

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Edgar W. Dickson, Circuit Court Judge

DENNIS M. TEMPLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-002254

JOHNSON PETITION FOR WRIT OF CERTIORARI

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR PETITIONER

ORIGINAL

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S.C. SUPREME COURT

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SC Court of Appeals

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ISSUE PRESENTED

Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

STATEMENT

An Oconee County Grand Jury indicted Petitioner for two counts of criminal sexual conduct in the first degree, kidnapping, and grand larceny, value of five thousand dollars or more, during the September 2010 term of court. Prior to trial, multiple hearings were held regarding Petitioner's right to counsel.

On May 20, 2010, a hearing was held before the Honorable R. Lawton McIntosh. App.

1. Lindsey Simmons represented the State, and Petitioner appeared *pro se*.¹ The purpose of the hearing was to test Petitioner for sexually transmitted diseases under S.C. Code Ann. § 16-3-740. Petitioner indicated that he chose to represent himself based upon "[p]rior experience with attorneys from Oconee County." App. 2, ll. 17 – 20. Judge McIntosh found that Petitioner freely, voluntarily, and knowingly waived his right to an attorney in the limited context of the hearing. App. 3 ll. 13 – 19.

Pursuant to the statute, a finding of probable cause was necessary before testing could be completed. Therefore, the State offered the testimony of Deputy Scott Arnold, who claimed that the alleged victim, C.M., identified Petitioner out of a six-picture photo lineup. App. 5 l. 4 – App. 6 l. 6. Judge McIntosh's findings were as follows:

First, I'm going to find that the victim did make a request for these tests under statute, there's probable cause to believe that [Petitioner] committed this offense, and further, there's probable cause to find that there were body fluids transmitted and that [Petitioner] received proper notice of this petition as well as waived his right to have an attorney represent him in this matter. I am going to grant the motion and sign the order as we speak.

App. 7 ll. 2 – 10.

¹ Upon information and belief, the transcript contains a scrivener's error: this hearing was held May 20, 2010, not May 20, 2012.

On June 30, another hearing was held before the Honorable Alexander Macaulay. App. 9. Lindsey Simmons appeared on behalf of the State, and Robert Mills Ariail represented Petitioner. At that hearing, Petitioner withdrew his motion for bond reconsideration. App. 12 ll. 2 – 3. Judge Macaulay waived the application for the Public Defender’s office and ordered Wilson Burr meet with Petitioner to start his representation. App. 13 l. 5 – App. 14 l. 14.

On July 29, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. App. 19. Lindsey Simmons appeared on behalf of the State, and Sarah G. Drawdy represented Petitioner. Petitioner had moved to relieve his counsel, Sarah Drawdy and Keith Denny. The State also had a motion that Petitioner obtain counsel within thirty days of the date of the hearing. According to the State, Wilson Burr “sent the case out of his office to Ms. Drawdy and Mr. Denny.” App. 22 ll. 3 – 8. Petitioner indicated that he had not authorized the court to appoint an attorney. App. 22 ll. 11 – 13. Judge Maddox advised Petitioner against proceeding *pro se*. App. 23 ll. 18 – 23. Judge Maddox granted both parties’ motions. App. 24 l. 21 – App. 25 l. 21.

On September 14, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. App. 30. Lindsey Simmons appeared on behalf of the State, and Dennis Temple appeared *pro se*. The State claimed that it received a fax from Petitioner requesting a speedy trial and indicating that he was going to proceed *pro se*. App. 33 ll. 6 – 11. Judge Maddox told Petitioner that he had a right to represent himself. App. 33 l. 20 – App. 34 l. 7. At this hearing, Petitioner contested the validity of the indictments under the South Carolina Rules of Criminal Procedure. App. 35 – 37. Regarding Petitioner’s representation status, Judge Maddox stated:

Well, see, the option I got is I can let you go forward and sit at the table and represent yourself or I can appoint what’s basically in my mind a shadow counsel. In other words, I’ll appoint a lawyer to sit there with you. He doesn’t represent you.

If you are dead set on going and representing yourself then I'm going to appoint somebody to sit with you so that you can answer questions - - you can ask questions, they can answer questions. That's only - - that's what I'm comfortable with.

App. 39 ll. 10 – 19.

Petitioner agreed that it would be unwise to represent himself but claimed that past hardships with attorneys who did not act as zealous advocates on his behalf prevented him from proceeding with their representation. App. 39 l. 4 – App. 41 l. 5. Judge Maddox appointed Petitioner another attorney:

Well, let me just tell you generic, generic. I'm not talking about your case. If I appointed you Johnny Cochran and he was still alive and he sat down with you and told you that, take this road, and you think you were going to [take] the other road, that's something you got to work out with your attorney. So every time you have a dispute with an attorney you can't come back and ask for another one.

In fact, what I'm going to do is I'm going to appoint you a lawyer. There's a list of lawyers who have agreed to be appointed. They are outside the public defender's office. I don't know who is next on that list but I'm going to appoint them with the caveat that this case is going to be tried December 13th.

App. 41 ll. 6 – 20.

Judge Maddox appointed Kurt Tavernier to represent Petitioner. App. 46 ll. 14 – 15.

On September 22, 2010, a Schmerber hearing was held before the Honorable Alexander S. Macaulay.² Chrissy Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier represented Petitioner. App. 49. Counsel for Petitioner stated that blood, buccal swabs, and hair samples were requested. App. 54 ll. 13 – 20. Counsel indicated that Petitioner refused to consent and would not consent to the issuance of the Schmerber order. App. 54 l. 22 – App. 55 l. 12. Counsel was unaware of any legal objection that prevented the samples from being taken. App. 55 ll. 9 – 12. However, counsel for Petitioner also sought to suppress any and

² Schmerber v. California, 384 U.S. 757 (1966).

all DNA which was taken in accordance with a May 13, 2010 search warrant. App. 55 ll. 14 – 22. Based on the premise that those were taken illegally, counsel requested that all of those samples be suppressed and that the search warrant be quashed. App. 56 ll. 2 – 18; App. 57 ll. 9 – 14. The State claimed that those samples were never taken to SLED and would not be used. App. 56 ll. 23 – 24.

Judge Macaulay granted Petitioner's motion, quashed the search warrant, and suppressed anything obtained. App. 58 ll. 4 – 15; App. 59 ll. 2 – 6. Counsel renewed Petitioner's motion that the indictments be quashed, based upon Rule 3(c), SCRCrimP. App. 62 l. 12 – App. 66 l. 24. Judge Macaulay denied the motion. App. 66 ll. 11 – 24.

Another hearing was held on October 21, 2010 before the Honorable J. Cordell Maddox, Jr., with Christine Adams appearing on behalf of the State and Kurt Tavernier representing Petitioner, to “deal with [Petitioner's] representations concerns and issues.” App. 75; App. 77 ll. 10 – 16. Petitioner indicated that when Mr. Tavernier was appointed by the court, the court did not “have [Petitioner's] best interest[s] at stake.” App. 78 ll. 1 – 20. Petitioner alleged that Mr. Tavernier threatened his family if he did not plead guilty and also refused to file a motion on his behalf. App. 78 ll. 5 – 13. The following conversation took place between Judge Maddox and Petitioner:

The Court: Well, what job have you done that was your best? Where did you work that you thought you were most able to do well?

Petitioner: I have done welding. I have done plumbing. I've done structures.

The Court: Okay. Let me tell you a problem I've got. I don't know anything about welding. And if you were out working welding and I came out and showed you - - and had no idea how to weld and started telling you how to weld, you'd think I was an idiot. And I would be an idiot. What I'm telling you is that, you know, this would be -

Petitioner: Are you saying, Your Honor, that I don't have experience in the law? I have fifteen years experience in the law.

App. 79 l. 15 – App. 80 l. 4.

Counsel indicated that Petitioner filed a grievance which claimed that he had threatened to kill him and his family. App. 81 ll. 13 – 24. When asked whether he wanted to represent himself or hire an attorney, Petitioner stated:

Well, Your Honor, according to the Constitution, the United States Constitution, I am entitled to a defense attorney. Just because the Court appoint[ed] me an attorney and he has skills in the law, that doesn't mean he's using those skills to defend me. So I still to this day have not been able to defend myself because you refuse to give me a lawyer to defend me, myself. Refuse. I have had no lawyer to defend me yet to this day.

...

I want Mr. Tavernier off my case because he has no interest, no best interest - - there's no best - - he don't have my best interest at stake. I am furious with his defense. I cannot work with somebody who's not - - have the best interest of my defense.

