during the sentencing, the last line --

THE COURT: What page? Seven --

MS. BALAJ: Seven eighty in the trial transcript.

THE COURT: Seven eighty. Okay.

MS. BALAJ: In the last line counsel informed the Court that Mr. Stalk had a tenth-grade education and there was never any issue brought up about any intelligence issues or mental disabilities.

THE COURT: Counsel, normally when you get school records, they are certified. Are these not?

MS. FRANKLIN-BEST: I mean, well, I will just tell you that, you know, I -- I just asked them to send them to us and if they're certified, I mean, -- I mean, yes. That -- I've never run into that as sort of a challenge before. These are definitely the school records that came. I can tell the Court as an Officer of the Court that this is what I did, these records. So --

THE COURT: Okay. I'm going to let the three exhibits become part of the record. Do you want to have any kind of response to arguments that she was making about the ADA or his right to --

MS. FRANKLIN-BEST: And you're asking me, Your Honor?

THE COURT: No. I wanted her to reply.

MS. FRANKLIN-BEST: Okay. Sorry, Your Honor.

THE COURT: And I know you would say, well, I've already kind of replied, but you were focused more on the exhibits, so I just wanted to hear if you have anything

additional to add.

MS. BALAJ: Just concerning if Applicant is entitled to relief under *Austin*, we would cite *Odom versus The State*, where the Courts -- clearly the Supreme Court stated that where Applicant is advised of his right by the Court to file an appeal; he is not entitled to relief under *Austin*.

THE COURT: So you would rely on *Austin*?

MS. BALAJ: And *Odom versus The State*, Your Honor.

THE COURT: Anything else?

MS. FRANKLIN-BEST: And, Your Honor, we would just rely on the fact that these records illustrate that he has borderline intellectual functioning and that he has a second-grade reading level and that whatever provisions were made in order to, you know, protect his right to appeal, were ineffective as to him because of these cognitive limitations, Your Honor. For that reason, we're asking that he be -- I mean, all I can do at this point is ask for the appeal, but ultimately, we would like to secure for him an ability to have a PCR in this matter.

MS. BALAJ: And, Your Honor, if I may just briefly. These school records, if I am correct, were from 2006 and I think they're an evaluation when he was 12 years old. We have nothing recently to show that he has any intellectual disabilities.

THE COURT: Would you have any suggestion as far as how

to remedy that?

MS. BALAJ: I don't have any suggestion.

THE COURT: Do you think he needs an evaluation?

MR. BARLOW: Your Honor, if she is presenting to the Court that he has this -- these issues -- and I'm sorry, Russ Barlow---

THE COURT: Yes, sir.

MR. BARLOW: ---on the State. I don't mean to overtake Ms. Balaj on this, but Your Honor, if she's asserting to the Court records that are aged as they are, we don't know what his current capacity and, Your Honor, I think it would be best to have him evaluated and so that we have current records so then we can make a determination on how to move forward.

THE COURT: Okay.

MR. BARLOW: I think it would be fair for the Applicant as well.

THE COURT: Absolutely. Okay. I would agree with that and if I can just see counsel up here off the record for a second.

(Whereupon, a Bench conference was had off the record.)

THE COURT: Okay. Counsel, do y'all need to add anything else on the record? I've -- just in our side bar conversation, I have asked -- well, I'm going to take it under advisement. I've asked both parties to brief. Got

anything else that you want to put on the record?

MS. BALAJ: No, Your Honor.

MS. FRANKLIN-BEST: No, Your Honor

THE COURT: Okay. Thank y'all.

MR. BARLOW: Thank you, Your Honor.

(END OF REQUESTED TRANSCRIPT)

STATE OF SOUTH CAROLINA)

) C E R T I F I C A T E

COUNTY OF YORK)

I, the undersigned Shannon E. McGilberry, official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of the record of all proceedings had and evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Lancaster County, South Carolina, on the 21st day of February, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

In witness whereof, I have hereunto subscribed my name, this 20th day of June, 2024.

_____

Shannon E. McGilberry, CVR-M

My Commission Expires:
April 26, 2027

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	
David Stalk, 358508, Applicant,	)	IN THE COURT OF COMMON PLEAS
v.	)	Case No. 2023-CP-29-00015
State of South Carolina, Respondent.	)	

BRIEFING ON ISSUE OF COURT ORDERED PSYCHOLOGICAL ASSESSMENT AND MOTION TO RECONSIDER

To: The Honorable Patrick C. Fant, III, Circuit Court Judge

Counsel respectfully asks this Court to reconsider its decision ordering Applicant to undergo a psychological assessment. At Stalk's PCR hearing on February 21, 2024, counsel submitted a psychological report conducted on Applicant when he was 12 years old.[1] In addition to a finding that Applicant's IQ was in the Borderline category, the report also found Stalk has two learning disabilities; a reading learning disability and a mathematics learning disability. The Attorney General's Office argued it wanted the Court to order Stalk to submit to additional psychological testing to determine his current intellectual functioning. Counsel objected and this Court ordered briefing on the issue.

Applicant's claim is that he did not knowingly and voluntarily waive his right to appeal an order of dismissal summarily dismissing his PCR when he filed an untimely application for PCR relief. Despite a letter written to the court and filed in the Clerk of Court's office explaining why his application was late, the Court dismissed the application. Stalk was not appointed counsel for

[1] A copy of the exhibits admitted at the hearing is attached to this briefing along with the entirety of Stalk's school records as obtained from the Lancaster County School System.

that case and never appeared in court. As amply reflected in the records submitted to this Court, Stalk has cognitive impairments that limit his ability to advocate for himself and he should be granted his statutory right to a PCR. This is the issue counsel intends to raise on appeal. The only issue before *this Court* is whether he knowingly and voluntarily waived his right to appeal that denial. The State's request for the psychological testing goes to the merits of what will be Stalk's appellate claim and is not the issue before this Court. If the Court wishes to have additional evidence on the issue of the voluntariness of the waiver of appeal, counsel can obtain and submit an affidavit or Stalk could testify. But respectfully, counsel does not believe that is necessary as he has shown, by initially appealing his case, by submitting a PCR application, by requesting that application not be dismissed through his letter to the Court[2], and by verifying that he wishes to appeal that denial by filing this second PCR application, that he wishes to challenge his conviction and sentence. Counsel is also attaching to this brief an additional letter by Stalk to the Clerk on August 3, 2019 asking about the status of his PCR. Stalk clearly wanted his full bite at the apple as he is entitled to under South Carolina state law. *Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991). The only evidence the State can point to that arguably could show he wanted to waive that right is the fact that the application was untimely filed, and counsel has provided evidence of Stalk's cognitive limitations to show that untimeliness should be excused in this case. Additionally, the Attorney General's Office argued that Stalk was given notice of how to appeal his denial by reading the last paragraph of the order.[3] According to a Flesch-Kincaid reading assessment, this

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[2] It appears from Judge Griffith's order that he never received Mr. Stalk's letter, but the Mr. Stalk's letter is clearly timestamped by the Clerk of Court's office.

[3] "This Court hereby advises Applicant he must file and serve a Notice of Appeal within thirty days of the service of this Order to secure appellate review. *See* Rule 203, SCACR. Applicant's attention

notice is written at a 10-12th grade level.[4] At the time of Stalk's educational assessment in 7th grade, he was reading at an early 2nd grade level. This notice was clearly beyond his reading comprehension level, a point counsel will raise in her argument before the South Carolina Supreme Court.

According to the US Department of Health and Human Services, National Institutes of Health, learning disabilities do not improve over time.[5] Learning disabilities reflect how the brain processes information and it is different than a person's intellectual ability. *Id.* An additional, expensive, assessment is not going to reveal that Stalk has "gotten over" his learning disabilities. But also, while there may be some variation in a person's IQ over time, there is no reason to believe Stalk's IQ has significantly improved when his school records indicate he last attended school in 9th grade. And there is abundant literature to show that incarceration correlates with cognitive decline.[6] Under the facts of this case, it is unreasonable to require Stalk undergo a psychological assessment to determine if he knowingly and voluntarily waived his right to appeal the denial of his PCR order of dismissal.

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is directed to Rule 243, SCACR, for the procedures following the filing and service of the notice of appeal."

[4] *See* https://readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level/ (*last visited* 2/26/24).

[5] https://www.nichd.nih.gov/health/topics/learning/conditioninfo (*last visited* 2/23/24).

[6] *See* Cognitive Decline as a Result of Incarceration and the Effects of a CBT/MT Intervention: A Cluster-Randomized Controlled Trial; located at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5961486/ (*last visited* 2/23/24) (showing that incarceration negatively affects cognitive functioning); The Role of Incarceration as a Risk Factor for Cognitive Impairment; located at : https://academic.oup.com/psychsocgerontology/article/77/12/e247/6717457 (*last visited* 2/23/24) (same).

David Stalk simply asks this Court to issue a decision in this case so he may take an appeal to the South Carolina Supreme Court. Counsel has put forth sufficient evidence to show that he did not knowingly and voluntarily waive his right to appeal the denial of his PCR. As evidenced by his letter to the Clerk asking the Court to excuse his untimely filing and his signature on the verification of his successor PCR application, Stalk has shown that he wishes to collaterally challenge his 45-year murder sentence and conviction. The South Carolina Supreme Court has consistently and unambiguously supported the right of a criminal defendant to have one full bite at the apple. *See Aice*, *supra*, *Robertson v. State*, 418 S.C. 505, 795 S.E.2d 29 (2016); *Odom v. State*, 337 S.C. 256, 523 S.E.2d 753 (1999). *See also Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) (noting that there are situations where the interests of justice require PCR courts to be flexible with procedural requirements before PCR applicants suffer procedural default on substantial claims).

CONCLUSION

Counsel respectfully asks this Court to find Stalk did not knowingly and voluntarily waive his right to appeal the denial of his first PCR application.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

February 26, 2024.

Nov 2, 2020

FILED
OFFICE OF CLERK
OF COURT

2020 NOV 16 PM 2:20

CLERK OF COURT
LANCASTER, SC

18-1006

I'm responding to the letter that i received for "Conditional order of dismissal" for my PCR application Post Conviction Relief. The reason why i wasn't able to file my PCR application in the time that it was due was because at the time i was placed on (RHU-Lock up) on the date of 5/29/16 i wasn't aware that i had a certain time limit to have a PCR application turned in. To be honest after my appeal was denied i didn't no i had to file for a PCR until later on down the road. Due to the fact this is my first time ever having to deal with a situation like this and i didn't no much of any thing about Appeals, PCR's or for that matter the law in general. I was placed in RHU and at the time i didn't have accesess to be able to work on my case nor at that time did i no i had to write the Clerk of Court to receive a PCR application i thought i would receive it from the institution that i was at. But from the date i was placed on RHU. I was getting moved around from institution to institution and i wasn't getting any of my personal mail or legal mail to let me no that i had a dead line. Also at the time of me getting moved around all of my personal property somehow got misplaced well it was lost and they never was able to locate it and this had my legal mail and all of my personal belongings. I was placed at Lee Corrections on 7-11-2016 and there i did fill out a PCR application but from my understanding the Clerk of Court never received it, which i didn't no that until i had a family member

call and check to see why i haven't heard anything back about it. If there is anyway possible i could get another chance i would greatly appreciate i'm just trying to get out of this place please + Thank you...

Sincerely,

David Stalk

8/3/2019

David Stalk #368508
McCormick Correctional Institution
386 Redemption Way
McCormick, S.C. 29899

18/1006

Clerk of Court of Lancaster County
Post Office Box 1809
Lancaster, S.C. 29721

I'm Writing this letter on behalf of my PCR applicat
that i filed. Which was (Aug 21st 2018) I was wonde
have i been appointed a lawyer yet? And if not, wher
one be assigned to me? If anyone could provide m
any information i would greatly appreciate it. Thank
for your time and help..

2019 AUG -8 AM 11:18
CLERK OF COURT
LANCASTER, SC

Sincerely,

David Stalk

Student Name			
Stalk, David Demarcus			
Student ID [redacted]	Grade 10	Gender M	
Birth Place	Date Of Birth [redacted]	Ethnic Code B	
Parent Guardian **Luther James Stalk** [redacted] Lancaster, SC 29720 [redacted]			

Transcript
Transcript

Enter Date: **08/09/04**
Leave Date:
Class Of: 2008
Diploma Type: Standard Diploma

School Name/Address
Lancaster High School
617 Normandy Road
Lancaster, SC 29720
Tel: 803-283-2001 Fax: 286-6962
School Alternate Number:
Counselor: **Cauthen, Gennell M.**

Crs ID	Course Title	Mark	Ab	Credit
Lancaster High School				
Grd 09 12/2004 Term: 4				
331000CW	C World Geography	31		
339976CW	C HS 101/Comp Health	46		
Crd Att: 2.000 Cmp: 0.000		TOTAL GPA: 0.0000		

Credit Summary - High School

Subject Area	Req	Cmp	Def
English/Language Arts	4.000	0.00	4.00
Mathematics	4.000	0.00	4.00
Science	3.000	0.00	3.00
US History & Constituti	1.000	0.00	1.00
Economics	0.500	0.00	0.50
US Government	0.500	0.00	0.50
Other Social Studies	1.000	0.00	1.00
Physical Ed or Jr ROTC	1.000	0.00	1.00
Computer Science - Keyb	1.000	0.00	1.00
Foreign Language or CAT	1.000	0.00	1.00
Electives	7.000	0.00	7.00
------Total Credits------	24.000	0.000	24.00

GPA Summary

Academic GPA:
Total GPA:
CSU GPA:

Total Credits Attempted: 2.000
Total Credits Earned: 0.000

Total GPA and Class Ranks are based upon the UGS

Transcript is unofficial unless signed and sealed by a school official

Date: 01/31/07

PRIVATE PROVIDER GRADE SUMMARY FOR: PWI

This is not a transcript of
South Carolina Department of Juvenile Justice

Name: David Stalk

Date of Birth: [redacted] MIS number: [redacted] Grade: 9

Enrollment Date: 6-3-05 Withdrawal Date: 1-25-06

Track: Diploma or Certificate (circle one) Disability: LD

Comments:

Grade: 9 COURSE/COURSE CODE	Teacher	C or NC	End of Course Test Results	Numeric Grade	Hours Earned	120 Hours Promotion Date
Engl 301100CW	Stevens	C		84	120	1-25-06
Math Tecl 314100TW	Brown			82		
PhySci 221100CW	Brown			79		
LRE 333600CW	Stevens			86		
Keybd 18510000	Stevens			89		
LD-R 19032000	Bell			92		

Grade: ___ COURSE/COURSE CODE	Teacher	C or NC	End of Course Test Results	Numeric Grade	Hours Earned	120 Hours Promotion Date

Standardized Test Scores

HSAP Test Date: _____ ELA_____ Math_____

PACT Test Date: _____ ELA_____ Math_____ Science_____ SS_____

Pre-GED: Form: _____ Passed/Failed (circle one) Score_____

GED: Date Taken: _____ Passed/Failed (circle one) Score_____

Name of person Filling out this form: EABell

Lead Teacher: EABell

Rev. 9/21/05

SOUTH CAROLINA CERTIFICATE OF IMMUNIZATION

(TO BE COMPLETED BY A LICENSED PRACTITIONER OF MEDICINE, SURGERY, OR OSTEOPATHY, OR BY HIS OR HER AUTHORIZED REPRESENTATIVE)

Section Ia - DAY CARE

___/___/___ Date For Next Immunization
(Child can attend day care for no more than one month following this date.)

OR

[ ] Final certificate for DAY CARE ATTENDANCE*

Section Ib - SCHOOL

[X] Has received all immunizations required for SCHOOL ENTRY*

(INVALID IF CHECKED BEFORE CHILD'S FOURTH BIRTHDAY)

EXEMPTIONS
(Check All That Apply)

[ ] MEDICAL CONTRAINDICATION
Complete Section IV below. Child can attend school for no more than one month following the earliest expiration date in Section IV.

[ ] AGE-RELATED EXEMPTION
Date of fourth birthday or next immunization after fourth birthday (child can attend school for no more than one month following this date): ___/___/___

[ ] CATCHING UP
Date for next immunization (child can attend school for no more than one month following this date): ___/___/___

*Required standards of immunization for permanent certification for day care attendance and for school entry are published annually by SCDHEC Division of Immunization and Prevention (Telephone 1-(800) 277-4687).

Section II- CHILD'S IDENTIFICATION
[redacted] - STALK, DAVID J DOB: [redacted]

Section III- DATES OF IMMUNIZATIONS

VACCINES	M/D/Y	M/D/Y	M/D/Y	M/D/Y	M/D/Y	M/D/Y	M/D/Y
Hepatitis B							
HepB-Ped							
HepB-Adult	09/16/02	9/8/03					
OPV	08/28/89	10/23/89	08/23/91	08/19/94			
IPV							
DTP or DTaP	08/28/89	10/23/89	12/20/89	08/23/91	08/19/94		
DT or TD						9/8/03	
HIB	08/23/91						
Hib-PRPOMP							
MMR	08/23/91	08/19/94					
VAR							
Other:	/ /	/ /	/ /	/ /	/ /	/ /	/ /

Section IV- MEDICAL CONTRAINDICATION
This child is exempted from receiving each of the vaccines listed below for a MEDICAL REASON.

VACCINE(S)	DATE EXEMPTION EXPIRES	OR PERMANENT EXEMPTION
	/ /	[ ]
	/ /	[ ]

Section V- CERTIFICATION OF IMMUNIZATION STATUS

Lancaster Co. Health Dept.
Type or Print Certifier's Name

D. Clanton RN
Certifier's Signature or Stamp

286-9948
Certifier's Telephone Number

09/08/2003
Date Certificate Issued

DHEC1148 (10/2001)

S.C. D.H.E.C.
CERTIFICATE OF IMMUNIZATION

Section I - Student Information (Invalid if issued before student's fourth birthday)

Student's Name: STALK, DAVID J.	Birthdate: [redacted]	School:
Parent's Name:	Home Phone: [redacted]	Work Phone:
Address: C/O LUTHER STALK, [redacted] LANCASTER, SC 29720		

Section II - Important Information For Health Care Providers & School Officials

Pursuant to Section 44-29-40 of the South Carolina Code of Laws, 1976, and regulation 61-8, no child shall be admitted to any public, private, parochial school, grades kindergarten through twelve (K-12) or any child development program under the control of the Department of Education or a child day care facility without first presenting a valid SOUTH CAROLINA CERTIFICATE OF IMMUNIZATION. THE STANDARD WHICH MUST BE MET TO OBTAIN A SOUTH CAROLINA CERTIFICATE OF IMMUNIZATION SHALL BE THE SCHEDULE OF REQUIRED IMMUNIZATIONS ANNUALLY PUBLISHED BY THE DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL.

***** TO BE ISSUED ONLY AFTER IMMUNIZATIONS ARE COMPLETE *****

Section III - Immunization Information

Date of each dose administered must be recorded in the appropriate box.		DOSES RECEIVED 1	2	3	4	5
********** VACCINES **********		M/D/Y	M/D/Y	M/D/Y	M/D/Y	M/D/Y
DIPHTHERIA, TETANUS, PERTUSSIS	(Any combination of DTP/DT/Td/DTaP)	08/28/89	10/23/89	12/20/89	08/23/91	08/19/94
POLIO	(Any combination of OPV or eIPV)	08/28/89	10/23/89	08/23/91	08/19/94	
MEASLES (Rubeola or Red Measles)	Must be given on or after first birthday.	08/23/91	08/19/94			
RUBELLA (3-day or German Measles)	Must be given on or after first birthday.	08/23/91	08/19/94			
MUMPS (Recommended)	Must be given on or after first birthday.	08/23/91	08/19/94			
Hib (Haemophilus influenzae b)	(Recommended)	08/23/91				
HBV (Hepatitis B Vaccine)	(Recommended)					
OTHER						

Section IV - Certification of Immunization Status

TO BE VALID, THE SOUTH CAROLINA CERTIFICATE OF IMMUNIZATION MUST BE SIGNED BY AN INDIVIDUAL LICENSED TO PRACTICE MEDICINE SURGERY, OR OSTEOPATHY OR HIS/HER AUTHORIZED REPRESENTATIVE.

I Certify that the Immunization Information Entered in Section III above is accurate based on this child's health record.

LANCASTER COUNTY HEALTH DEPT.
P. O. BOX 817
LANCASTER, S. C. 29721
1-803-286-9948

Type or Print Certifier's Name

Susan Burgess

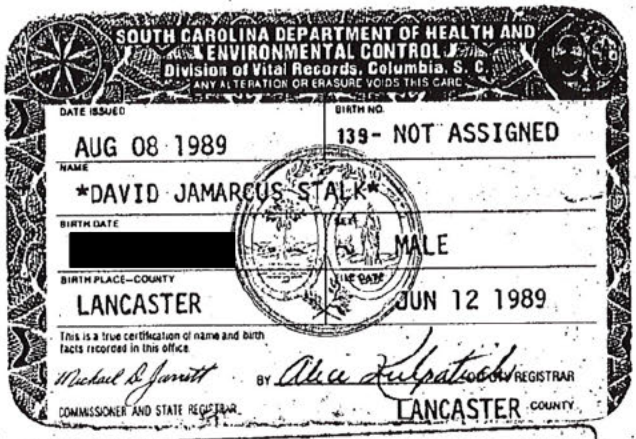
Certifier's Signature or Stamp

803-286-9948
Certifier's Telephone

08/19/1994
Date Certificate Issued

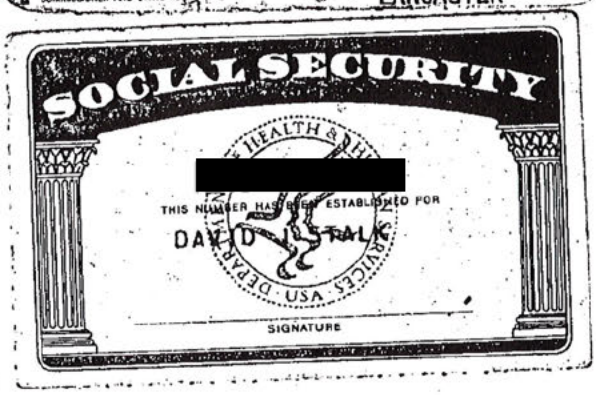
DHEC 1125E (REV 11/92)

LANCASTER CHD



SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
Division of Vital Records, Columbia, S. C.
ANY ALTERATION OR ERASURE VOIDS THIS CARD

DATE ISSUED: AUG 08 1989
BIRTH NO.: 139- NOT ASSIGNED
NAME: *DAVID JAMARCUS STALK*
BIRTH DATE: [redacted]
SEX: MALE
BIRTH PLACE—COUNTY: LANCASTER
FILE DATE: JUN 12 1989
This is a true certification of name and birth facts recorded in this office
COMMISSIONER AND STATE REGISTRAR
BY REGISTRAR
LANCASTER COUNTY



EASTSIDE ACADEMY
1300 EAST MEETING STREET
LANCASTER, SC 29720
416-8944
December 19, 2002

GRADES FOR 2002-2003 SCHOOL YEAR

NAME: David Stalk

LANGUAGE ARTS: 90

MATH: 60

SOCIAL STUDIES: 74

CAREERS: 70

SERVICE LEARNING HOURS: 45

David has been involved in Eastside for the first semester of this school year. He has been tested by Special Services and an IEP has been completed and signed and has been placed in resource classes in math and reading. He had made great improvements in his behavior and has shown more interest in academics and his self-control. He is still playful at times and has to be reminded to stop the playfulness, but adheres with mo problems. He continues on probation with DJJ and has several mentors that check on him often. We feel with the specialized placement and the improvements he has made, that he will be successful at A.R. Rucker. David loves to assist teachers, do yard work and participated in service learning projects with great pride and satisfaction. His Grandfather has been involved in conferences and has stated he stays home more and has also improved there as well. Please give us a call if we can be of further assistance with this very likeable and pleasant student.

2/11/03-5/21/03

LANCASTER COUNTY SCHOOL DISTRICT
Putting our children first

February 11, 2003

Mr. Luther Stalk
415 East Dunlap Street
Lancaster, SC 29720

Dear Mr. Stalk:

Thank you for appearing at the hearing on February 11, 2003 with your child, David Stalk, who was recommended for expulsion from A.R. Rucker Middle School. Your interest and concern for your child is appreciated.

After careful consideration of the evidence presented at the hearing, I am recommending that David be expelled from school for the remainder of the 2002-2003 school year, February 11, 2003 through May 21, 2003. Mr. Gardner, the principal from A.R. Rucker Middle School will call you regarding Home Instruction. During the expulsion, David will not be permitted on the school grounds or to attend any school sponsored activities.

You have the right to appeal my decision to the Lancaster County School Board of Trustees, and you may do so by submitting a written request within 10 days of receipt of this letter to Dr. Pat Burns, Superintendent. If I can be of assistance to you, please feel free to contact me at 286-6972.