App. 84 ll. 6 – 14; App. 85 ll. 15 – 20.

Judge Maddox ordered Mr. Tavernier to stay on the case as standby counsel, Petitioner's objections notwithstanding. App. 90 ll. 8 – 21; App. 96 ll. 1 – 9. Judge Maddox told Petitioner "the biggest mistake you can make is to show up on December 13th representing yourself." App. 103 ll. 1 – 2.

On December 7, 2010, a pre-trial hearing was held before the Honorable J. Cordell Maddox, Jr. App. 107. Christina Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier appeared as standby counsel for Petitioner. At this hearing, Petitioner moved to suppress a photographic lineup identification as well as any evidence obtained as a result. App. 136 l. 7 – App. 137 l. 7. The State offered the testimony of Lieutenant Greg Reed, and

Petitioner questioned him on cross examination. App. 138 – App. 148. C.M. also testified and was questioned by Petitioner. App. 148 – 156.

At the conclusion of the hearing, Judge Maddox discussed with Petitioner his right to counsel:

The second to last thing before I talk about what we're going to do on Monday, Mr. Temple, I've gone over exhaustively your right to counsel. I know you and I don't agree on some of these issues. And that's fine. Unfortunately, the law does basically say that we may not agree, but what I say is final. Mr. Tavernier, who has sat here very quietly all day, deserves to know for his preparation if you have changed your mind about whether or not he's going to represent you or whether you intend on Monday of next week to represent yourself. For my sake, I just need you to tell me, have you changed your mind? You still want to represent yourself?

App. 182 l. 20 – App. 183 l. 7.

Petitioner spoke with Mr. Tavernier, and the latter spoke to the court regarding his representation. App. 186 l. 9 – App. 192 l. 5. Judge Maddox ruled that Petitioner was to proceed *pro se* with Mr. Tavernier to serve as advisory counsel. App. 192 l. 11 – 17.

Petitioner then proceeded to a jury trial on December 13, 2010 before the Honorable J. Cordell Maddox. App. 191. Chrissy Adams and Lindsey Simmons represented the State, and Petitioner represented himself with Kurt Tavernier serving as standby counsel. App. 191.

The jury found Petitioner guilty as indicted. App. 646 ll. 17 – 25. Judge Maddox sentenced Petitioner to thirty years' imprisonment on each of the criminal sexual conduct in the first degree charges, thirty years' imprisonment on the kidnapping charge, and ten years' imprisonment on the grand larceny charges, with the sentences to run consecutive. App. 655 l. 23 – App. 656 l. 5.

Wanda Carter, Deputy Chief of Appellate Defense, filed an Anders³ brief on behalf of Petitioner with the South Carolina Court of Appeals on September 28, 2012. App. 658 – App. 669. Thereafter, Petitioner filed a “Pro Se Brief” on November 1, 2012. App. 671 – App. 690.

By way of unpublished opinion dated September 11, 2013, the Court of Appeals dismissed Petitioner’s appeal. App. 704 – App. 705. The remittitur was issued on September 27, 2013. App. 706.

Petitioner filed an application for post-conviction relief on October 15, 2013. App. 707. His application contained allegations of various constitutional defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714 – App. 735. Petitioner filed a Motion to Amend Application for Post-Conviction Relief on October 31, 2013. App. 738 – App. 739. Petitioner also filed a “Motion to Amend and Supplement” on January 14, 2014. App. 743 – App. 746. He also filed a Memorandum in Support of Summary Judgment on March 5, 2014. App. 748 – 761. Petitioner filed an affidavit on February 27, 2014, presumably in support of his application for post-conviction relief. App. 762 – App. 765. On March 5, 2014, Petitioner filed a Motion for Summary Judgment. App. 783 – App. 784. On March 19, 2014, Petitioner filed an Affidavit, also presumably in support of his motions and application. App. 785 – App. 788. He also filed a Notice of Motion and Motion for Default Judgment on May 12, 2014. App. 805 – App. 806. He filed a Memorandum in Support of Default Judgment at the same time. App. 807 – App. 818. He likewise filed an Affidavit on May 12, 2014. App. 819 – App. 823.

On May 21, 2014, Hugh Welborn, attorney for Petitioner, filed a Notice of Motion and Motion to be Relieved as Counsel. App. 824 – App. 825. The State filed a Return and Partial

³ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Motion to Dismiss and a Motion for a More Definite Statement on or about July 7, 2014. App. 826 – App. 833.

An evidentiary hearing was conducted on July 28, 2014 before the Honorable Edgar Dickson. App. 835. Hugh Welborn represented Petitioner, and John W. Whitmire represented the State. Petitioner testified during the hearing.

In a written order filed on October 31, 2016, Judge Dickson dismissed Petitioner's application, granted summary judgment on the issue of ineffective appellate counsel, and found that some of Petitioner's other allegations were barred by *res judicata*. App. 684 – App. 893. Judge Dickson further ruled that some of Petitioner's other allegations were direct appeal issues and summarily dismissed them. App. 891.

This Petition follows.

ARGUMENT

The PCR Court erred in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

Petitioner testified that appellate counsel was ineffective for failing to include all of the pre-trial transcripts, including the preliminary hearing transcript, in the record. App. 856 l. 9 – App. 857 l. 15. In particular, Petitioner alleged that the court did not have jurisdiction to hear his case due to a defect with the arrest warrant, namely that there was a lack of probable cause:

Based on the fact that there was no probable cause to arrest me - - I was arrested on these arrest warrants, detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

App. 858 ll. 6 – 15.

A transcript from that hearing is unavailable. Petitioner later testified: "I think that my appellate counsel was ineffective by the very fact that she proceeded with my appeal with not receiving all the transcripts. There could have been more motions that was objected to." App. 866 ll. 10 – 13.

On cross-examination the following exchange took place:

Q: So you're alleging appellate counsel was ineffective for not providing the court with all of your preliminary hearing transcripts; is that correct?

A: No. I'm alleging that appellate counsel was not effective because she proceeded on my appeal and not had all the transcripts.

Q: Now, what is this transcript you're speaking of? What date it is?

A: July the 16th, 2010.

Q: What judge was it before?

A: It was before - - I'm not even sure because I don't even have the transcript.

Q: You can't remember?

A: No, I don't.

Q: Did you ever request this supposed transcript at your trial?

A: Mr. Welborn, I asked my attorney - -

Q: I mean at your trial.

A: Did I ever request it?

Q: Uh-huh (affirmative). A copy of it.

A: It's a part of the record, isn't it?

Q: This July transcript you speak of doesn't exist. That's why I'm asking you. Did you make any efforts to locate it or track it down?

A: Well, my attorneys requested all the transcripts that was available.

App. 869 l. 15 – App. 870 l. 15.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); See Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (finding that even where appellate counsel believes his or her client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits

brief and the challenge of appellate counsel's performance should be reviewed under Strickland.).

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (2009). In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013).

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. In determining whether any triable issues of fact exist,

the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

If probable cause was established at the preliminary hearing, such a decision could have been the subject of appellate counsel's appeal. Additionally, in the light most favorable to Petitioner, testimony at the preliminary hearing could have indicated that the underlying warrants were unsupported by probable cause. The transcript from this hearing, if available, should have been included in the Record on Appeal in order to allow the South Carolina Court of Appeals the opportunity to conduct meaningful appellate review of the underlying record. Without a copy of that transcript, the court's decision was made based on an incomplete record.

Furthermore, if Petitioner was unrepresented and proceeded at the preliminary hearing without the assistance of counsel, the probable cause determination may have been exceedingly unfair.

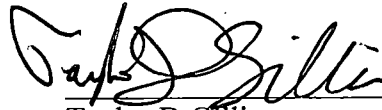
At the time of Petitioner's PCR hearing, there existed a genuine issue of material fact as to the contents of a transcript from the preliminary hearing. Summary judgment was improper,

because a triable issue of fact existed regarding the probable cause determination and whether it was supported by facts as required by the Fourth Amendment.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. “A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property.” State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his petition for writ of certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

 Certiorari to Oconee County

 Honorable Edgar W. Dickson, Circuit Court Judge

DENNIS M. TEMPLE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

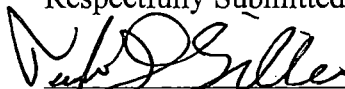
 PETITION TO BE RELIEVED AS COUNSEL

Counsel for Dennis M. Temple states:

1. He is Appellate Defender for the South Carolina Office of Appellate Defense, and was appointed to represent petitioner.
2. He has reviewed the record of petitioner's trial before Judge Edgar W. Dickson, which was held on July 28, 2014, and, in his opinion, the appeal is without legal merit sufficient to warrant a new trial.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed an arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Dennis M. Temple.

Respectfully Submitted,



Taylor D Gilliam

Appellate Defender

ATTORNEY FOR PETITIONER

This 2nd day of August, 2017.

CERTIFICATE OF COUNSEL

The undersigned certifies that to the best of his ability this Johnson Petition for Writ of Certiorari complies with Rule 211(b), SCACR, and 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."

A handwritten signature in black ink, appearing to read "Taylor D. Gilliam", written over a horizontal line.

Taylor D Gilliam
Appellate Defender

South Carolina Commission on Indigent
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Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR PETITIONER

This 2nd day of August, 2017.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Oconee County

Honorable Edgar W. Dickson, Circuit Court Judge

DENNIS M. TEMPLE,

PETITIONER

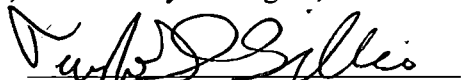
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STATE OF SOUTH CAROLINA,

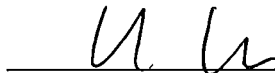
RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix in the above referenced case has been served upon Lindsey McCallister, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and a copy of the Johnson Petition for Writ of Certiorari and a copy of the Appendix have been served on Dennis M. Temple, #274802, at Perry Correctional Institution, 430 Oaklawn Road, Pelzer, SC 29669, this 2nd day of August, 2017.


Taylor D Gilliam
Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO before me
this 2nd day of August, 2017.

 (L.S)
Notary Public for South Carolina
My Commission Expires: 5/12/2025

Hugh W. Welborn

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November 4, 2016

South Carolina Supreme Court
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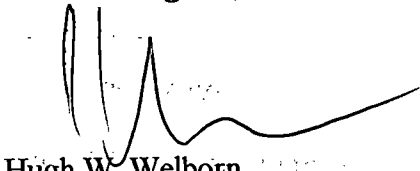
In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

S.C. SUPREME COURT

Dear Sir/Madam:

Please find enclosed herewith the original and one (1) copy of the Appellant's Notice of Appeal in connection with the foregoing matter which I ask that you file for record, returning the clocked copy to my office. I also enclose a copy of the Order of Dismissal and the original Proof of Service on Walt Whitmire, Office of the Attorney General. Please use the enclosed self-addressed envelope to return the clocked copy to my office.

With kind regards,



Hugh W. Welborn

HWW/sba

Enclosures

cc: Office of the Appellate Defense
Office of the Attorney General
Client

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-0729

DENNIS M. TEMPLE, #274802

APPELLANT,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

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S.C. SUPREME COURT

NOTICE OF APPEAL

Dennis M. Temple, #274802 appeals the denial of his Post Conviction Relief. The Post Conviction Relief Action was heard and denied by the Honorable Edgar W. Dickson, Circuit Court Judge on July 28, 2014, and Order of Dismissal issued on October 24, 2016 and filed on October 31, 2016. The Appellant received Order of Dismissal on November 4, 2016.



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Attorney for Dennis M. Temple, #274802

Other Counsel of Record:
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THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

HONORABLE EDGAR W. DICKSON

2013-CP-37-0729

DENNIS M. TEMPLE, #274802

APPELLANT,

VS

STATE OF SOUTH CAROLINA,

RESPONDENT.

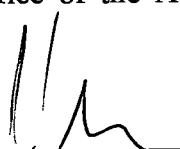
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PROOF OF SERVICE

S.C. SUPREME COURT

I certify that I have served the Notice of Appeal on the State of South Carolina by depositing a copy of it in the United States Mail postage prepaid on November 4, 2016 addressed to its attorney of record Walt Whitmire, Office of the Attorney General, Post Office Box 11549, Columbia, South Carolina 29211-1549



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November 4, 2016

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November 4, 2016

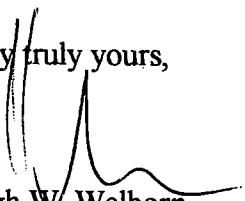
South Carolina Office of Appellate Defense
P. O. Box 11589
Columbia, South Carolina 29211-1589

In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

Dear Sir or Madam:

In connection with the foregoing matter, please be advised that I was the Court Appointed Attorney and enclose herewith a copy of my appointment. I also enclose copies of all documents you requested for filing a copy of the Appellant's Notice of Appeal in this matter together with a copy of the Order and Proof of Service. I ask that your office assume representation of this indigent Applicant.

Very truly yours,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Attorney General
Client

Hugh W. Welborn

Attorney at Law
Post Office Box 173
913 Carolina Circle
Anderson, South Carolina 29622

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(864) 226-5787
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hughwelborn@bellsouth.net

November 4, 2016

Walt Whitmire
Assistant to Attorney General
P. O. Box 11549
Columbia, South Carolina 29211-1549

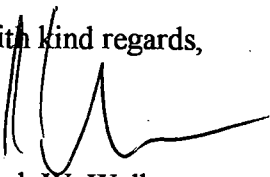
In RE: Dennis Temple #274802 vs. State of South Carolina
Case #: 2013-CP-37-729

Dear Walt:

Please find enclosed herewith a copy of the Appellant's Notice of Appeal, Proof of Service and Order of Dismissal in connection with the foregoing matter. I also enclose copies of correspondence to the Appellate Defense Office and the Supreme Court. I have also forwarded copies of all documents to my client.

If you have any questions, please do not hesitate to contact my office.

With kind regards,



Hugh W. Welborn

HWW/sba
Enclosures

cc: South Carolina Supreme Court
Office of Appellate Defense

STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)

IN THE COURT OF (Select one.)

☒ COMMON PLEAS ☐ FAMILY COURT
TENTH JUDICIAL CIRCUIT

DENNIS TEMPLE,

CASE NO.: 2013-CP-37-729

Plaintiff(s),

APPOINTMENT OF COUNSEL OR GAL

-vs-

(Select one.)

State of South Carolina,

☒ ORDER

Defendant(s).

☐ AMENDED ORDER

TYPE OF CASE/PROCEEDING: (Check one.)

☒ Post-Conviction Relief (PCR)/habeas case	☐ Adoption	☐ Juvenile
☐ SVP case	☐ Custody and/or Visitation	☐ Abuse and Neglect
☐ Minor Name Change	☐ Other:	

It appears that DENNIS TEMPLE, who is a litigant in this case, is entitled to court-appointed counsel or a guardian ad litem.

It further appears that: (Select only one.)

- ☒ counsel/guardian ad litem has not yet been appointed by the court; therefore, an appointment for counsel/guardian ad litem is necessary.
- ☐ counsel or a guardian ad litem was previously appointed by the court but has indicated either a possible conflict of interest, an entitlement to exemption, or other good cause warranting the appointment of new counsel or guardian ad litem based on: _____
- ☐ counsel was previously appointed by the court but has not indicated that the litigant has retained private counsel and is no longer entitled to appointed counsel.
- ☐ court appointed counsel has obtained _____ Esquire as substitute counsel pursuant to Rule 608(h)(2); provided, however, only the member who originally received the appointment and who sought substitute counsel shall receive credit.
- ☐ Other: _____
- ☐ counsel ☐ lead counsel (if capital PCR case) ☐ guardian ad litem

Therefore, it is ordered that _____ hereby is appointed as (Select one.)

for the above-named person. Any counsel or GAL previously appointed is/are hereby relieved.

☐ (If Death Penalty PCR Case) It is further ordered that HUGH WELBORN, P.O. BOX 173, ANDERSON, S. C. 29622, Esquire, is hereby appointed as second counsel in this capital PCR case.

The clerk of court is directed to forward a copy of this order to all persons entitled to notice.

IT IS SO ORDERED THIS 31 DAY OF OCTOBER, 2013.

☐ Circuit Judge

☒ Clerk of Court

NOTICE: SC Supreme Court Order of September 29, 2006, requires appointed counsel entitled to payment from the Office of Indigent Defense (OID) to register the case online with OID within fifteen (15) days of this appointment at www.sccid.sc.gov, and further directs that reimbursement vouchers be submitted directly to SCCID and not to the trial judge or clerk of court. See SCCID website for further details.

1027

AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Dennis Maurice Temple

Petitioner

v.

Warden Joseph McFadden

Respondent)
)
)
)
)
)

Civil Action No. 8-14-3499-JFA

JUDGMENT IN A CIVIL ACTIONThe court has ordered that *(check one)*:

☐ the petitioner *(name)* _____ recover from the respondent *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the petitioner recover nothing, the action be dismissed on the merits, and the respondent *(name)* _____ recover costs from the petitioner *(name)* _____.