Sincerely,

Dr. Patrice G. Robinson
Hearing Officer

cc: Mr. Gardner

300 South Catawba Street • Post Office Box 130 • Lancaster, SC 29721-0130
Telephone- (803) 286-6972 Fax- (803) 286-4865

Standardized Test Results

CSAB - BSAP

Stalk	David	Jamarcus	[redacted]
Student's last name	First name	Middle name	Birth date

100373 COGNITIVE SKILLS ASSESSMENT BATTERY 09/95

STUDENT NAME: STALK DAVID J
STUDENT ID : [redacted]
TEACHER NAME: WALTON NANCY

READINESS SCORE : 84
READINESS STATUS: NOT READY

BSAP SPRING 1998 GRADE 3

STALK, DAVID J.
Lancaster, North Elementary
06/09/89 B/M/N/ /N/S/N/

TEST	SCORE	* - OBJ. NEEDING IMPROVEMENT
Math	639	* = CN,OP,ME,PS
Reading	692	* = DW,DE,MI
Science	617	* = CN,PR

OR:49020

PACT SPRING 1999 GRADE 04

Stalk, David J.
Lancaster, North Elementary
06/09/89 B/M/N/ /N/S/

TEST	SCORE	PERF. LEVEL	NEEDING IMPROVEMENT
Math	368	BB	I,II,III,IV,V,VI
ELA	388	BB	R,L

OR:49020

PACT SPRING 2000 GRADE 5

STALK, DAVID D.
LANCASTER, CLINTON ELEMENTARY
06/09/89 B/M/N/ /N/S/

	MATH	ELA	R	W
Score	479	479		
Perf. Level	BB	BB	BB	BB

OR:49006

PACT SPRING 2001 GRADE 6

STALK, DAVID D.
LANCASTER, BARR STREET MIDDLE
06/09/89 B/M/N/ /N/

	MATH	ELA	R	W
Score	586	566		
Perf. Level	BB	BB	BB	BB

OR:49001

PACT SPRING 2002 GRADE 6

STALK, DAVID D.
LANCASTER, BARR STREET MIDDLE
06/09/89 B/M/N/

	MATH	ELA	R	W
Score	579	575		
Perf. Level	BB	BB	BB	BB

OR:49001

PACT SPRING 2003 GRADE 7

STALK, DAVID D.
LANCASTER, A R RUCKER MIDDLE SCHOOL
06/09/89 B /M/N/ L
OR:49001

	MATH	ELA	R	W	SCI	SS
Score	672	682			684	680
Perf. Level	BB	BB	BB	BB	BB	BB

PACT SPRING 2004 GRADE 8

STALK, DAVID D.
LANCASTER, A R RUCKER MIDDLE SCHOOL
06/09/89 B /M/LD OR:2901003
FA:2901008

	MATH	ELA	R	W	SCI	SS
Score	791	784				
Perf. Level	BB	BB	BB	BB		

LANCASTER COUNTY SCHOOL DISTRICT

Standardized Test Results

Achievement & Aptitude

METROPOLITAN ACHIEVEMENT TESTS SEVENTH EDITION

STALK DAVID J
GR 01 AGE 6-10 GENDER M
LEVEL PRIMARY 1 FORM S
STUDENT NO. [redacted]

TEST DATE 4/96
1992 NORMS NATIONAL
SPRING

SCORE TYPE	Total Rdg	Word Recog	Vocab	Rdg Comp	Total Math	Conc& PSolv
RS	44	18	11	15	30	18
SS	490	511	450	492	497	501
N/PR-S	35-4	45-5	38-4	30-4	32-4	27-4
N/CE	41.9	47.4	43.6	39.0	40.1	37.1

SCORE TYPE	Pro-cdrs	Lang	3 R's Total
RS	12	22	96
SS	488	508	498
N/PR-S	43-5	22-3	28-4
N/CE	46.3	33.7	37.7

Normative data © 1993 by HBC

METROPOLITAN ACHIEVEMENT TESTS SEVENTH EDITION

STALK DAVID J
GR 02 AGE 7-10 GENDER M
LEVEL PRIMARY 2 FORM S
STUDENT NO. [redacted]

TEST DATE 4/97
1992 NORMS NATIONAL
SPRING

SCORE TYPE	Total Rdg	Word Recog	Vocab	Rdg Comp	Total Math	Conc& PSolv
RS	42	10	10	22	26	17
SS	527	530	505	532	513	525
N/PR-S	24-4	33-4	24-4	23-4	15-3	20-3
N/CE	35.1	40.7	35.1	34.4	28.2	32.3
AAC	HIGH	HIGH	HIGH	HIGH	HIGH	HIGH

SCORE TYPE	Pro-cdrs	Lang	3 R's Total
RS	9	21	89
SS	494	530	526
N/PR-S	14-3	12-3	17-3
N/CE	27.2	25.3	29.9
AAC	HIGH	MID	HIGH

Normative data © 1993 by HBC

Otis-Lennon School Ability Test

STALK DAVID J
AGE 7-10 GENDER M
GR 02 LEVEL C FORM 1

1988 NORMS NATIONAL
SPRING

	TOTAL	VERBAL	NON-VERBAL
RS	16	8	8
SAI	72	76	75
A/PR-S	4-2	7-2	5-2
SS	502	499	505
NG/PR-S	2-1	4-2	2-1

METROPOLITAN ACHIEVEMENT TESTS SEVENTH EDITION

STALK DAVID J
GR 03 AGE 8-10 GENDER M
LEVEL ELEM 1 FORM S
STUDENT NO. [redacted]

TEST DATE 4/98
1992 NORMS NATIONAL
SPRING

SCORE TYPE	Total Rdg	Vocab	Rdg Comp	Total Math	Conc& PSolv	Pro-cdrs
RS	24	6	18	29	19	10
SS	528	498	544	540	549	527
N/PR-S	8-2	3-1	14-3	19-3	23-4	21-3
N/CE	20.4	10.4	27.2	31.5	34.4	33.0

SCORE TYPE	Lang	Pre-wrtng	Compsng	Edit-ing	3 R's Total
RS	17	7	0[1]	10	70
SS	546	553	NA[1]	569	540
N/PR-S	17-3	27-4		36-4	10-2
N/CE	29.9	37.1		42.5	23.0

Normative data © 1993 by HBC

OTIS-LENNON SCHOOL ABILITY TEST, Seventh Edition

STALK, DAVID D
GRADE: 05 GENDER: M
AGE: 10 YRS 08 MOS
STUDENT NO: [redacted]

1995 NORMS MIDYEAR
NATIONAL
LEVEL/FORM: E/3
TEST DATE: 02/00

	TOTAL	VERBAL	NON-VERBAL
RS/NP	19/72	9/36	10/36
SAI	79	80	81
AGE PR-S	10-2	11-3	12-3
AGE NCE	23.0	24.2	25.3
SCALED SCORE	557	557	557
NAT'L GRADE PR-S	6-2	7-2	7-2
NAT'L GRADE NCE	17.3	18.9	18.9
LOCAL GRADE PR-S	8-2	12-3	7-2
LOCAL GRADE NCE	20.4	25.3	18.9

LANCASTER COUNTY SCHOOL DISTRICT

2002-03

Student Name		
Stalk, David D.		
Student ID [redacted]	Grade 08	Gender M
Birth Place	Date Of Birth [redacted]	
Parent Guardian **Luther James Stalk** [redacted] Lancaster, SC 29720 [redacted]		

Enter Date:
Leave Date:

School Name/Address
A. R. Rucker Middle School
422 Old Dixie Rd.
Lancaster, SC 29720
Tel: 803-416-8555 Fax:

Crs ID	Course Title	Mark	Ab	Credit
A. R. Rucker Middle School Grd 06 5/2001				
20011700	Success Language A	66		
21101700	Math SUCCESS	68		
A. R. Rucker Middle School Grd 06 5/2002				
10015600	LA SS 6	78		
11105600	MATH SS6	70		

NGA Summary

Academic GPA: 70.500
Total GPA: 70.500

Comments:

Transcript not official unless signed by a school official.

School Official's Signature _____ Date: 07/28/03

6-12 Cumulative Record

Personal Information

Stalk (Last name) David (First) Demarcus (Middle)

[redacted] (Address (please use pencil)) Lancaster (City) SC (State) 29721 (Zip)

[redacted] (Telephone (please use pencil)) [redacted] (Social security / ID number) [redacted] (Date of birth) (Place of birth)

Sex F (M) Race W (B) AI AP O (Date entered school) (Grade during which student entered school)

McArthur Nelson (Father's name) Teresa Stalk (Mother's name) Luther Stalk - Grandfather (Person with whom student lives and relationship)

Medical problems

Date	Type

School	School year	Grade	1st sem.	2nd sem.	Year end
BSMS	00-01	6	Attendance		164
BSMS	01-02	6			138
RMS	02-03	7	Home Instruction		179
RMS	03-04	8			119
			Attendance		

LANCASTER COUNTY SCHOOL DISTRICT

Issued 8/24/95

647

K-5 Cumulative Record

Personal Information

Stalk
Last name

David
First

Jamarcus
Middle

[redacted]
Address (please use pencil)

Lancaster, S.C. 29720
City State Zip

[redacted]
Telephone (please use pencil)

[redacted]
Social security / ID number

[redacted]
Date of birth

Lancaster, SC
Place of birth

Sex F (M) Race W (B) AI AP O

8/22/94
Date entered school

Kindergarten
Grade during which student entered school

Willie White, Guardian
Father's name

Teresa Stalk, Guardian
Mother's name

Ethel Morris- G mother
Father James Stalk and
Person with whom student lives and relationship
Nancy Stalk

Promotion Code (Place code on line by promoted)
1 - Regular promotion standards
2 - Alternate promotion guidelines
3 - Promotion by principal-special factors
4 - Resource placement

Grade Code

A = 94-100	S = Satisfactory
B = 86-93	N = Needs improvement
C = 77-85	U = Unsatisfactory
D = 70-76	S, N, U used in subjects with •
F = Failure: 0-70	

LANCASTER COUNTY SCHOOL DISTRICT
Issued July 1, 1989

School North
School year 94-95 Kindergarten

	1st sem.	2nd sem.	Year end
Attendance	79	78	157

1 Promoted ___ Retained
Teacher's initials J.E.

School ___
School year ___ Kindergarten

	1st sem.	2nd sem.	Year end
Attendance			

___ Promoted ___ Retained
Teacher's initials ___

School North
School year 95-96 Grade 1

Courses	1st sem.	2nd sem.	Year end
Reading	78	82	80
Reading level	P	1	1
Spelling			
Mathematics	81	81	81
English			
Social Studies	76		76
Science	60	83	72
Health		86	86
Handwriting •	N	S	S
Music •	S	S	S
Art •	S	S	S
Physical Ed •	S	S	S
Attendance	85	87	172

√1 Promoted ___ Retained
Teacher's initials RW

School North
School year 96-97 Grade 2

Courses	1st sem.	2nd sem.	Year end
Reading	88	77	82
Reading level	2	2	2
Spelling	83	89	86
Mathematics	84	79	81
English			
Social Studies	S		S
Science	S	S	S
Health		S	S
Handwriting •	S	S	S
Music •	S	S	S
Art •	S	S	S
Physical Ed •	S	S	S
Attendance	85	86	171

1 Promoted ___ Retained
Teacher's initials CB

School North
School year 9798 Grade 3

Courses	1st sem.	2nd sem.	Year end
Reading	91	76	84
Reading level	3'	32	32
Spelling	94	92	93
Mathematics	75	62	69
English	71	53	62
Social Studies	83	48	66
Science	81	78	80
Health	-	90	90
Handwriting •	S	S	S
Music •	S	S	S
Art •	S	S	S
Physical Ed •	S	S	S
Attendance	88	89	177

√3 Promoted ___ Retained
Teacher's initials JH

School North
School year '98-99 Grade 4

Courses	1st sem.	2nd sem.	Year end
Reading	71	66	69
Reading level	4'	42	42
Spelling	67	61	64
Mathematics	64	60	62
English	66	63	65
Social Studies	60	60	60
Science	67	62	65
Health	/	72	72
Handwriting •	N	N	N
Music •	S	S	S
Art •	S	S	S
Physical Ed •	S	S	S
Attendance	86	78	164

(3) Promoted ___ Retained
Teacher's initials AC

School Clinton
School year 99-2000 Grade 5

Courses	1st sem.	2nd sem.	Year end
Reading			
Reading level			
Spelling			
Mathematics			
English			
Social Studies			
Science			
Health			
Handwriting •			
Music •			
Art •			
Physical Ed •			
Attendance	12	76	88

3 Promoted ___ Retained
Teacher's initials QA

School ___
School year ___ Grade ___

Courses	1st sem.	2nd sem.	Year end
Reading			
Reading level			
Spelling			
Mathematics			
English			
Social Studies			
Science			
Health			
Handwriting •			
Music •			
Art •			
Physical Ed •			
Attendance			

___ Promoted ___ Retained
Teacher's initials ___

School ___
School year ___ Grade ___

Courses	1st sem.	2nd sem.	Year end
Reading			
Reading level			
Spelling			
Mathematics			
English			
Social Studies			
Science			
Health			
Handwriting •			
Music •			
Art •			
Physical Ed •			
Attendance			

___ Promoted ___ Retained
Teacher's initials ___

SOUTH CAROLINA STUDENT HEALTH RECORD

Student Name: Stalk, David Jamarcus

COMPREHENSIVE HEALTH RECORD ☐

Student ID: [redacted] **Grade** K **Sex** M **Birthdate:** [redacted]

Last Name: Stalk **First:** David **Middle:** Jamarcus

Teacher: _____ **Class:** _____ **Ethnic Code:** B

Parent/Guardian: Willie White and Teresa Stalk Ethel Morris - Grandmother

Mailing Address: [redacted]

Lancaster, S.C. 29720

Home Phone: [redacted]

Father Employed: — **Phone:** (___) _____

Mother Employed: — **Phone:** (___) _____

Emergency Contact: _____ **Phone:** (___) _____

Physician: Dr. Lambert **Phone:** (___) _____

Dentist: Dr. Gridiron **Phone:** (___) _____

Health Insurance: _____ **#** _____

Medical Alert: _____

Allergies: _____

Daily Medications: 1) _____ 2) _____

3) _____ 4) _____

IMMUNIZATIONS & TESTS

VACCINE						
Diptheria, Tetanus, Pertusis (DTP, DT)	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__
POLIO	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__
MEASLES	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__
RUBELLA	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__
MUMPS	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__
	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__	__/__/__

( ) Medical Exemption __/__/__

( ) Religious __/__/__

_____
(signature of documenter)

NAME: Stalk, David Jamarcus
Last First Middle

SCREENING RECORD

Grade	3 Yr	4 Yr	K	1	2	3	4	5	6	7	8	9	10	11		Date Referred	Date Completed
Date (Year)			94-95	95/96	96/97	97/98	98/99										
VISION: Acuity W/O Glasses R	20/	20/	20/30	20/30	20/	20/20	20/20	20/	20/	20/	20/	20/	20/	20/	20/		
VISION: Acuity W/O Glasses L	20/	20/	20/30	20/30	20/	20/20	20/20	20/	20/	20/	20/	20/	20/	20/	20/		
Acuity With Glasses R	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/		
Acuity With Glasses L	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/	20/		
Cover* Test R																	
Cover* Test L																	
Plus* Lenses R																	
Plus* Lenses L																	
Color*																	
Hearing* R 1000 Hz (20dB)			P	P	P	P	P										
2000 Hz (20dB)			P	P	P	P	P										
4000 Hz (25dB)			P	P	P	P	P										
Hearing* L 1000 Hz (20dB)			P	P	P	P	P										
2000 Hz (20dB)			P	P	P	P	P										
4000 Hz (25dB)			P	P	P	P	P										
DDST/DIAL-R*				RCS													
DENTAL*																	
SPEECH*																	
SPINAL*																	
B.P.																	
HEIGHT			47 1/2 / 50	51 / 52	53 / 54	57 1/2	58 / 60										
WEIGHT			52 / 60	67 / 73	79 / 86	93	95 / 98										
HCT/HBG*																	
LEAD* TEST																	
PPD* TEST																	
SIGNATURE			BC	qw	RCS	9/97	RC 97										

* Record -- P = Pass F = Fail

South Carolina Department of Juvenile Justice
Evaluation Center Transcript

Student's Name: David Damarcus Stalk

Date of Birth: [redacted] Grade: 7

Date Enrolled: 5-22-03 Date Released: 6-25-03

Days Present: 24 Date of Report: 6-11-03

Note: The curriculum at the Evaluation Center is aligned with the South Carolina Curriculum Standards but is presented at the students' individual instructional levels. Teachers use whole-class, small group, and individualized instructional methods. Grades reflect achievement at the student's functional level.

Subjects and Grades

80 **English/Language Arts**
- ✓ Reading/Literature
- ✓ Writing/Grammar
- ___ Speaking
- ✓ Listening
- ___ Research

76 **Science**
- ___ Inquiry
- ✓ Life Science
- ✓ Earth Science
- ___ Physical Science
- ___ Health

87 **Mathematics**
- ✓ Numbers and Numeration Systems
- ✓ Numerical/Algebraic Concepts/Operations
- ✓ Patterns, Relationships, Functions
- ___ Geometry and Spatial Sense
- ___ Measurement
- ___ Probability and Statistics

83 **Social Studies**
- ✓ American History
- ✓ S.C. History
- ✓ Geography
- ✓ Law-Related Education
- ___ Character Education

Grading Scale: 93 – 100 = A; 85 – 92 = B; 77 – 84 = C; 70 – 76 = D; 69 and Below = F

Instructional Level, as Determined by Administration of the California Achievement Test (C.A.T.) Locator 1 or 2:

Reading Range: 4.6 - 6.2 Math Range: 4.6 - 6.2

Signature of Lead Teacher: Johnny R. Arrowood LLC

Print Name: Johnny R. Arrowood

Telephone Number: 864-429-3610

EASTSIDE ACADEMY
1300 EAST MEETING STREET
LANCASTER, SC 29720
416-8944
December 19, 2002

GRADES FOR 2002-2003 SCHOOL YEAR

NAME: David Stalk

LANGUAGE ARTS: 90

MATH: 60

SOCIAL STUDIES: 74

CAREERS: 70

SERVICE LEARNING HOURS: 45

David has been involved in Eastside for the first semester of this school year. He has been tested by Special Services and an IEP has been completed and signed and has been placed in resource classes in math and reading. He had made great improvements in his behavior and has shown more interest in academics and his self-control. He is still playful at times and has to be reminded to stop the playfulness, but adheres with mo problems. He continues on probation with DJJ and has several mentors that check on him often. We feel with the specialized placement and the improvements he has made, that he will be successful at A.R. Rucker. David loves to assist teachers, do yard work and participated in service learning projects with great pride and satisfaction. His Grandfather has been involved in conferences and has stated he stays home more and has also improved there as well. Please give us a call if we can be of further assistance with this very likeable and pleasant student.

Lancaster County School District
Department of Special Services
302 West Dunlap
Lancaster, SC 29720

PSYCHOLOGICAL REPORT
Confidential -- For Professional Use Only

NAME: David Stalk
BIRTHDATE: [redacted]
AGE: 12 - 10
SCHOOL: Eastside Academy
GRADE: 6th TEACHER: Ms. Faulkenbury
PARENTS: Mr. Luther Stalk
PHONE: [redacted]
ADDRESS: [redacted]
DATE OF EVALUATION: 04/11/2002
PSYCHOLOGIST: David G. Yarborough III PhD

REASON FOR REFERRAL: Lack of Basic Skills

BASIS FOR REPORT

Wechsler Intelligence Scale for Children 3rd Edition (WISC-III)
Wechsler Individual Achievement Test 2nd Edition (WIAT-II)
Behavior Assessment System for Children (BASC)
Bender Gestalt Test of Visual Motor Integration
Interview
Review of Records

BACKGROUND INFORMATION

David has a history of academic and behavioral difficulty in the academic setting. He has performed poorly in the classroom while presenting with behavior problems at home and at school, according to pre-referral information. Ms. Williams, David's 6th grade teacher at Barr street Middle school stated in her request for assessment that David had little interest in learning, was inattentive and had a poor attendance record. Additional time was missed due to suspension from school. David was moved from Barr Street to Eastside Academy in the middle of this academic year. Eastside Academy is a program structured for students with severe behavioral and adaptive deficits in the regular school environment. David has responded well to the increase in focused interventions available at Eastside and his teachers note that while behavioral concerns remain, they appear to be reduced considerably. His skill deficits remain. If he is found to be eligible for special services his opportunity for academic success in the general education setting will be significantly improved.

David resides with his grandparents and step cousins, based on self report. He enjoys watching trucks in his free time and states that he would like to be a truck driver when he is an adult.

BEHAVIORAL OBSERVATIONS DURING TESTING:

David is a twelve year old male with black hair and brown eyes. He is average in stature and average in body build for his age. At the time of

testing, rapport was easily established. David was friendly and interacted easily with this examiner.

Motivation was good and he maintained good interest and effort. His activity level was normal and appropriate persistence was observed. Attention and concentration were good throughout the evaluation.

In general, this is believed to be an accurate estimate of David's ability level. Ms Funderburke complete the BASC teacher rating scale. Significant concerns were expressed across most measured behaviors. David is seen to be aggressive, hyperactive , socially inept, to have difficulty accepting responsibility and to have a poor attitude towards learning. In spite of these numerous concerns, David was judged to have significantly improved in his at-school behavior while at Eastside.

WECHSLER INTELLIGENCE SCALE FOR CHILDREN-III

	SS		SS
INFORMATION:	6	PICTURE COMPLETION:	12
SIMILARITIES:	4	CODING:	8
ARITHMETIC:	5	PICTURE ARRANGEMENT:	2
VOCABULARY:	5	BLOCK DESIGN:	1
COMPREHENSION:	10	OBJECT ASSEMBLY:	10

VERBAL IQ SCORE	78	(+/- 6 at 90% confidence)
PERFORMANCE IQ SCORE	79	(+/- 7 at 90% confidence)
FULL SCALE IQ SCORE	76	(+/- 5 at 90% confidence)

David obtained a Full Scale IQ ~~of 76 on~~ the WISC-III which places him at the 5 %'ile. This indicates that his overall intellectual functioning is equal to or better than 5 % of individuals the same age. The corresponding classification is in the Borderline range of intellectual ability. Comparison of Verbal vs. Performance scores indicates that David performed equally as well on tasks requiring verbal ability as nonverbal ability. He obtained a Verbal IQ of 78 and a Performance IQ of 79.

On the Verbal Comprehension Factor, David's performance was within the Low Average range of ability. The corresponding Verbal Comprehension Index Score was 80. This factor measures ability to apply verbal skills and information to the solution of new problems, and reflects some weakness in processing verbal information. This skill is usually very closely related to general scholastic aptitude.

David's ability to think and solve problems in nonverbal, abstract and conceptual terms was found to be in the Borderline range of ability. The corresponding Perceptual Performance Index Score was 79. This factor measures ability to form abstract visual concepts without the use of words, and also ability to manipulate objects as well as perceive relationships between them. Mechanical skills, manual dexterity, speed and accuracy, are all reflected in this factor.

Overall, David's average Verbal subtest scaled score was 6.0. David's average Performance subtest scaled score was 6.6. In relation to his own performance on the individual subtests, David indicated relative strength in the following:

Verbal comprehension and reasoning

Perceptual alertness and visual memory
Assembly skills and perception of part-whole relationships David indicated relative weakness in the following:
Perceptual organization and alertness to detail
Spatial visualization and abstract conceptualizing ability

Intersubtest comparisons based on David's own ability:

Higher Comprehension than Arithmetic may suggest that reasoning ability is adequate in social situations but not in situations involving numbers.

Lower Similarities than Comprehension may suggest a deficit in verbal concept formation relative to real-world conceptualizing ability.

Lower Picture Arrangement coupled with higher Comprehension may suggest an understanding of social situations in the abstract, but difficulty in deciding what the situations mean or what actions to take once the examinee is involved in the situations.

Higher Picture Completion than Picture Arrangement may suggest that perception of details is better developed for nonsequencing tasks than for tasks requiring sequencing and organization.

Higher Picture Completion than Block Design may suggest adequate nonspatial visual perceptual ability but inadequate spatial visualization ability.

Higher Picture Completion than Arithmetic may suggest adequate concentration for a visual stimulus, but not for an auditory stimulus.

Higher Object Assembly than Picture Arrangement may suggest that visual inductive reasoning skills are better developed than visual sequencing skills.

Higher Object Assembly than Block Design may suggest that nonverbal inductive reasoning skills (working from parts to a whole) are better developed than nonverbal deductive reasoning skills (working from a whole to parts). Additionally, it may suggest difficulty in interpreting figure-ground relationships.

Overall, based on these results, David can be expected to perform at a level which is considerably lower than same aged peers. The corresponding academic expectancy, based on the intellectual assessment, would fall at the high third grade level.

ACHIEVEMENT

	G.E.	S.S.	%	TEST
Reading	4.6	82	12	WIAT-II
Reading Comprehension	2.0	51	.08	WIAT-II
Math Calculation	3.8	71	3	WIAT-II
Math Reasoning	2.8	59	.7	WIAT-II
Written Language	3.5	80	9	WIAT-II
Listening Comprehension	3.5		.01	

The achievement scores above, are presented with both grade equivalent, and standard scores. The grade equivalent scores represent the grade equivalent based on the national norm group. The Standard Scores (or SS scores), represent the anticipated IQ score for individuals the same age, and can be compared

directly to the IQ score on the WISC-III. Differences of 15 points or greater, between these standard scores and the IQ score, are usually considered significant.

In comparison to David's WISC-III Full Scale IQ of 76, David's performance on the basic reading test was within the expected range. The standard score for Basic Reading Recognition was 82, which suggests that compared with other children the same age, performance was below average. The grade equivalent score fell at the middle fourth grade level. He obtained a percentile score of 12.

David's performance on the reading comprehension subtest indicated a relative weakness based on his performance on the WISC-III. The grade equivalent was at the low second grade level. The corresponding standard score was 51. This placed David at the .08 percentile compared with the national norm group, and indicates that his performance was considerably below average. Overall, David scored significantly higher on sight recognition than on reading comprehension. This may indicated some difficulty with general comprehension as well.

David's performance on the Arithmetic Calculations subtest indicated anticipated progress based on his performance on the WISC-III. He obtained a standard score of 71 which yielded a percentile rank of 3 compared with other children the same age. Based on this subtest, David's general ability to perform basic "pencil and paper math" calculations was considerably below average. The grade equivalent for Arithmetic Calculations was at the high third grade level.

On the Math Reasoning subtest, he obtained a standard score of 59 which placed him at the .7 percentile. This suggests that his ability to utilize math skills when applied to real life situations was considerably below average. The grade equivalent was at the high second grade level. Based on his performance on the ability test, math reasoning skills represented a relative weakness.

On the Written Language subtest, overall performance was below average compared with other individuals the same age. Here, David scored at the 9th percentile, and the corresponding standard score was 80. He obtained a grade equivalent score of middle third grade. Based on his performance on the ability test, performance was within the expected range.

Overall, Listening Comprehension skills fell in the considerably below average range compared with other individuals the same age. The standard score was 3.5 and the percentile rank was 9. This suggests that David's ability to listen and comprehend information auditorily was considerably below average. Based on his performance on the ability test, performance was poorly developed.

LEARNING DISABILITY DETERMINATION

The Learning Disability formula used to determine whether a significant discrepancy exists between ability and achievement is based on the Federal Standards for L.D. eligibility. The formula is as follows: (IQ-100/st. dev.) - (SS-100/st. dev.) = Discrepancy Score. Discrepancy Scores of + 15 or greater are very significant, and may indicate the presence of a specific learning disability, while scores in the negative range indicate overachievement based on the IQ. The Full Scale IQ was used to calculate the L.D. determination scores.

The L.D. determination scores are as follows:

Reading Discrepancy Score=	-0.40
Reading Comprehension Discrepancy Score=	**+1.67**
Math Computation Discrepancy Score=	+0.33
Applied Math Discrepancy Score=	**+1.13**
Written Language Discrepancy Score=	-0.27
Listening Comprehension Discrepancy Score=	0

DEVELOPMENTAL TEST OF VISUAL-MOTOR INTEGRATION (3-R)

On the Test of Visual-Motor Integration (3-R), David obtained a raw score of 24. This results in a visual-motor age equivalent of 9 years 0 months. Compared with other individuals 12 years and 10 months of age, visual-motor development was below average. Compared with intellectual development, visual motor skills were at expectancy. Right hand dominance was indicated on the VMI-3R drawings. Pencil grip was good and pencil pressure was normal.

SUMMARY

Based on the results of this psycho educational evaluation David is functioning in the borderline significantly/severely below average range of academic aptitude and in the significantly to severely below average range of academic achievement. David has a **severe deficit in basic reading comprehension and math reasoning** and according to SC Redbook guidelines, is eligible for support as a resource student in these areas.