☒ other: the petition is dismissed.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Joseph F Anderson, Jr on the record.

Date: September 30, 2014

CLERK OF COURT

s/ L K McAlister, Deputy Clerk

Signature of Clerk or Deputy Clerk

1028

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple, #274802	)	C/A No.: 8:14-3499-JFA-JDA
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
Warden Joseph McFadden,	)	
	)	
Respondent.	)	
	)	

The *pro se* petitioner, Dennis Temple, is a prisoner currently housed at the Leiber Correctional Institution of the South Carolina Department of Corrections. He has filed a petition pursuant to 28 U.S.C. § 2254 challenging his state court conviction and sentence.

The Magistrate Judge assigned to this action¹ has prepared a Report and Recommendation and opines that the petition should be dismissed as premature because petitioner has not exhausted his state remedies. The Report sets forth in detail the relevant facts and standards of law on this matter, and the court incorporates such without a recitation.

Petitioner was advised of his right to file objections to the Report and Recommendation, which was entered on the docket on September 9, 2014. Petitioner, however, failed to file objections. In the absence of specific objections to the Report of

¹ The Magistrate Judge's review is made in accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02. The Magistrate Judge makes only a recommendation to this court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the court. *Mathews v. Weber*, 423 U.S. 261 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1).

1029

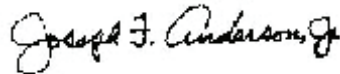
the Magistrate Judge, this court is not required to given any explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983).

After carefully reviewing the applicable laws, the record in this case, and the Report and Recommendation, this court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. The Report is incorporated herein by reference.

Accordingly, the petition is dismissed *without prejudice*. It is further ordered that a certificate of appealability is denied because the petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).²

IT IS SO ORDERED.

September 30, 2014
Columbia, South Carolina



Joseph F. Anderson, Jr.
United States District Judge

² A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (West 2009). A prisoner satisfies this standard by demonstrating that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the court finds that the petitioner has failed to make "a substantial showing of the denial of a constitutional right."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple, #274802,	)	C/A No. 8:14-3499-JFA-JDA
	)	
Petitioner,	)	
	)	
vs.	)	REPORT AND RECOMMENDATION
	)	
Warden Joseph McFadden,	)	
	)	
Respondent.	)	
	)	

Dennis Maurice Temple ("Petitioner"), proceeding pro se, brings this habeas corpus action pursuant to 28 U.S.C. § 2254. Petitioner is a prisoner committed to the South Carolina Department of Corrections ("SCDC"), and he is incarcerated at Lieber Correctional Institution. He challenges his conviction of criminal sexual conduct ("CSC"), first degree (two counts), kidnaping, and grand larceny and his sentence of 100 years imprisonment. The Petition is subject to summary dismissal.

Background

In this habeas corpus action pursuant to 28 U.S.C. § 2254, the first one brought by Petitioner to challenge his December 15, 2010, state conviction by a jury, Petitioner raises three grounds for relief. [Doc. 1 at 1, 5–20.] The grounds for relief include the following—trial judge erred by coercing Petitioner to proceed pro se at the trial; trial judge erred by failing to suppress certain evidence; and, the state committed perjury upon the trial court when it contended that Petitioner's case was fast-tracked due to Petitioner's speedy trial motion. [*Id.* at 5–20.] Petitioner alleges that he raised all of the grounds for relief during his direct appeal, and the South Carolina Court of Appeals dismissed it on September 11, 2013. [*Id.* at 2, 5–20.] He further alleges that he raised ground one—trial

judge erred by coercing Petitioner to proceed pro se at the trial—in his state PCR action. [*Id.* at 5–12, 21.] He alleges that he filed his state PCR action on October 15, 2013, and on July 28, 2014, it was “dismissed” but he has not received a final court order and the PCR action is “pending.” [*Id.* at 3, 11, 21, 23.] Relying on the state rule that issues raised on direct appeal may not be reasserted in a PCR proceeding, it appears that Petitioner may contend that this federal habeas action should be decided despite the pending state PCR action because he also raised ground one in the direct appeal. [*Id.* at 21.]

This Court takes judicial notice that Petitioner has a PCR action pending in the Oconee County Court of Common Pleas, and the state docket indicates that a hearing was held on July 28, 2014, at 1:00 p.m. and no final court order has been entered. See Oconee Cnty. Pub. Index, <http://publicindex.sccourts.org/Oconee/PublicIndex/PISearch.aspx> (enter “Dennis Temple” and “search,” then click “2013CP3700729,” and click “Actions”) (last visited Sept. 9, 2014); see also *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009) (courts “may properly take judicial notice of matters of public record.”); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (“We note that ‘the most frequent use of judicial notice is in noticing the content of court records.’”).

Standard of Review

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(c) DSC, the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the district court. Petitioner filed this action *in forma pauperis* pursuant to 28 U.S.C. § 1915. This statute authorizes the Court to dismiss a case if it is satisfied that the action fails to state a claim on which relief may be granted,

is frivolous or malicious, or seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B). Additionally, this Court is charged with screening Petitioner's lawsuit to determine if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing Section 2254 Cases in the U.S. District Courts (2012); see also Rule 1(b) Rules Governing Section 2254 Cases in the U.S. District Courts (2012) (a district court may apply these rules to a habeas corpus petition not filed pursuant to § 2254).

As a pro se litigant, Petitioner's pleadings are accorded liberal construction and held to a less stringent standard than formal pleadings drafted by attorneys. See *Erickson v. Pardus*, 551 U.S. 89, 93–94 (2007) (per curiam). However, even under this less stringent standard, the Petition is subject to summary dismissal. The requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990).

Discussion

This Petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 should be dismissed because Petitioner has not yet exhausted his state court remedies. With respect to his conviction and sentence, Petitioner may seek a writ of habeas corpus under 28 U.S.C. § 2254 only after he has exhausted his state court remedies. See 28 U.S.C. § 2254(b); *Woodford v. Ngo*, 548 U.S. 81, 92 (2006) (noting that a "state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claims through one 'complete round of the State's established

appellate review process”). To exhaust state court remedies in South Carolina, a direct appeal may be pursued. See *State v. Northcutt*, 641 S.E.2d 873 (S.C. 2007). If a direct appeal was filed and is ultimately unsuccessful, a petitioner may file an application for post-conviction relief (“PCR”) in a court of common pleas. See S.C. Code Ann § 17-27-10 *et seq.* (1976); see also *Miller v. Harvey*, 566 F.2d 879, 880-81 (4th Cir. 1977) (noting that South Carolina’s Uniform Post-Conviction Procedure Act is a viable state court remedy). If a South Carolina prisoner’s PCR application is denied or dismissed by a court of common pleas, a petitioner can file a request for writ of certiorari with a South Carolina appellate court. See S.C. Code Ann § 17-27-100 (1976); *Knight v. State*, 325 S.E.2d 535 (S.C. 1985). In fact, if a petitioner’s PCR application is denied by a court of common pleas, the petitioner must seek appellate review in the state courts or federal collateral review of the grounds raised in his PCR application may be barred by a procedural default. See *Longworth v. Ozmint*, 377 F.3d 437, 447–48 (4th Cir. 2004) (finding that exhaustion requires state prisoners to complete at least one complete round of the state’s established appellate review process by presenting the ground for relief in a face-up and square fashion).

Petitioner contends that he filed an unsuccessful direct appeal in state court, and, thereafter, he filed a state PCR action. Petitioner seems to allege that he exhausted grounds two and three of his § 2254 Petition by raising them in state court on direct appeal. As to ground one of his § 2254 Petition, he contends that he raised it in the pending state PCR action. He seems to contend that because he also raised his federal ground one in the state direct appeal, he improperly asserted it in the state PCR action. If Petitioner had

elected to proceed directly to a federal habeas action after his direct criminal appeal, he may have been permitted to do so because he allegedly had exhausted all grounds for relief during the direct appeal. See *Wolfe v. Weisner*, 488 F.3d 234, 238 n.5 (4th Cir. 2007) (even if a petitioner did not exhaust a claim during the PCR process, it may be exhausted because it was presented and ruled upon by the state high court on direct appeal). However, Petitioner chose to pursue a PCR action, and it is still pending. See S.C. Code Ann § 17-27-10 (1976) (explaining that certain persons *may* institute a PCR action). Even assuming that the state PCR court may have ruled from the bench that it will dismiss the PCR action,¹ no final order has been entered. Moreover, no appeal from the PCR decision has been filed in a state court. Thus, at this point there does not appear to be the absence of available state corrective process. See 28 U.S.C. § 2254(b)(1)(B). The pending PCR action gives the state court a chance to provide Petitioner possible relief.² Accordingly, Petitioner has not yet exhausted his state remedies.