Recommendations

1. Intensive program of remediation in basic math and reading.
2. Behavior plan addressing concern for David's history of hyperactive & aggressive behavior in the academic setting
3. Be given alternative methods of examination (oral, untimed) given basic reading deficits.
4. Provide opportunity for hands on learning where practical in the academic setting.
5. Pre-vocational intervention to establish links between current and future academic and behavioral preparation which will enable him to pursue his stated vocational interests (currently is to be a truck driver).

Diagnosis:
Learning Disabled in Reading Comprehension
Learning Disabled in Math

Dave G. Yarborough III, PhD
School Psychologist III

LANCASTER COUNTY SCHOOL DISTRICT
SUSPENSION NOTICE/INITIATION OF EXPULSION PROCEDURES
A.R. RUCKER MIDDLE SCHOOL
422 OLD DIXIE ROAD
LANCASTER, SC 29720

February 4, 2003

Mr. Luther James Stalk
[redacted]
Lancaster, SC 29720

Dear Mr. Stalk:

It is with regret that I inform you that your son/daughter, David, has been suspended from school effective Thursday, January 23, 2003, and that I am recommending to the Lancaster County School District Board of Education that he/she be expelled from school. The reason(s) for the suspension and recommendation for expulsion are as follows:

Continued Misbehavior

The suspension will remain in effect during the time of expulsion proceedings. A hearing of the matter has been scheduled for 11:00 a.m. on Tuesday, February 11, 2003, at the Lancaster County School District Office at 300 S. Catawba Street. At the hearing you will have the right to legal counsel (but no counsel will be provided) and to all other legal rights, including the right to question all witnesses. The hearing will take place before the Director of Outreach Initiatives, the Board's designee for student expulsions. If you plan to have an attorney present, notice must be given to the principal or hearing officer no later than 12:00 p.m. on Monday, February 10, 2003. Failure to do so may result in a postponement.

Sincerely yours,

Richard O. Gardner
Principal

LANCASTER COUNTY SCHOOL DISTRICT
SUSPENSION NOTICE/INITIATION OF EXPULSION PROCEDURES
A.R. RUCKER MIDDLE SCHOOL
422 OLD DIXIE ROAD
LANCASTER, SC 29720

October 22, 2003

Mr. Luther James Stalk
[redacted]
Lancaster, SC 29720

Dear Mr. Stalk:

It is with regret that I inform you that your son/daughter, David, has been suspended from school effective Tuesday, October 21, 2003, and that I am recommending to the Lancaster County School District Board of Education that he/she be expelled from school. The reason(s) for the suspension and recommendation for expulsion are as follows:

Continued Misconduct

The suspension will remain in effect during the time of expulsion proceedings. A hearing of the matter has been scheduled for 10:00 a.m. on Thursday, October 30, 2003, at the Lancaster County School District Office at 300 S. Catawba Street. At the hearing you will have the right to legal counsel (but no counsel will be provided) and to all other legal rights, including the right to question all witnesses. The hearing will take place before the Director of Outreach Initiatives, the Board's designee for student expulsions. If you plan to have an attorney present, notice must be given to the principal or hearing officer no later than 12:00 p.m. on Wednesday, October 29, 2003. Failure to do so may result in a postponement.

Sincerely yours,

Richard O. Gardner
Principal

Student Name		
Stalk, David D.		
Student ID [redacted]	Grade 08	Gender M
Birth Place	Date Of Birth [redacted]	
Parent Guardian **Luther James Stalk** [redacted] Lancaster, SC 29720 [redacted]		

Enter Date:
Leave Date:

School Name/Address
A. R. Rucker Middle School
422 Old Dixie Rd.
Lancaster, SC 29720
Tel: 803-416-8555 Fax:

Crs ID	Course Title	Mark	Ab	Credit
A. R. Rucker Middle School Grd 06 5/2001				
20011700	Success Language A	66		
21101700	Math SUCCESS	68		
A. R. Rucker Middle School Grd 06 5/2002				
10015600	LA SS 6	76		
11105600	MATH SS6	70		

NGA Summary

Academic GPA: 70.500
Total GPA: 70.500

Comments:

Promoted
IEP

Transcript not official unless signed by a school official.

School
Official's Signature _____ Date: 07/14/04

Home Instruction

Name David Stalk

Grade 9th

Lancaster High School
Registration 2005-06
Grades 9-12

Date 2-22-05

Phone

Grade	Course #	Course Title
10,11,12	500100CW	Accounting I
11,12	500500CW	Accounting 2
11,12	512200TW	Admin Support
12	3014001W	Adv. Comp. Col
9	411122CW	Algebra 1(YR)
9,10,11,12	411100CW	Algebra 1
10,11,12	411200CW	Algebra 2
9	411222HW	Algebra 2 Hn (YR)
9,10,11,12	350100CW	Art I
10,11,12	350200CW	Art II
11,12	350300CW	Art III
12	350400CW	Art IV
12	375300AW	Art AP
10,11,12	350207CW	Art 3D Design $10
10,11,12	350206CW	Art Comp Graphic Des $10
10,11,12	325100CW	Astronomy (Need Phy Sci)
10,11,12	602000TW	Auto Coll Basic Panel
10,11,12	602100TW	Auto - Coll Center Ops
10,11,12	602200TW	Auto Coll Painting Finish
10,11,12	602300TW	Auto Coll Panel Rep/Alig
10,11,12	603000TW	Auto - Brake Sys
10,11,12	603100TW	Auto Susp & Steering
10,11,12	603200TW	Auto - Elect. System
10,11,12	603300TW	Auto - Engine Prof
9,10	601500TW	Auto Science
9,10,11,12	3531CGCW	Band/Color Guard
9	353100CW	Band I
10	353200CW	Band II
11	353300CW	Band III
12	353400CW	Band IV
9,10,11,12	353201CW	Band Percussion
12	329955HW	Intro Biology AP
12	327200AW	Biology AP
10,11,12	322700TW	Biology App II
10,11,12	322100CW	Biology I
11,12	322200CW	Biology II
11,12	309932CW	Broadcast Jour Adv
10,11,12	513100TW	Business & Per Fin
10,11,12	504400TW	Business Law
12	413500HW	Calculus Hn
10,11,12	609100TW	Carpentry-Intro
10,11,12	609200TW	Carpentry Basic
10,11,12	609300TW	Carpentry Inter
10,11,12	609400TW	Carpentry Adv
10,11,12	459910CH	Chamber Choir
11,12	323600TW	Chemistry for Tech
11,12	323100CW	Chemistry I
12	323200CW	Chemistry II
11,12	354100CW	Chorus I
12	354200CW	Chorus II
11,12	354300CW	Chorus III
11,12	354400CW	Chorus IV
10,11,12	580400TW	Clothing/Textiles
11,12	302100TW	Com Wkpl 3 (Eng 3 Tech)
11,12	302200TW	Com Wkpl 4(Eng 4 Tech)
10,11,12	349901CH	Comp Health Ed (0.50)
10,N,12	500800CW	Comp App
10,11,12	500801CW	Comp App (with Keybord)
10,11,12	505000CW	Comp Prog I
11,12	505100CW	Comp Prog II
10,11,12	580800TW	Cons Homemaking
10,11,12	549000TW	Coop-Business
10,11,12	629902TW	Coop-Construction
12	639000TW	Coop-Manufactoring
12	619901TW	Coop-Transportation
11	615000TD	Cosmetology I (2.00)
11	615001TD	Cosmetology I (2.00)
12	615100TD	Cosmetology II (2.00)
12	615101TD	Cosmetology II (2.00)
11,12	303200CW	Creative Writing
9,10,11,12	517700TW	Document Processing
10,11,12	517600TW	Desktop Pub
10,11,12	617000TW	Drafting - Computer Aide
10,11,12	617101TW	Drafting - Eng Graph
10,11,12	617102TW	Drafting - Arch Graph
10,11,12	617200TW	Drafting - Eng Graph Desg
10,11,12	617300TW	Drafting - Arch Graph Desg
9,10,11,12	452100CW	Drama I
10,11,12	452200CW	Drama II
11,12	452300CW	Drama III

Grade	Course #	Course Title
10,11,12	370100CH	Drivers Ed Fall (0.50) $40
10,11,12	370101CH	Drivers Ed Spr (0.50) $40
10,11,12	335000CH	Economics/Government
	333000CH	
10,11,12	628700TW	Electricity Concept/App
10,11,12	628800TW	Electricity House Wiring
10,11,12	628900TW	Electricity Control Wiring
10,11,12	629000TW	Electricity Comp Apps
10,11,12	651200TW	Emergency & Fire Service
9	301122CW	English I (YR)
9	301100CW	English I
10	301200CW	English II
11	301300CW	English III
12	301400CW	English IV
9	301122HW	English I Hn (YR)
10	30120011W	English II Hn
11	301300HW	English III Hn
9	301100TW	English - Tech I
10	301200TW	English - Tech II
9,10,11,12	379951TW	ESOL I Fall
9,10,11,12	379952TW	ESOL II Spring
10,11,12	540000TW	Entreprencurship
10,11,12	326100CW	Environmental Science
10	339985HW	Intro European Hist. AP
10	337600AW	European History AP
11,12	309933CW	Filmaking
11,12	582400TW	Foods & Nutrition
9,10,11,12	361100CW	French I
10,11,12	361200CW	French II
11,12	361300HW	French III Honors
11,12	361400HW	French IV Honors
11,12	367100AW	French AP
10,11,12	412100CW	Geometry
10	412100HW	Geometry - Honors
10	336000CW	Global Stud /World Hist
10,11,12	459901CW	Guitar Lab
10,11,12	555400TW	Health Occup. Intro
11,12	555000TW	Health Science Tech I
10,11,12	583000TW	Housing/ Interior Design
9	339976CW	HS 101/Comp Health
10,11,12	305000CW	Journalism I
10,11,12	305100CW	Journalism II
9,10,11,12	375100CW	JROTC I
10,11,12	375200CW	JROTC II
11,12	375300CW	JROTC III Fall
11,12	375301CW	JROTC III Spring
12	375400CW	JROTC IV Fall
12	375401CW	JROTC IV Spring
12	375302CW	JROTC Drill
12	375402CW	Staff Class
10,11,12	650500TW	Law Intr. Public Safety
12	651000TW	Law Enforcement Serv. I
10,11,12	623000TW	Machine Tool - Basic
10,11,12	623100TW	Machine Tool - Turning
10,11,12	623200TW	Machine Tool - Shaping
10,11,12	623300TW	Machine Tool - Comp
10,11,12	604500TW	Man./ Bldg. Science
9,10	542100TW	Marketing
10,11,12	3141001W	Math Tech I
9	3142001W	Math Tech II
10	3143001W	Math Tech III
11,12	629901TW	Mechanical Drawing
9,10,11,12	339963CW	Multicultural Studies
10,11,12	503000TW	Multimedia
11,12	356100CW	Music Appreciation I
9,10,11,12	305300CW	Newspaper Production I
11,12	305301CW	Newspaper Production II
11,12	532400CW	Oracle I
11,12	350202CW	Photography I - $35
10,11,12	454100CW	Piano / Keyboarding
9,10,11,12	344113CW	PE I - Soccer/Tennis
9,10,11,12	344111CW	PE I - Softball/ Dance
9,10,11,12	344114CW	PE I - Volleyball/Aerobics
9,10,11,12	344110CW	PE I - Wrestling/ Outdoors
9,10,11,12	344205CW	Phys. Ed II
10,11,12	344200CW	PE/WgtTrn/Track I
10,11,12	344201CW	PE/WgtTrn/Track II
10,11,12	344202CW	PE/WgtTrn/Track III
10,11,12	344203CW	PE/WgtTrn/Track IV

Grade	Course #	Course Title
9,10,11,12	321100CW	Physical Science
9	321122CW	Physical Science (YR)
9	321100HW	Physical Science Hn (YR)
12	324100CW	Physics
12	324300TW	Physics for Tech
11,12	413100CW	PreCalculus
11,12	413100HW	PreCal Honors
12	414100TW	Probability/Statics TP
11,12	334000CH	Psychology/ Sociology
	334500CH	
10,11,12	304000CW	Public Speaking
10,11,12	401100CH	SAT Prep Verb/Math
	415000CH	
9,10,11,12	354000CW	Select Chorus (Audition Only)
9,10,11,12	379920CH	Service Learning Fall
9,10,11,12	379921CH	Service Learning Spring
9,10,11,12	365100CW	Spanish I
10,11,12	365200CW	Spanish II
11,12	365300CW	Spanish III
11,12	365300HW	Spanish III Honors
12	365400HW	Spanish IV Honors
12	367500AW	Spanish AP
10,11,12	555500CW	Sports Medicine
11,12	319966HW	Intro Statistics AP
11,12	417100AW	Statistics I AP
12	339962CW	Teacher Asst Program
11,12	339961DW	Teacher Cadet
11	332000CW	U.S. History
10,11,12	634000TW	Welding - Arc
10,11,12	634100TW	Welding - Arc/Gas Metal
10,11,12	634200TW	Welding - Oxy Cut
10,11,12	634300TW	Welding - Oxy Cut/Tung
9,10,11,12	331000CW	World Geography
11,12	395400CW	Yearbook Production

Early Bird Classes

11,12	309931CW	Broadcast Jour (Early Start)
12	323200HW	Chem Intro Hn (Indian Land)
11,12	377300AW	Chem AP (ES Indian Land)
9,10,11,12	605000CW	Engineer Principles (ES But)

USC-Lancaster Courses

9,10,11,12	359900DH	Art 111/112 USCL $60
	359901DH	Evening Class
10,11,12	339969DH	Criminal Justice Sys 101 $60
10,11,12	334000DH	Psy 101

York Tech Courses

12	301400DW	Adv. Comp. Coll. $60
12	413500DW	Calculus/Coll MAT 140
12	319955HW	Calculus Intro AP
12	417000AW	Calculus AP
12	309911HW	English Intro AP
12	307000AW	English AP
12	333000DH	Gov Excells 201 $60
11	339911AW	Intro US History
11	337200AW	US History AP

Alternate Courses

1 Welding - Arc

2 _____

Parent Signature

SB

Counselor Signature

All courses are subject to availability of teachers and classrooms. Every student may not get every course which they have selected. Eight courses and two alternates should be selected.