The United States District Court for the District of South Carolina should not keep this case on its docket while Petitioner is exhausting his state remedies.³ See *Galloway v. Stephenson*, 510 F. Supp. 840, 846 (M.D.N.C. 1981) ("When state court remedies have

¹ This is a reasonable inference because Petitioner alleges he was at the hearing, and he believes the judge dismissed the case.

² Additionally, although Petitioner's briefs filed in the state direct appeal and in the state PCR action are not before the Court, it is possible that ground one is worded differently in the PCR action from the wording on direct appeal. In other words, Petitioner may have pursued different legal claims based on similar facts.

³ There are specific time limitations for filing a habeas action in this federal court pursuant to 28 U.S.C. § 2254. See 28 U.S.C. § 2244(d).

not been exhausted, absent special circumstances, a federal habeas court may not retain the case on its docket, pending exhaustion, but should dismiss the petition.").

Recommendation

Accordingly, it is recommended that this action be dismissed without prejudice and without requiring the Respondent to file an answer or return. **Petitioner's attention is directed to the important notice on the next page.**

s/ Jacquelyn D. Austin
United States Magistrate Judge

September 9, 2014
Greenville, South Carolina

**PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY**

United States District Court		District: <i>SOUTH CAROLINA</i>
Name (under which you were convicted): <i>DENNIS MAURICE TEMPLE</i>		Docket or Case No.:
Place of Confinement : <i>Lieber Correctional Institution</i>		Prisoner No.: <i>274802</i>
Petitioner (include the name under which you were convicted) <i>DENNIS MAURICE TEMPLE</i>		Respondent (authorized person having custody of petitioner) <i>Warden Joseph McFadden, Attorney General. Alan Wilson</i>
The Attorney General of the State of <i>South Carolina, Alan Wilson</i>		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
*Oconee County Courthouse, P.O. Box 678;
Walhalla, South Carolina 29691*
(b) Criminal docket or case number (if you know): *2010 - GS - 3700886 - 889*
2. (a) Date of the judgment of conviction (if you know): *December 15, 2010*
(b) Date of sentencing: *December 15, 2010*
3. Length of sentence: *100 Years*
4. In this case, were you convicted on more than one count or of more than one crime? ☒ Yes ☐ No
5. Identify all crimes of which you were convicted and sentenced in this case:
*Count 1 - Criminal Sexual Conduct, First Degree
Count 2 - Criminal Sexual Conduct, First Degree
Count 3 - Kidnapping
Count 4 - Grand Larceny*
6. (a) What was your plea? (Check one)

☒ (1) Not guilty	☐ (3) Nolo contendere (no contest)
☐ (2) Guilty	☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? *N/A*

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☒ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: *SOUTH CAROLINA COURT OF APPEALS*

(b) Docket or case number (if you know): *2011 - 182806*

(c) Result: *APPEAL DISMISSED*

(d) Date of result (if you know): *SEPTEMBER 11, 2013*

(e) Citation to the case (if you know): *STATE V. DENNIS TEMPLE*

(f) Grounds raised: *(1) trial judge erred by coerced appellant to appear pro se at trial; (2) trial judge err when he failed to suppress the evidence obtained from the arrest warrants issued upon a supporting affidavit that did not link appellant to the criminal activity; (3) that the state committed perjury upon the court*

(g) Did you seek further review by a higher state court? ☐ Yes ☒ No

If yes, answer the following:

(1) Name of court: *N/A*

(2) Docket or case number (if you know): *N/A*

(3) Result: *N/A*

(4) Date of result (if you know): *N/A*

(5) Citation to the case (if you know): *N/A*(6) Grounds raised: *N/A*

(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes☒ No

If yes, answer the following:

(1) Docket or case number (if you know): *N/A*(2) Result: *N/A*(3) Date of result (if you know): *N/A*(4) Citation to the case (if you know): *N/A*

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☒ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: *Oconee County Circuit Court*(2) Docket or case number (if you know): *2013-CP-37-00729*(3) Date of filing (if you know): *October 15, 2013*(4) Nature of the proceeding: *Post-conviction Relief*

(5) Grounds raised:

- *U.S. Constitution violations*
- *S.C. Constitution violations*
- *error*
- *ineffective assistance of trial and Appellate*
- *counsel.*
- *Coerced to proceed Pro se during trial*

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes ☐ No(7) Result: *Dismissed*(8) Date of result (if you know): *Pending*

(b) If you filed any second petition, application, or motion, give the same information:

- (1) Name of court: *N/A*
- (2) Docket or case number (if you know): *N/A*
- (3) Date of filing (if you know): *N/A*
- (4) Nature of the proceeding: *N/A*
- (5) Grounds raised: *N/A*

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No *N/A*

(7) Result: *N/A*

(8) Date of result (if you know): *N/A*

(c) If you filed any third petition, application, or motion, give the same information:

- (1) Name of court: *N/A*
- (2) Docket or case number (if you know): *N/A*
- (3) Date of filing (if you know): *N/A*
- (4) Nature of the proceeding: *N/A*
- (5) Grounds raised: *N/A*

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☐ No *N/A*

(7) Result: *N/A*

(8) Date of result (if you know): *N/A*

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☐ Yes ☐ No *N/A*

(2) Second petition: ☐ Yes ☐ No *N/A*

(3) Third petition: ☐ Yes ☐ No *N/A*

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

N/A

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

see attachment Page 17.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See attachment Pages 17, 18, 19, 20 & 21.

(b) If you did not exhaust your state remedies on Ground One, explain why:

Exhausted state remedies by appealing to the South Carolina Court of Appeals. See State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002).

GROUND ONE: "The trial judge erred by what was in effect coercing petitioner to appear pro se at trial because although petitioner waived the right to counsel prior to trial; ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

(a) supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

At trial, Catherine McGough testified that around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit at All Safe Storage located in Seneca, South Carolina, and then began walking to her car when she encountered a black male (whom she identified as petitioner at trial and after viewing a photograph layout after the incident) who wanted her to purchase shoes he was selling at that time. McGough stated that she showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough explained that when she -

Went back to close the door, petitioner pushed her down in the unit and managed to place a belt around her neck. Thereafter, petitioner managed to guide her to another storage unit wherein after he placed his penis and a bottle of solution into her vagina, and then kept her tied up inside the storage room while he fled in her vehicle. McGough stated that she managed to call 911 from a cell phone and waited for police to arrive. Tr. 84, 1. 5 - P. 124, 1. 7.

Oconee officer Neill Burkett testified that he was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. Tr. 158, 1. 7 - P. 162, 1. 6. Officer Brian Danielson transported McGough from the incident location to the local hospital. Tr. 214, 1. 18 - P. 215, 1. 21. Subsequently, Officer Greg Reed created a photographic lay-out, which he showed to McGough, who in turn identified the picture of petitioner as the perpetrator. Tr. 259, 1. 6 - P. 267, 1. 21; Tr. 277, 1. 23 - P. 278, 1. 1.

From the outset of the case, Petitioner expressed his unhappiness with all three of his court appointed attorneys assigned to represent him in the case. At the pretrial hearing dated June 30, 2010, Judge Alexander S. MacCaulay appointed Wilson Burr to represent Petitioner. Tr. 5, l. 5 - P. 6, l. 14. Later, the case was sent out of Burr's office and assigned to trial counsels Sarah Drawdy and Keith Denny. During another pretrial hearing held before Judge Maddox on July 29, 2010, Petitioner requested that Counsels Drawdy and Denny be removed from his case and asked for time in which to obtain private counsel to represent him. Both of Petitioner's requests were granted by Judge Maddox. Tr. 4, l. 3 - P. 10, l. 4. On another pretrial hearing held on September 14, 2010, Judge Maddox learned that Petitioner had not retained private counsel and went on to appoint Kurt Travernier to represent Petitioner in the case. Tr. 4, l. 6 - P. 6, l. 3; Tr. 9, l. 22 - P. 12, l. 20; Tr. 17, l. 6 - P. 19, l. 7. See. Order of Appointment of Counsel dated September 27, 2010. Tr. 78. Then later, during a hearing held on October 21, 2010, Judge Maddox accepted Petitioner's voiced displeasure with Kurt Travernier and his apparent decision to -

represent himself at trial by default, and then appointed Kurt Travernier as stand-by counsel for trial. Tr. 3, l. 22-P. 23, l. 11. See Order of Appointment of Stand-by Counsel dated November 8, 2010. Tr. 111-118. On December 7, 2010, Judge Maddox accepted Petitioner's apparent pro se status for trial and again reiterated that Kurt Travernier would remain seated as stand-by counsel at trial. Tr. 79, l. 18-P. 87, l. 18.