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–29–00015 **REPLY BRIEF AND RENEWED MOTION TO DISMISS**

The parties appeared before this Court at the Lancaster County Courthouse on February 21, 2023, for a motion hearing on David D. Stalk's (Applicant) post-conviction relief application filed on January 6, 2023, nearly *two years* after the denial of his first PCR action. In his application, Applicant alleged he did not knowingly and voluntarily waive his right to appeal the denial of his first PCR action. Applicant requests a belated appeal of his first PCR action pursuant to Austin[1]. During the hearing, Applicant moved to introduce several documents into evidence, including a letter written by Applicant[2] to the Lancaster County Clerk of Court explaining why his first PCR application was untimely filed on August 8, 2019; uncertified school records containing an alleged psychological evaluation of Applicant conducted April 11, 2002; and a printout of a Flesch-Kincaid reading assessment of a paragraph of the Final Order of Dismissal. Applicant argued the 2002 psychological report showed Applicant had an intellectual disability that made him incapable of reading and writing, and therefore, he could not timely file his appeal.

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).
[2] Respondent is not clear on who actually wrote the letter. It was presented to Respondent as being written by Applicant, but, then it was presented that Applicant could not read which would mean Applicant cannot write. Then it was presented as potentially written by someone else for Applicant.

Respondent objected to the introduction of Applicant's exhibits based on authentication, as the school records were not certified. The Court admitted Applicant's exhibits over Respondent's objection. Additionally, Respondent argued that the psychological report was issued too remote in time to Applicant's current action and was not relevant to Applicant's current intellectual abilities. In response to Respondent's argument, the Court *sua sponte* asked Respondent for suggestions on how to remedy the non-existence of a current or more recent psychological evaluation. Respondent submitted that Applicant is not precluded from acquiring a psychological assessment to evaluate whether he has a present intellectual disability.[3] Applicant argued a psychological evaluation was unnecessary. At the conclusion of the hearing, the Court asked each party to submit briefs on this issue.

On February 26, 2024, Applicant submitted "Briefing on Issue of Court Ordered Psychological Assessment and Motion to Reconsider." Respondent makes this Reply Brief and Renewed Motion to Dismiss in response:

REPLY TO APPLICANT'S BRIEF AND RENEWED MOTION TO DISMISS

In his brief, Applicant requested the Court to reverse its order that Applicant undergo a psychological evaluation and asserted Respondent requested Applicant be psychologically evaluated. Applicant's understanding of the Court's decision and Respondent's position and argument at the hearing is erroneous. As stated *supra*, Respondent merely indicated that Applicant could get a current evaluation to support his contention that he has cognitive impairments, as the 2002 evaluation is too remote in time and not relevant. Additionally, the Court did not order Applicant to undergo a psychological evaluation but asked for briefing on the issue of a psychological evaluation. Respondent submits the evidence Applicant provided

[3] Notably, Applicant bears the burden to prove to the Court his claim(s), and not Respondent.

at the hearing, and the additional documents submitted with his brief, are not enough to meet Applicant's burden showing he was denied his right to an appeal of his first PCR action.

In a post-conviction relief action, the applicant bears the burden of proving the allegations by a preponderance of the evidence—a mere allegation of ineffective assistance is not sufficient to warrant granting relief. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985). Successive applications such as the one before this court are disfavored. S.C. Code Ann. § 17-27-90. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). Therefore, "the contention that prior PCR counsel was ineffective is not *per se* a 'sufficient reason' warranting a successive PCR application under [S.C. Code Ann.] § 17-27-90." Aice v. State, 305 S.C. 448, 451, 409 S.E.2d 392, 394 (1991).

The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991). Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.[4]

Here, Applicant *untimely* filed his first PCR action *pro se*. The action was ultimately dismissed, and the PCR court issued a Final Order of Dismissal. The Final Order of Dismissal

[4] Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

advised Applicant of the thirty-day time requirement to file a notice of appeal, and directed Applicant's attention to Rule 243, SCACR, for the procedures following the filing and service of notice of appeal. This gave Applicant sufficient notice of his right to appeal as required by Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

In Odom, the Supreme Court found Odom never received a full "bite of the apple" where his PCR action was summarily dismissed and the record did not indicate whether Odom was advised of his right to appeal or the statute of limitations for an appeal. Id. 337 S.C. at 265, 523 S.E.2d at 756. Based on these facts, the Supreme Court required PCR judges to advise *pro se* applicants of their right to appeal. Id. In Applicant's case, the record clearly evidences Applicant was advised of this right and elected not to pursue it.

Applicant avers the records he provided to this Court show he has cognitive impairments that should exclude him from the strict time requirements provided by statute. Respondent submits the records Applicant provided are not admissible, irrelevant, and do not conclusively support a finding that Applicant has a cognitive impairment that made him unable to timely file his appeal.

First, the records Applicant provided were not authenticated and constitute inadmissible hearsay. "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(a), SCRE. The authentication requirement is not satisfied merely by admitting the document on its own, but something more must be shown connecting the writing to the person the proponent claims the author to be. State v. Green, 427 S.C. 223, 231 830 S.E.2d 711, 714 (Ct. App. 2019), aff'd as modified, 432 S.C. 97, 851 S.E.2d 440 (2020). Rule 901, SCRE, lists ten non-exclusive methods of

authentication, the most direct being having someone authenticate with personal knowledge about the writing testify the document is what it is claimed to be. Rule 901(b)(1), SCRE.

Concerning public records and reports, Rule 1005, SCRE, provides:

> The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, *certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original.* If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

(emphasis added); See S.C. Code Ann. § 19-5-10 (certified copies or certified photostatic copies of documents admissible). However, the Supreme Court noted a distinction between documents prepared as part of official duty and records of investigations and inquiries, holding the former admissible and the latter inadmissible. State v. Pearson, 223 S.C. 377, 76 S.E.2d 151 (1953); see also State v. Homewood, 241 S.C. 231, 128 S.E.2d 98 (1962).

At the hearing, Applicant presented a document, which Applicant primarily relies on to support their contention Applicant is cognitively impaired, of an alleged psychological report conducted by David G. Yarborough, III, on March 11, 2002. The report contains Mr. Yarborough's opinions and conclusions about Applicant's cognitive abilities. Applicant presented the documents as public school records, but the documents were not certified[5]. Applicant merely relied on PCR Counsel's oath as an officer of the court to authenticate the document, which is insufficient. Nevertheless, even if certified, the psychological report would not be admissible based on what Applicant presented because it contains conclusions, opinions, and judgments. See Pearson, 223 S.C. at 383, 76 S.E.2d 153-54.

[5] This Court noted school records are ordinarily certified.

Applicant is not required to directly authenticate the psychological report by presenting testimony from Mr. Yarborough, the preparer of the report. However, Respondent submits because the report contains the conclusions, judgments, and opinions of Mr. Yarborough, his testimony would have been necessary to authenticate the report and constitute admissible hearsay. See State v. Jeffcoat, 279 S.C. 167, 303 S.E.2d 855 (1983) (Even when evidence is properly authenticated, it must still be admissible under the other rules of evidence). Rule 803, SCRE, provides public records and reports constitute admissible hearsay regardless of the availability of a witness unless it contains opinions, judgments, or conclusions. See Rule 803(8), SCRE; see also Fowler v. Nationwide Mut. Fire Ins. Co., 410 S.C. 403, 764 S.E.2d 249 (Ct. App. 2014) (Reports containing opinions, judgments, or conclusions are outside the scope of the public records exception to the hearsay rule.)). Therefore, for the report to be admissible, the testimony of Mr. Yarborough would have been necessary, and Applicant not only failed to present his testimony, but also failed to present any evidence establishing the authenticity of the report.

Second, even if this Court found the report admissible, the records are negligibly relevant to the present issue before this Court. The psychological evaluation was conducted in 2002 when Applicant was twelve years old. Applicant is now thirty-four years old, and, as far as Respondent knows, he has had no other psychological evaluations since. "Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009). Over *twenty-two years* have passed since Applicant was allegedly psychologically evaluated. Respondent submits the psychological report, though minimally relevant, has lost its probative value because it is too far removed from the issue

before the Court, whether Applicant has a present cognitive impairment. State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997); Cf. State v. Bright, 323 S.C. 221, 473 S.E.2d 851 (Ct. App. 1996) (finding evidence of two fires which occurred fifteen years prior were too remote to have any probative value in proving defendant's guilt where defendant was charged with criminal conspiracy, second-degree arson, and burning personal property to defraud an insurer).

Further, considering all the documents Applicant provided at the hearing and with his brief, they do not conclusively support a finding Applicant is cognitively impaired in that Applicant cannot read, write, or comprehend. Applicant argued in his brief that the psychological report indisputably established Applicant has a permanent intellectual disability, making a psychological evaluation unnecessary. However, looking at the psychological report on its face, nowhere does the report conclusively state Applicant had permanent and fixed cognitive issues. Notably, the records Applicant submitted with his brief include his December 2002 grades and progress report, eight months after his evaluation, which showed Applicant received a 90% in language arts and noted he was making progress. This does not support a conclusive finding Applicant is presently cognitively impaired to such an extent he was not able to progress past a second/third grade reading level in the past twenty-two years.

Moreover, at trial, Applicant represented to the trial court he had successfully completed the tenth grade. (Trial Tr. pp. 130; 780 – 81). In his brief, Applicant asserts that the Flesh-Kincaid reading assessment established the final paragraph of the Final Order of Dismissal is written at a 10-12th grade reading level. Based on Applicant's representations to the trial court, Applicant would have been able to comprehend the PCR court's instructions

in the Final Order of Dismissal. Further, the records before this Court include legible, well-written letters signed by Applicant to the Lancaster Clerk of Court.

In his brief, Applicant asserts the mere fact Applicant filed his first PCR application and a subsequent appeal is sufficient evidence Applicant wishes to appeal his sentence and conviction, making additional evidence unnecessary. However, as stated *supra*, Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394. Applicant's *untimely* filing of his *first* and *second* PCR actions is insufficient to establish Applicant is entitled to relief under Austin.

Additionally, in his brief, Applicant argues the issue of a psychological evaluation goes to the merits of what Applicant intends to present on appeal and is not the issue before this Court. However, Applicant argued he was untimely in filing the appeal of his first PCR action because of his cognitive impairments. Applicant bears the burden of establishing he is entitled to relief. Rule 71.1(e), SCRCP. Therefore, Applicant **must** establish he has a present cognitive impairment that made him unable to comprehend the directions of the PCR court in the last paragraph of the Final Order of Dismissal. At the hearing, Applicant presented inadmissible, irrelevant, and self-serving evidence in an attempt to circumvent PCR procedures and receive a second bite of the apple, where he was notified of the strict time procedures for filing his appeal and failed to do so.

For the foregoing reasons, Respondent submits this Court should dismiss the application and deny relief. Applicant has failed to meet his burden of establishing that he was entitled to relief pursuant to Austin. Even if this Court were to consider the substance of the records Applicant provided, the records offer pure conjecture as to Applicant's present cognitive abilities. Nothing Applicant has provided conclusively establishes he could not

read and comprehend the PCR judge's instructions in the Final Order of Dismissal. Therefore, Respondent submits Applicant was not denied his right to appeal his first PCR action, and respectfully asks this Court to deny and dismiss the application as barred by the statute of limitations and deny Applicant relief under Austin.

CONCLUSION

WHEREFORE, Respondent moves this Court to summarily dismiss the application as Applicant failed to meet his burden in establishing he is entitled to relief under Austin.

Respectfully submitted,

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By: _____

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March 11, 2024

STATE OF SOUTH CAROLINA COUNTY OF LANCASTER	)	IN THE COURT OF COMMON PLEAS FOR THE SIXTH JUDICIAL CIRCUIT
David D. Stalk, #358508, Applicant, v. State of South Carolina, Respondent.	)	CASE NO. 2023–CP–29–00015 **ORDER OF DISMISSAL**

This matter comes before the Court by way of David D. Stalk's (Applicant) application for post-conviction relief (PCR) filed on January 6, 2023. Respondent, the State of South Carolina, made its Return on August 4, 2023, requesting an evidentiary hearing to determine whether Applicant was entitled to Austin[1] review of his initial PCR action. On February 21, 2024, an evidentiary hearing convened at the Lancaster County Courthouse before the Honorable Patrick Cleburne Fant, III. Assistant Attorney Generals Talida Balaj and D. Russel Barlow, II, represented Respondent. Elizabeth Anne Franklin-Best, Esquire, represented Applicant. At the hearing, Applicant proceeded forward on the claims set forth in his application. In support of his claims, Applicant submitted several documents. Applicant did not testify on his behalf. At the conclusion of the hearing, this Court requested the parties submit supplemental memoranda in support of their arguments.

Following a thorough review of the record in its entirety, along with the evidence presented at the evidentiary hearing and supplemental memoranda, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, **DENIES** and **DISMISSES** this action with prejudice.

[1] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to the Lancaster County Clerk of Court orders of commitment. In May 2013, the Lancaster County Grand Jury indicted Applicant for Murder (2013–CP–29–758), Attempted Armed Robbery (2013–CP–29–759), and Possession of a Firearm During the Commission of a Violent Crime (2013–CP–29–760). Applicant was represented by Assistant Public Defender Marion H. (Mark) Grier, Jr., Esquire. Fourth Circuit Solicitor Douglas A. Barfield, Jr., Esquire, prosecuted the case.

After a withdrawn guilty plea, Applicant proceeded to a jury trial on January 13 – 17, 2014, before the Honorable R. Knox McMahon. On January 17, 2014, the jury found Applicant guilty on all charges as indicted. Judge McMahon sentenced Applicant to concurrent terms of forty-five years for murder, twenty years for attempted armed robbery, and five years for the weapons charge. Applicant timely appealed his convictions and sentences.

On appeal, Applicant was represented by Appellate Defender Raia Jane Hirsch. Assistant Attorney General Alphonso Simon, Jr. represented the State. On June 29, 2016, after briefing, the Court of Appeals affirmed without oral argument pursuant to Rule 215, SCACR. State v. Stalk, Op. No. 2016-UP-341 (S.C. Ct. App. filed June 29, 2016). The Remittitur was returned to the circuit court on July 15, 2016.

First PCR Action: 2018–CP–29–1006

Applicant subsequently *untimely* filed an application for PCR on August 28, 2018, in which he alleged the following grounds for relief:

1. False Statements
2. No Evidence
3. Officers threatening family

Applicant filed an amendment to his PCR application on May 26, 2020, alleging:

1. Counsel was ineffective during the jury charge by failing to object or file motions to the jury charge that inferred malice may arise when the deed is done with a deadly weapon.
2. Counsel was ineffective during jury deliberations to the answering two questions out of six that were asked to the Court, by the jury.
3. Counsel was ineffective for failing to file motions or object to the time of death of the deceased to wit 1/28/2013 or 1/26/2013 by indictment or 1/16/2013 all in violation of due process.

Applicant requested relief as follows:

> I'm seeking to get a time cut or a new trial[.] [I] was sentenced to 45 years and I barely even have a record and also this is my first time ever being in prison[.] [I] just don't think it was fair[.] [A]ll I ask for is another chance[.]"

On October 3, 2020, the State moved to summarily dismiss the application pursuant to § 17-27-70 of the South Carolina Code (2014) on the basis that there was no genuine issue of material fact which would necessitate an evidentiary hearing. On October 9, 2020, the court issued a Conditional Order of Dismissal.[2] On January 22, 2021, the court issued the Final Order of Dismissal, informing Applicant of the dismissal and his right to appeal and detailing what Applicant needed to do to appeal the Final Order of Dismissal.

SUMMARY OF FACTS GIVING RISE TO CONVICTION

On January 26, 2013, Applicant shot the victim, Kevisis Anthony, in the head. The victim died two days later as a result of anoxic encephalopathy—brain death due to a laceration of the brain that was due to a gunshot wound to the head. (Trial Tr. pp. 250-51, 255, 265; R. pp. 148-49, 150, 158).

[2] For reasons unknown, on December 10, 2020, the Honorable Brian M. Gibbons signed and filed a second Conditional Order of Dismissal that was identical to the first Conditional Order of Dismissal.

Eric Huddleston, one of Ketta Evans'[3] neighbors, testified that on January 26, two children came to his house and asked if their mother could use his phone. (Trial Tr. pp. 274-75; R. pp. 163-64). Huddleston testified that he went with the children and allowed their mother, who he later learned was Ms. Evans, to use his cell phone. (Trial Tr. pp. 275-76, 283-86; R. pp. 164-65, 172-75). He also testified that he received a return phone call around 8:15 p.m. (Trial Tr. pp. 280-81; R. pp. 169-170). He further identified the Evans' house as the one where he took his phone so the mother could use the phone. (Trial Tr. pp. 283, 286; R. pp. 172, 175).

Sylvia Stover, who also lived near Ketta Evans, testified that on January 26, three children came and asked to use her cordless house phone. (Trial Tr. pp. 287-88; R. pp. 176-77). She noted that she did not get the phone back until it was returned by law enforcement later. (Trial Tr. p. 288; R. p. 177). Stover noted that she heard gunshots about five or ten minutes after she let the children take her phone. (Trial Tr. p. 290; R. p. 179).

Quinshun Evans, Ketta's oldest son, testified he recalled Applicant being at the house on January 26. (Trial Tr. p. 299; R. p. 186). Quinshun noted that his brothers and sisters were at the house, and other children were there. Id. One of those other children was Applicant's daughter. Id. Quinshun testified that Applicant was at the house, and he was having a discussion with Ketta. (Trial Tr. pp. 297, 300; R. pp. 184, 187). Quinshun recalled that Applicant went out the side door in the kitchen leading to the carport. (Trial Tr. pp. 301-02; R. pp. 188-89). A couple of minutes after Applicant left, Quinshun heard three gunshots. (Trial Tr. p. 303; R. p. 190). Quinshun indicated that the shots sounded like they were coming from under the carport. (Trial Tr. p. 303; R. p. 190). After the shots, Quinshun looked out the blinds and saw a man lying on the sidewalk in front of the yard. (Trial Tr. p. 304; R. p. 191). When Quinshun went outside the help the victim,

[3] Ketta Evans and Applicant were dating at the time of the shooting. (See Tr. 529; Supp. R. p. 18).

Quinshun saw the victim's car under the carport. (Trial Tr. p. 305; R. p. 192). Quinshun testified that he and his mother helped the victim off the ground and brought him inside the house. (Trial Tr. pp. . 305-08; R. pp. 192-95). Quinshun also gathered all of the victim's belongings that had been scattered in the yard and placed them inside a knit cap. (Tria Tr. pp. 307-08; R. pp. 194-95). They also used a rag to help the victim clean up as he had a bleeding bump on his head. (Trial Tr. pp. 308-10; R. pp. 195, 196; Supp. R. p. 8). Ketta and Quinshun then took the victim to the hospital, driving the victim's car. (Trial Tr. pp. 310-11; R. pp. 196-97)

The victim was later flown to the Carolinas Medical Center in Charlotte, NC. (Trial Tr. pp. 199, 248, 250; R. pp. 112, 147, 148).

LAW ENFORCEMENT INVESTIGATION

A call from a cellphone number later associated with Applicant was received by 911 at approximately 9:41 p.m. on January 26. (Trial Tr. pp. 169, 406, 468, 553; R. pp. 92, 243, 300, 337). The caller indicated that someone had been shot on Pleasant Hill Street. (Trial Tr. p. 171; R. p. 93). Law enforcement was later dispatched to St. Paul Street in Lancaster. (Trial Tr. pp. 174-75; R. pp. 96-97). They were specifically dispatched to what was later determined to be Ketta Evans' house. (Trial Tr. pp. 175-76, 179; R. pp. 97-98, 101). At the house, they found five children. (Trial Tr. pp. 176-77; R. pp. 98-99).

Law enforcement found a can of Lime-A-Rita outside the house, a toboggan hat, a pack of Newport cigarettes, a red lighter, two silver Cigarillo packs, a metal watch, and a cellphone cover. a broken cell phone, vomit, and what appeared to be fresh blood in the driveway. (Trial Tr. pp. 186-87, 212-13, 225, 369-70; Supp. R. p. 4; R. pp. 104, 120-21, 133, 214-15). Six fired .380 caliber cartridge casings were found under the carport at Ketta Evans' house. (Trial Tr. pp. 217-22; R. pp. 125-30). Inside of Ketta Evans' house, law enforcement located a blue washcloth with

apparent blood on it. (Trial Tr. p. 228; Supp. R. p. 5). A cordless phone, later determined to belong to Sylvia Stover, was inside the house. (Trial Tr. p. 229, 287-91, 375; R. pp. 136, 176-80, 220).

A projectile jacket was recovered from the area near the windshield wiper of the victim's car. (Trial Tr. pp. 195, 202-03, 230; R. pp. 108, 115-16, 137). Also, there appeared to be other gunshot-related defects in the vehicle. (See Trial Tr. pp. 195, 201-02, 229-31, 232-34; see R. pp. 108, 114-15, 136-38, 139-41). A fired projectile was recovered from a rear speaker in the victim's car. (Trial Tr. pp. 233-34; R. pp. 140-41). During the autopsy, a fired projectile was also removed from the victim's head. (Trial Tr. p. 272; Supp. R. p. 7).

Law enforcement was able to determine that the six .380 shell casings cartridge cases recovered from underneath the carport were fired by the same gun. (Trial Tr. pp. 350, 353; R. pp. 201, 204). It was also determined that the bullet jacket recovered near the victim's vehicle's windshield wiper was consistent with having been loaded into a .380 caliber cartridge. (Trial Tr. p. 356; R. p. 205). The projectile recovered from the speaker of the victim's car was too damaged to determine its caliber. (Trial Tr. pp. 233-34, 356-57; R. pp. 140-41, 205-06). The projectile recovered from the victim's head was consistent with bullets fired in some .380 cartridges. (Trial Tr. pp. 359-60; R. pp. 208-09). The SLED firearms analyst also determined that the general rifling characteristics of the projectile reflected that it was fired by a Hi-Point firearm. (Trial Tr. p. 360; R. p. 209).

Applicant's Statements to Law Enforcement

Applicant was arrested on February 5, 2013, for charges relating to a home invasion that occurred on January 22, 2013. (Trial Tr. p. 371; R. p. 216). Investigator Hall, the lead investigator in the case, testified that Applicant was interviewed on February 5. (Trial Tr. p. 388; R. p. 233).

Hall testified that he recalled there may have been some discussion with Applicant about a bond for the charge relating to the home invasion. (Trial Tr. p. 386; R. p. 231). Hall noted that no promises were made to get Applicant to talk, and no threats of physical violence or legal problems were used. (Trial Tr. p. 386; R. p. 231). He also indicated that no coercion was used against Applicant. (Trial Tr. p. 386; R. p. 231). Hall testified Applicant denied having any involvement in the murder during the February 5 interview. (Trial Tr. pp. 400, 401-07; Supp. R. pp. 16; R. pp. 238-44).

Hall further testified that he was informed Applicant wanted to talk with officers again on February 6. (Trial Tr. p. 390; R. p. 235). Hall noted that during this interview, Lynn Tucker, Applicant's employer, and friend, was present at Applicant's request. (Trial Tr. pp. 397-98, 409; R. pp. 236-37; 246). During the interview on February 6, Applicant admitted that he was the one who shot the victim. (Trial Tr. pp. 411-16; State's Exhibit 69; R. pp. 248-53). Applicant indicated that his intention was to rob the victim. (Trial Tr. p. 411; State's Exhibit 69; R. p. 248). Applicant stated that he was standing behind Evans' house when the victim came to the carport. (Trial Tr. p. 411; see State's Exhibit 69; R. p. 248). He also testified that he did not know the victim and thought the victim was Evans' friend. (Trial Tr. p. 411; see State's Exhibit 69; R. p. 248). Ms. Evans had used a neighbor's phone to call the victim to have him stop by her house. (Trial Tr. p. 411; see State's Exhibit 67, 69; R. p. 248). Applicant asserted that he had only intended to rob the victim because he and Evans needed money, and Evans advised him that the victim had money because he was involved in selling marijuana. (Trial Tr. p. 412; see State's Exhibit 67, 69; R. p. 249).

Hall stated that Applicant admitted that he parked under the carport when the victim arrived. (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250). Once the victim made it to the house's side door, Applicant came around from the back of the house wearing a black hoodie, mask, and

pants. Id. Applicant had a gun in his hand, and he looked at the victim and said, "You know what time it is." (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250). He told the victim not to run, but the victim took off running anyway. Id. Applicant stated he shot at the victim once and then at him three more times. Id. The victim fell to the ground. Id. Applicant stated that he was trying to shoot the victim in the leg to get him to the ground so that he could rob him. Id. Applicant did not admit to robbing the victim; he did not complete the robbery because he did not leave with any of the victim's property. Id. Applicant stated that after he fired the shots, he got scared and ran behind the house. (Trial Tr. p. 413; see State's Exhibit 69; R. p. 250).

Hall further relayed that in the statement, Applicant stated he jumped over a creek, used his cell phone to call 911, informed the dispatcher that there was a shooting on Pleasant Hill Street, and requested the dispatcher send an ambulance. (Trial Tr. p. 414; see State's Exhibit 69; R. p. 251). Applicant stated that he threw the phone down after the call and took off running again. Id. When he later realized he had the gun in his hand, he threw the gun into the woods. Id.

Hall testified that Applicant did take law enforcement to where he discarded the cell phone and the gun. (Trial Tr. pp. 415-16; R. pp. 251-53). They were unable to locate either item. (Trial Tr. p. 416; R. p. 253). During the defense's case, Hall also indicated that Applicant told him that he had used a Hi-Point .380 pistol. (Trial Tr. p. 611; R. p. 361).