Next, on the actual trial date and minutes after the jury was selected Petitioner requested the full assistance of appointed counsel (presumably Travernier) to represent him at trial, which was in effect Petitioner's Plea to neither proceed pro se nor receive stand-by legal assistance, but rather to receive the full assistance of appointed counsel in the case. Travernier advised the trial judge that Petitioner was requesting "a continuance or that in some way or form that I might be able to represent him in the trial." Tr. 60 l. 7-10. The state argued that this case was fast-tracked due to Petitioner's speedy trial motion and -

that a reversal of petitioner's waiver of his right to counsel would place an undue burden on the prosecution. Tr. 61, l. 10-P. 62, l. 10. The Court ruled as follows:

The Court: I understand your motion. And like I said, one of the main things I want to do is protect your rights, as we talked about last week in answer for an appeal. At this late date, after all the questioning that I've done, I'm gonna deny your motion for a continuance... I understand at this point - I've been concerned all along that we would get up here and you might be overwhelmed with the legal proceedings, but I'm gonna continue to order that Mr. Tavernier sit with you and respond to your questions. Tr. 66, lines 12 - 22.

Petitioner is in state custody in violation of the U.S. Constitution 6th and 14th Amendments.

AO 241
(Rev. 10/17)

Page 7

(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

Did raise this issue

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *Post-Conviction Relief*

Name and location of the court where the motion or petition was filed: *Oconee County Circuit Court, P.O. Box 678, Walhalla 29691*

Docket or case number (if you know): *2013 - CP - 37 - 00729*

Date of the court's decision: *July 28, 2013*

Result (attach a copy of the court's opinion or order, if available):

pending

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? *pending*

☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal?

☐ Yes ☐ No *pending*

(6) If your answer to Question (d)(4) is "Yes," state: *pending*

Name and location of the court where the appeal was filed: *pending*

Docket or case number (if you know): *pending*

Date of the court's decision: *pending*

Result (attach a copy of the court's opinion or order, if available): *pending*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

pending

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One: *none*

GROUND TWO: *See. attachment page 22.*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See. attachment page 22 & 23.

(b) If you did not exhaust your state remedies on Ground Two, explain why:

Exhausted state remedies by appealing to the South Carolina Court of Appeals. See State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002).

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: *N/A*

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *N/A*

Name and location of the court where the motion or petition was filed: *N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

GROUND TWO: "Did the judge err when he failed to suppress the evidence obtained from the arrest warrants that was issued upon a supporting affidavit that did not link petitioner to the criminal activity or storage unit #193 and failed to link the storage unit #193 to petitioner."

(a) supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

On May 10, 2010 Oconee County Sheriff's Department issued (3) three arrest warrants for the petitioner's (Dennis Temple) arrest for kidnapping, criminal sexual conduct, 1st Degree and Grand Larceny based upon the sworn statement of Catherine McGough.

note: This Sworn statement by Catherine McGough never mention petitioner's name or storage unit #193.

The fourth Amendment requires "a nexus ... between the item to be seized and criminal behavior. Warrant invalid because supporting affidavit lacked basis from which the magistrate could infer that evidence of (criminal) activity would be found ... Warrant invalid because supporting affidavit lacked evidence of nexus between contraband and place to searched.

Petitioner is in state custody in violation of the U.S. Constitution 4th and 14th Amendments.

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Result (attach a copy of the court's opinion or order, if available): *N/A*

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No *N/A*

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No *N/A*

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No *N/A*

(6) If your answer to Question (d)(4) is "Yes," state: *N/A*

Name and location of the court where the appeal was filed: *N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two *none*

GROUND THREE: *see. attachment page 24.*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

see. attachment page 24 & 25.

GROUND THREE: "Did the state commit perjury upon the court when it contented that this case was fast-tracked due to petitioners speedy trial motion.

(a) supporting facts (Do not argue or cite law. Just state the specific facts that support your claim):

On December 13, 2010 the actual trial dates and minutes after the jury was selected petitioner requested the full assistance of appointed counsel (presumably Travernier) to represent him at trial, which was in effect petitioner's plea to neither proceed pro se nor receive stand-by legal assistance, but rather to receive the full assistance of appointed counsel in the case. Travernier advised the trial Judge that petitioner was requesting "a continuance or that in some way or form that he might be able to represent him in the trial." Tr. 60, l. 7-10.

The state argued that this case was fast-tracked due to petitioner's speedy trial motion and that a reversal of petitioner's

waiver of his right to counsel would place a undue burden on the Prosecution. Tr. 61.1.10-P. 62.1.10.

However, on July 29, 2010 in a motion hearing held at the Oconee County Courthouse in Walhalla South Carolina in front of the Presiding Judge J. Cordell Maddox Jr. The solicitor or state argued that she was shooting to try this case in December. Tr. 7.1.5-8.

In addition, on September 14, 2010 a hearing was held at the Anderson County Courthouse regarding the state's Schmerber motion in front of the same Judge J. Cordell Maddox Jr. The state contended that it received a fax from the petitioner (or defendant) requesting a speedy trial and indicating that he was proceeding Pro Se. Tr. 4.1.9-10.

The record clearly shows that the state intended to take this case to trial in December 2010. Prior to defendant or (petitioner filing a motion for a fast and speedy trial in the month of August 2010.

petitioner is in state custody in violation of the U.S. Constitution 5th and 14th Amendments.

(b) If you did not exhaust your state remedies on Ground Three, explain why?

Exhausted state remedies by appealing to the South Carolina Court of Appeals. See State v. McKennedy, 348 S.C. 270 559 S.E. 2d 850 (2002).

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: *N/A*

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *N/A*

Name and location of the court where the motion or petition was filed: *N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(3) Did you receive a hearing on your motion or petition? *N/A*

☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? *N/A*

☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No *N/A*

(6) If your answer to Question (d)(4) is "Yes," state: *N/A*

Name and location of the court where the appeal was filed: *N/A*

Docket or case number (if you know): *N/A*

Date of the court's decision: *N/A*

Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three: *None*

GROUND FOUR: *none*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

none

(b) If you did not exhaust your state remedies on Ground Four, explain why: *N/A*

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes

☐ No

N/A

(2) If you did not raise this issue in your direct appeal, explain why: *N/A*

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes

☐ No

N/A

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: *N/A*

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Name and location of the court where the motion or petition was filed: *N/A*Docket or case number (if you know): *N/A*Date of the court's decision: *N/A*Result (attach a copy of the court's opinion or order, if available): *N/A*(3) Did you receive a hearing on your motion or petition? *N/A* ☐ Yes ☐ No(4) Did you appeal from the denial of your motion or petition? *N/A* ☐ Yes ☐ No(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No *N/A*(6) If your answer to Question (d)(4) is "Yes," state: *N/A*Name and location of the court where the appeal was filed: *N/A*Docket or case number (if you know): *N/A*Date of the court's decision: *N/A*Result (attach a copy of the court's opinion or order, if available): *N/A*

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

- (c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: *NONE*

13. Please answer these additional questions about the petition you are filing:

- (a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☐ Yes ☒ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not

presenting them: *Grounds one, two & three have not been presented to the S.C. Supreme Court because it's not required to exhaust state remedies, see State v. McKennedy, 348 S.C. 270, 559 S.E.2d 850 (2002).*

- (b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

N/A

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available. *N/A*

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☒ Yes ☐ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the

raised. *I raised the issue that trial Judge coerced me to proceed pro se in trial, but issues that were raised in trial or on direct appeal cannot be raised for the first time or reasserted on post-conviction Relief. Simmons v. State, 215 S.E.2d 883 (S.C. 1975).*

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: *Sarah Drawdy 2315 N. Main Street, Suite 117, Anderson S.C. 29621; Keith Denny, P.O. Box, 101 Walhalla, SC 29691.*

(b) At arraignment and plea:

Petitioner

(c) At trial: *(stand-by counsel, Kurt Tavernier 110 East Benson Street, Anderson, South Carolina 29624)*

(d) At sentencing: *Kurt Tavernier 110 East Benson Street, Anderson South Carolina 29624*

(e) On appeal: *Wanda H. Carter, S.C. Commission on Indigent Defense P.O. Box 11589, Columbia, S.C. 29211-1589.*

(f) In any post-conviction proceeding:

Hugh W. Welborn, P.O. Box 173, Anderson SC 29622.