APPLICANT'S DEFENSE

Applicant presented testimony from several witnesses to support his defense. James Johnson testified Applicant was at his house sometime shortly after 9 p.m. on the day of the shooting. (Trial Tr. p. 490; R. p. 307). Johnson indicated Applicant talked with Lynn Tucker and then later left. (Trial Tr. p. 490; R. p. 307). Johnson recalled seeing Applicant return ten to fifteen minutes later. Id. Johnson later noted Applicant stayed approximately ten to fifteen minutes the

first time, and approximately twenty to thirty minutes the second time. (Trial Tr. p. 495; R. p. 310). Crystal Johnson, James' wife, testified she saw Applicant at the house sometime after 10 or 11 p.m. (Trial Tr. p. 497; R. p. 312). She noted that Applicant was not at the house when she arrived home from a party. (Trial Tr. p. 496; R. p. 311). She also indicated that she thought Applicant came to the house twice after she got home. (Trial Tr. p. 499; R. p. 313).

Tawana Stalk, Applicant's sister, testified that she last saw Applicant on January 26 when he left her house to take his daughter to Ketta Evans' house. (Trial Tr. p. 523; R. p. 320). She noted it was around 6 p.m. (Trial Tr. p. 523; R. p. 320). Tawana testified that she heard from Applicant later that evening when he told her to get their children from Evans' house.[4] (Trial Tr. p. 524; R. p. 321). Tawana stated that when she got home later that night, she found Applicant sleeping in the bed. (Trial Tr. p. 524; R. p. 321). She indicated that she did not get home until around 1 a.m. or 1:30 a.m. (See Trial Tr. pp. 532, 535; R. pp. 328, 331).

Lynn Tucker, Applicant's friend and employer, testified he saw Applicant at the Johnsons' house on January 26. (Trial Tr. p. 559; R. p. 338). Tucker thought Applicant had left the house after about thirty minutes, but he saw Applicant again later that evening. (Trial Tr. pp. 559, 561; R. pp. 338, 340). The second time he saw Applicant, he thought Applicant stayed around for about an hour. (Trial Tr. pp. 559, 562; R. pp. 338, 341). Tucker could not say that Applicant was at the house or had left the house because he did not know where Applicant was when he was not in the room with Tucker. (See Trial Tr. pp. 560-62; R. pp. 339-41).

Applicant also testified in his defense. He denied shooting the victim and denied knowing anything about shooting the victim. (Trial Tr. p. 628, R. p. 376). Applicant also denied making

[4] Ketta Evans was watching Tawana's three children and Applicant's daughter that evening. (Trial Tr. p. 521; Supp. R. p. 17).

the 911 call. (Trial Tr. p. 622; R. p. 370). He also denied that he had the cell phone that was associated with the number that made the 911 call on January 26. (Trial Tr. pp. 619-21; Supp. R. pp. 19-20; R. p. 369). He claimed that the version of the story he gave police was what Ketta Evans told him her son did on the night of the shooting. (Trial Tr. p. 626; R. p. 374). Applicant asserted that he gave law enforcement a false confession. Id.

CURRENT ACTION

Applicant has now *untimely* filed his *second* application for post-conviction relief, alleging he is being held in custody unlawfully on the following grounds:

1. "Applicant requests appellate review of the denial of his first PCR case."
   a. "Applicant did not knowingly and intelligently waive his right to the appeal of his PCR case."

Applicant seeks relief in the form of a new trial.

Before this Court are the Lancaster County Clerk of Court records regarding the subject's convictions; Applicant's records from the South Carolina Department of Corrections; Applicant's records from his first PCR action; Applicant's records from his direct appeal; and the records of the current PCR action.

SUMMARY OF THE EVIDENTIARY HEARING

At the evidentiary hearing, Respondent moved the Court to summarily dismiss the application as barred by the statute of limitations based on Applicant's untimely filing of his application. In response, Applicant moved to introduce several documents into evidence, arguing that the documents supported the argument that Applicant had cognitive impairments which made him unable to timely file his appeal. The documents included: a letter written by Applicant to the Lancaster County Clerk of Court explaining why his first PCR application was untimely filed on August 8, 2019; uncertified school records containing an alleged psychological evaluation of

Applicant conducted on April 11, 2002; and a printout of a Flesch-Kincaid[5] reading assessment of a paragraph of the Final Order of Dismissal. Applicant argued the 2002 psychological report proved Applicant has an intellectual disability that impacts his reading and writing capabilities; thus, the reason Applicant did not timely file an appeal of his first PCR action.

Respondent objected to the introduction of Applicant's exhibits based on authentication, as the school records were not certified. The Court admitted Applicant's exhibits over Respondent's objection. Additionally, Respondent argued that the psychological report was conducted when Applicant was twelve (12) years old[6], was too remote in time to Applicant's current action, and was not relevant to Applicant's current intellectual abilities. In response, the Court *sua sponte* asked Respondent for suggestions on how to remedy the non-existence of a current or more recent psychological evaluation. Respondent submitted that Applicant is not precluded from acquiring a psychological assessment to evaluate whether he has a present intellectual disability.[7] Applicant argued a psychological evaluation was unnecessary. At the conclusion of the hearing, the Court asked each party to submit briefs on this issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged he is entitled to relief pursuant to Austin v. State[8]. In analyzing these claims, this Court has considered the legal arguments by counsel and thoroughly reviewed the record in its entirety. This Court additionally considered the supplemental memoranda submitted by the parties.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to

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[5] See https:/readable.com/readability/flesch-reading-ease-flesch-kincaid-grade-level/
[6] Applicant is now thirty-four (34) years old.
[7] Notably, Applicant bears the burden to prove to the Court his claim(s), and not Respondent.
[8] 305 S.C. 453, 409 S.E.2d 395 (1991).

establish any constitutional violations or deprivations that would require this Court to grant his application for post-conviction relief. See Rule 71.1(e), SCRCP (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); Lucero v. State, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

Accordingly, set forth below are the relevant findings of facts and conclusions of law as required by § 17-27-80 of the South Carolina Code:

REQUEST FOR BELATED APPEAL OF INITIAL PCR ACTION

In his application, Applicant alleged he is entitled to a belated appeal of his initial PCR action because he did not knowingly and voluntarily waive his right to appeal. In support of his contention, Applicant presented several documents to the Court at the evidentiary hearing. Included was an alleged psychological evaluation of Applicant from 2002, when Applicant was twelve years old.

Applicant argued the psychological evaluation conclusively established he had cognitive impairments that prohibited him from understanding the PCR court's instructions in the final paragraph of the Final Order of Dismissal. Specifically, Applicant averred the 2002 psychological report established Applicant had a 2nd-3rd grade reading level and an IQ of 76, and therefore, Applicant would not have been able to understand the instructions and timely file his application. Additionally, Applicant argued that he filed his initial PCR, sent a letter to the Lancaster Clerk of Court explaining his untimeliness, and then filed this PCR, showing he desired to appeal his first

PCR action and is entitled to relief under Austin. This Court finds this argument is without merit.

The Uniform Post-Conviction Procedure Act filing procedures requires applicants to file a PCR application, as follows:

> An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment of conviction or within one year after the sending of the Remittitur to the lower court from an appeal or the filing of the final decision upon an appeal, whichever is later.

S.C. Code Ann. § 17-27-45. The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1996. Peloquin v. State, 321 S.C. 468, 469 S.E.2d 606 (1996). The statute of limitations does not apply to Austin[9] claims.

Successive applications such as the one before this Court are disfavored. S.C. Code Ann. § 17-27-90. The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. Coleman v. Thompson, 501 U.S. 722, (1991). The only recognized exception to the rule barring claims of ineffective assistance of post-conviction relief counsel is found in Austin v. State. 305 S.C. 453, 409 S.E.2d 395 (1991). Austin provides for a belated appellate review of an initial post-conviction relief action where prior post-conviction relief counsel fails to timely appeal the denial of the application. Id. at 454, 409 S.E.2d at 396; see S.C. Code Ann. § 17-27-100 (right to appeal final judgment by post-conviction relief court). But Austin "is limited to its particular factual situation." Aice v. State, 305 S.C. 448, 452, 409 S.E.2d 392, 394 (1991).[10] Where an applicant's action is summarily dismissed and he is not represented by counsel, the Supreme Court has held PCR judges are required to inform *pro se* applicants of their right to

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[9] Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991).

[10] Aice was issued in conjunction with Austin, limiting the reach of Austin and holding "that once a PCR applicant obtains a complete adjudication on the merits of his original application, including an appeal, he may not make successive applications based on ineffective assistance of prior PCR counsel." 305 S.C. at 454 n.1, 409 S.E.2d at 396 n.1.

appeal and the statute of limitations to appeal. Odom v. State, 337 S.C. 256, 523 S.E.2d 753 (1999).

The record in Applicant's action reflects he was advised of his right to appeal and the time to appeal. Applicant untimely filed his first PCR action *pro se*. The action was ultimately dismissed, and the PCR court issued a Final Order of Dismissal. The Final Order of Dismissal advised Applicant of the thirty-day time requirement to file a notice of appeal, and directed Applicant's attention to Rule 243, SCACR, for the procedures following the filing and service of notice of appeal. This gave Applicant sufficient notice of his right to appeal as required by Odom.

Applicant avers the records he provided to this Court show he has cognitive impairments that should exclude him from the strict time requirements provided by statute.

At the hearing, Applicant presented an alleged psychological report conducted by David G. Yarborough, III, on March 11, 2002, which Applicant primarily relies on to support his contention that he is cognitively impaired. The report contains Mr. Yarborough's opinions and conclusions about Applicant's cognitive abilities. Applicant presented the uncertified public school records.

The psychological report is also negligibly relevant to the present issue before this Court. The psychological evaluation was conducted in 2002 when Applicant was twelve (12) years old. Applicant is now thirty-four (34) years old, and no records before this Court indicate Applicant has had any other psychological evaluation since 2002. "Evidence meets the test of relevance if it tends to establish or to make more or less probable some matter in issue upon which it directly or indirectly bears." Judy v. Judy, 384 S.C. 634, 641, 682 S.E.2d 836, 839 (Ct. App. 2009). Over *twenty-two years* have passed since Applicant was allegedly

psychologically evaluated. Though the report is minimally relevant, it has lost its probative value because it is too far removed from the issue, whether Applicant has a present cognitive impairment. State v. Glenn, 328 S.C. 300, 309, 492 S.E.2d 393, 397 (Ct. App. 1997); Cf. State v. Bright, 323 S.C. 221, 473 S.E.2d 851 (Ct. App. 1996) (finding evidence of two fires which occurred fifteen years prior were too remote to have any probative value in proving defendant's guilt where defendant was charged with criminal conspiracy, second-degree arson, and burning personal property to defraud an insurer).

After reviewing all documents Applicant provided at hearing the Court finds they do not conclusively support a finding Applicant is cognitively impaired in that Applicant cannot read, write, or comprehend. Applicant argued in his brief that the psychological report indisputably established Applicant has a permanent intellectual disability, making a current psychological evaluation unnecessary. However, looking at the psychological report on its face, nowhere does the report conclusively state Applicant had permanent and fixed cognitive deficits. Notably, the records Applicant submitted with his brief include his December 2002 grades and progress report, eight months after his evaluation, which showed Applicant received a 90% in language arts and noted he was making progress. This does not support a conclusive finding Applicant is presently cognitively impaired to such an extent he was not able to progress past a second/third grade reading level in the past twenty-two years.

Moreover, at trial, Applicant represented to the trial court he had successfully completed the tenth grade. (Trial Tr. pp. 130; 780 – 81). In his brief, Applicant asserts that the Flesh-Kincaid reading assessment established the final paragraph of the Final Order of Dismissal is written at a 10-12th grade reading level. Based on Applicant's representations to the trial court, Applicant would have been able to comprehend the PCR court's instructions

in the Final Order of Dismissal. Further, the records before this Court include legible, well-written letters signed by Applicant to the Lancaster Clerk of Court. Applicant presented this letter to the Court as one he wrote, which is contrary to his claim that he cannot read, write, or comprehend.

Applicant's assertion that the mere fact he filed his first PCR application and subsequent appeal evidence he wished to appeal his sentence and conviction is not sufficient to establish he is entitled to relief under Austin. As stated *supra*, Austin "is limited to its particular factual situation." Aice, 305 S.C. at 452, 409 S.E.2d at 394.

This Court finds Applicant has failed to meet his burden of establishing that he was entitled to relief pursuant to Austin. Even if this Court were to consider the substance of the records Applicant provided, the records offer pure conjecture as to Applicant's present cognitive abilities. Nothing Applicant has provided conclusively establishes he could not read and comprehend the PCR judge's instructions in the Final Order of Dismissal. Accordingly, this Court **DENIES** Applicant relief under Austin, and **DENIES** and **DISMISSES** the application as barred by the statute of limitations.

|CONCLUSION PAGE FOLLOWS|

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 application for post-conviction relief must be **DENIED and DISMISSED WITH PREJUDICE.**

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the 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 a right to an appellate counsel's assistance in seeking a review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

2. The Applicant must be remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED this 22nd **day of** March**, 2024.**

THE HONORABLE PATRICK CLEBURNE FANT, III
Presiding Judge
Circuit Court Judge

Lancaster, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LANCASTER COUNTY
Court of Common Pleas

The Honorable Patrick Cleburne Fant III, Circuit Court Judge

Case No. 2023-CP-29-00015

David D. Stalk,

Petitioner,

vs.

The State of South Carolina,

Respondent.

NOTICE OF APPEAL

David D. Stalk appeals the final order of the Honorable Patrick Cleburne Fant III denying the Petitioner's application for post-conviction relief. This order was received by counsel March 22, 2024. Attached is a copy of the order.

Respectfully submitted,

/s/ Elizabeth Franklin-Best
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March 27, 2024.

CERTIFICATE OF SERVICE

Counsel certifies that she has provided a copy of this motion on Mark Farthing of the South Carolina Attorney General's Office via email on this date, March 27, 2024.

/s/ Elizabeth Franklin-Best