(g) On appeal from any ruling against you in a post-conviction proceeding:

Pending

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

none

(b) Give the date the other sentence was imposed: *none*

(c) Give the length of the other sentence: *none*

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

Because I was convicted on December 15, 2010, I timely filed a notice of appeal within 10 days with the -

South Carolina Court of appeals. The South Carolina Commission on Indigent defense assigned me a attorney that commenced my direct appeal. Direct appeal was finalized on September 11, 2013. I filed a Post-conviction Relief application on October 15, 2013 with the Oconee County Circuit Court. This PCR was dismissed on July 28, 2014. The final order has not been issued and received by the petitioner.

Therefore the federal one-year statute of limitation as contained in 28 U.S.C. § 2254 does not bar this petition since petitioner filed a direct appeal and Post-conviction Relief application. The time was tolled during these proceedings and remain tolled until petitioner receive his final order from the Post-conviction Relief Court.

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
 - (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief:

Release from state prison at once.

or any other relief to which petitioner may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 8/26/2014 (month, date, year).

Executed (signed) on 8/26/2014 (date).

Dennis M. Temple

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple, #274802,	)	C/A No. 8:14-3499-JFA-JDA
	)	
Petitioner,	)	
	)	
vs.	)	ORDER
	)	
Warden Joseph McFadden,	)	
	)	
Respondent.	)	
	)	

This is an action seeking habeas corpus relief under 28 U.S.C. § 2254. Petitioner is a prisoner. Therefore, in the event that a limitations issue arises, Petitioner shall have the benefit of the holding in *Houston v. Lack*, 487 U.S. 266 (1988) (prisoner's pleading was filed at the moment of delivery to prison authorities for forwarding to District Court). Under Local Civil Rule 73.02(B)(2) of the United States District Court for the District of South Carolina, pretrial proceedings in this action have been referred to the assigned United States Magistrate Judge.

PAYMENT OF THE FILING FEE:

Petitioner requests to proceed without prepaying the filing fee by filing an Application to Proceed without Prepayment of Fees and Affidavit (Form AO-240), which is construed as a motion for leave to proceed *in forma pauperis*. Based on a review of Petitioner's motion for leave to proceed *in forma pauperis*, it is **granted**.

TO THE CLERK OF COURT:

The Clerk of Court shall serve the § 2254 Petition and this Order upon Respondent pursuant to Rule 4 of the Rules Governing Section 2254 cases. Rule 4 also requires service on "the attorney general or other appropriate officer of the state." The Attorney General of the State of South Carolina and the General Counsel of the South Carolina Department of Corrections shall each receive a copy of this Order and a copy of the 28 U.S.C. § 2254 Petition through the Electronic Case Filing System.

The Clerk of Court shall not enter any change of address submitted by Petitioner which directs that mail be sent to a person other than Petitioner unless that person is an attorney admitted to practice before this Court who has entered a formal appearance.

TO RESPONDENT:

Respondent shall not file an answer to the Petition because the Petition is subject to summary dismissal.

TO PETITIONER:

Petitioner must place the Civil Action Number (C/A No. 8:14-3499-JFA-JDA) listed above on any document filed in this case. **Any future filings in this case must be sent to: 300 East Washington Street, Room 239, Greenville, South Carolina 29601.** All documents requiring Petitioner's signature shall be signed with Petitioner's full legal name written in Petitioner's own handwriting. Pro se litigants shall *not* use the "s/typed name" format used in the Electronic Case Filing System. In all future filings with this Court, Petitioner is directed to use letter-sized (8½ inches x 11 inches) paper only, to write or type text on one side of a sheet of paper only and not to write or type on both sides of any sheet of paper. Petitioner is further instructed not to write to the edge of the paper, but to maintain one inch margins on the top, bottom, and sides of each paper submitted.

Petitioner is a pro se litigant. Petitioner's attention is directed to the following important notice:

You are ordered to always keep the Clerk of Court advised **in writing (300 East Washington Street, Room 239, Greenville, South Carolina 29601)** if your address changes for any reason, so as to assure that orders or other matters that specify deadlines for you to meet will be received by you. If as a result of your failure to comply with this Order, you fail to meet a deadline set by this Court, **your case may be dismissed for violating this Order.** Therefore, if you have a change of address before this case is ended, you must comply with this Order by immediately advising the Clerk of Court in writing of such change of address and providing the Court with the docket number of all pending cases you have filed with this Court. Your failure to do so will not be excused by the Court.

IT IS SO ORDERED.

s/ Jacquelyn D. Austin
United States Magistrate Judge

September 9, 2014
Greenville, South Carolina

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AO 450 (SCD 04/2010) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Dennis Maurice Temple, #274802

Petitioner

v.

Warden Scott Lewis

Respondent)
)
)
)
)
)

Civil Action No. 8-18-cv-3258-JFA

JUDGMENT IN A CIVIL ACTIONThe court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars (\$___), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____.

☒ other: summary judgment is entered for Respondent Warden Scott Lewis.

This action was *(check one)*:

☐ tried by a jury, the Honorable _____ presiding, and the jury has rendered a verdict.

☐ tried by the Honorable _____ presiding, without a jury and the above decision was reached.

☒ decided by the Honorable Joseph F Anderson, Jr.

Date: October 31, 2019

CLERK OF COURT

s/L. K. McAlister

Signature of Clerk or Deputy Clerk

1063IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple,

Petitioner,

vs.

Warden Scott Lewis,

Respondent.

C/A No.: 8:18-03258-JFA-JDA

ORDER**I. INTRODUCTION**

Dennis Maurice Temple (“Petitioner”), is currently incarcerated in the South Carolina Department of Corrections pursuant to an order of commitment of the Oconee County Clerk of Court. Petitioner, proceeding *pro se*, filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. (ECF No. 1). On April 1, 2019, Warden Scott Lewis (“Respondent”) filed a Motion for Summary Judgment along with a return to the Petition and memorandum of law in support. (ECF Nos. 24 & 25). On April 2, 2019, the court advised Petitioner of the summary judgment procedure and the possible consequences if he failed to respond via an order issued pursuant to *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975). (ECF No. 26). Petitioner filed a response on April 25, 2019, to which Respondent filed a reply on May 2, 2019. (ECF Nos. 31 & 33). In accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.), this matter was referred to the Magistrate Judge.

The Magistrate Judge assigned to this action¹ prepared a thorough Report and Recommendation (“Report”) and opines that this court should grant Respondent’s Motion for Summary Judgment and dismiss the petition because (1) Grounds One and Two of the petition fail to state a claim for relief; and (2) Ground Three is not a cognizable issue in a federal habeas action. (ECF No. 34). The Report sets forth, in detail, the relevant facts and standards of law on this matter, and this court incorporates those facts and standards without a recitation.

The court is charged with making a *de novo* determination of those portions of the Report to which specific objections are made, and the court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b)(1). However, a district court is only required to conduct a *de novo* review of the specific portions of the Magistrate Judge’s Report to which an objection is made. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b); *Carniewski v. W. Virginia Bd. of Prob. & Parole*, 974 F.2d 1330 (4th Cir. 1992). In the absence of specific objections to portions of the Report of the Magistrate, this court is not required to give an explanation for adopting the recommendation. *See Camby v. Davis*, 718 F.2d 198, 199 (4th Cir. 1983). Thus, the court must only review those portions of the

¹ The Magistrate Judge’s review is made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(c) (D.S.C.). The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261 (1976). The Court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. *See* 28 U.S.C. § 636(b).

Report to which Petitioner has made a specific written objection. *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310, 316 (4th Cir. 2005).

“An objection is specific if it ‘enables the district judge to focus attention on those issues—factual and legal—that are at the heart of the parties’ dispute.’” *Dunlap v. TM Trucking of the Carolinas, LLC*, No. 0:15-cv-04009-JMC, 2017 WL 6345402, at *5 n.6 (D.S.C. Dec. 12, 2017) (citing *One Parcel of Real Prop. Known as 2121 E. 30th St.*, 73 F.3d 1057, 1059 (10th Cir. 1996)). A specific objection to the Magistrate’s Report thus requires more than a reassertion of arguments from the complaint or a mere citation to legal authorities. See *Workman v. Perry*, No. 6:17-cv-00765-RBH, 2017 WL 4791150, at *1 (D.S.C. Oct. 23, 2017). A specific objection must “direct the court to a specific error in the magistrate’s proposed findings and recommendations.” *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982).

“Generally stated, nonspecific objections have the same effect as would a failure to object.” *Staley v. Norton*, No. 9:07-0288-PMD, 2007 WL 821181, at *1 (D.S.C. Mar. 2, 2007) (citing *Howard v. Sec’y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)). The court reviews portions “not objected to—including those portions to which only ‘general and conclusory’ objections have been made—for *clear error*.” *Id.* (emphasis added) (citing *Diamond*, 416 F.3d at 315; *Camby*, 718 F.2d at 200; *Orpiano*, 687 F.2d at 47).

Petitioner was advised of his right to object to the Report, which was entered on the docket on June 20, 2019. (ECF No. 34). Petitioner filed objections to the Report on July 19, 2019, and later filed amended objections on August 26, 2019 (together the

“Objections”). (ECF Nos. 41 & 48). Respondent replied to the original objections on July 24, 2019, and again to the amended objections on September 9, 2019. (ECF Nos. 43 & 50). Thus, this matter is ripe for review.

II. LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A material fact is one that “might affect the outcome of the suit under the governing law.” *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute of material fact is “genuine” if sufficient evidence favoring the non-moving party exists for the trier of fact to return a verdict for that party. *Anderson*, 477 U.S. at 248–49.

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex*, 477 U.S. at 323. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e). All inferences must be viewed in a light most favorable to the non-moving party, but he “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

III. DISCUSSION

Petitioner’s habeas petition raises the following three issues:

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GROUND ONE: The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

GROUND TWO: The PCR court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the record on appeal.

GROUND THREE: Did the General Sessions Court have jurisdiction to hear appellant's criminal case when the magistrate court never established it had probable cause to detain appellant on the arrest warrants.

(ECF No. 1-1).

Initially, the Magistrate Judge stated that Ground Three is not a cognizable claim under § 2254 because federal habeas actions provide for review of solely federal law claims and subject matter jurisdiction of a state court is a state law issue not cognizable here. *Estelle v. McGuire*, 502 U.S. 62, 67068 (1991); *Wright v. Angelone*, 151 F.3d 151, 158 (4th Cir. 1991); *Wills v. Egeler*, 532 F.2d 1058, 1059 (6th Cir. 1976) (holding that a “[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary.”). Petitioner's objections on this issue fail to address this court's inability to adjudicate this claim as it is a state law claim and merely rehash his original arguments. A specific objection to the Magistrate's Report requires more than a reassertion of arguments from the Complaint or a mere citation to legal authorities. *See Workman v. Perry*, No. 6:17-cv-00765-RBH, 2017 WL 4791150, at *1 (D.S.C. Oct. 23, 2017). Accordingly, there is no error in the Report.

Even if this claim was cognizable, Petitioner's arguments would still fail because any jurisdictional challenge based on an alleged lack of probable cause was cured by the indictment returned by the grand jury in Petitioner's original criminal action. *Thompson v. State*, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968).

Additionally, Petitioner seems to assert within his Objections that he was subject to an unlawful search or seizure under the Fourth Amendment. (ECF No. 48 p. 29-37). These assertions have no bearing on the Magistrate Judge's above conclusion and therefore fail to identify any error in the Report.

As to Grounds One and Two, the Magistrate Judge opines that:

Under the AEDPA, a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2).

[A] decision cannot be contrary to or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas relief for petitioners. *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (citing *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006)); see *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

(ECF No. 34 p. 17-18).

Specifically, with regards to Ground One, the Report states:

Petitioner concedes that he waived his right to counsel before trial; however, Petitioner contends that he subsequently rescinded that waiver and re-asserted his right to counsel after the jury had been selected. [Doc. 1-1 at 5–12.] The United States Supreme Court “has never explicitly addressed a criminal defendant’s ability to reassert his right to counsel once he has validly waived it.” *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (internal

quotation marks omitted). Because the Supreme Court has never squarely addressed the issue, the state court's decision not to continue Petitioner's trial so that he could proceed with counsel is not contrary to clearly established federal law. *Lopez v. Smith*, 574 U.S. 1, 2 (2014); *Marshall*, 569 U.S. at 64.

(ECF No. 34 p. 19).

In response to this conclusion, Petitioner claims that the "trial judge erred in allowing appellant to be tried without the assistance of counsel because although appellant waived the right to counsel prior to trial, he rescinded that waiver after the jury was selected and re-asserted his right to the assistance of appointed counsel to represent him at trial. This error violated petitioner's sixth amendment right to counsel." (ECF No. 48 p. 9). Petitioner also claims that he "did not receive his required *Faretta*² warning again prior to trial that he had a right to counsel and that there were dangers and disadvantages associated with self representation." *Id.*

Petitioner's Objections again mirror those arguments previously asserted within his petition and opposition to the motion for summary judgment. Moreover, they fail to show that the trial judge's denial of a continuance to proceed with representation after Petitioner's valid waiver of counsel, and subsequent attempt to rescind, was a decision contrary to clearly established law. See *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013). Additionally, Petitioner's unsupported assertion that he was somehow prejudiced because he did not receive a separate subsequent *Faretta* hearing is without merit because Petitioner clearly states that he was "advised under the *Faretta* requirements" of his rights prior to validly waiving his right to counsel. (ECF No. 48 p. 6).

² *Faretta v. California*, 422 U.S. 806 (1975).

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Lastly, as to Ground Two, the Magistrate Judge states:

The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the court applied the applicable Supreme Court precedent. Second, the record fails to demonstrate that the PCR court confronted a set of facts that was materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from Supreme Court precedent. There is no indication that appellate counsel's representation was deficient or that Petitioner was prejudiced as a result. Although appellate counsel failed to raise the probable cause issue in her brief, Petitioner has failed to show that he was prejudiced by that omission.

(ECF No. 34 p. 21-22). Within the Objections, Petitioner argues that appellate counsel's failure to include transcripts from his preliminary hearing prejudiced him because, "if probable cause was established at the preliminary hearing, such a decision could have been the subject of appellate counsel's appeal. Additionally, in the light most favorable to the petitioner, testimony at the preliminary hearing could have indicated that the underlying warrants were unsupported by probable cause." (ECF No. 48 p. 16). Yet again, these arguments are a mere rehashing of Petitioner's original claims for relief.

Accordingly, Petitioner has failed to show any error in the Report. Even so, just as the PCR court originally held, the record available to the court indicated that Petitioner's arrest was supported by probable cause. Thus, Petitioner could show no prejudice from a failure to include the preliminary hearing transcript in the record for appeal. Moreover, as discussed above, the subsequent grand jury indictment cured any alleged deficiencies in the arrest warrants. Therefore, appellate counsel could not have been ineffective for failing to raise the probable cause issue or for failing to include relevant transcripts because even

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if the arrest warrants were improper, the prosecution could have proceeded on the indictment.

None of Petitioner's attempted Objections address the Magistrate Judge's proposed findings or point to any errors in the Report. Petitioner continuously reasserts his same arguments from his initial petition. Thus, Petitioner has not asserted any specific objections. "Generally stated, nonspecific objections have the same effect as would a failure to object." *Staley v. Norton*, No. 9:07-0288-PMD, 2007 WL 821181, at *1 (D.S.C. Mar. 2, 2007) (citing *Howard v. Sec'y of Health and Human Servs.*, 932 F.2d 505, 509 (6th Cir. 1991)). To the extent that any of Petitioner's arguments could constitute specific objections, they fail to indicate any errors within the Report as discussed above.

IV. CONCLUSION

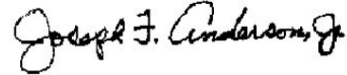
After carefully reviewing the applicable laws, the record in this case, the Report and Recommendation, and the objections thereto, this Court finds the Magistrate Judge's recommendation fairly and accurately summarizes the facts and applies the correct principles of law. Accordingly, the Court adopts the Report and Recommendation (ECF No. 34). Thus, Respondent's Motion for Summary Judgment (ECF No. 25) is granted and Petitioner's habeas petition (ECF No. 1) is dismissed with prejudice.

It is further ordered that a certificate of appealability is denied because Petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).³

³ A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A prisoner satisfies this standard by demonstrating

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IT IS SO ORDERED.



October 31, 2019
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge

that reasonable jurists would find both that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Rose v. Lee*, 252 F.3d 676, 683 (4th Cir. 2001). In the instant matter, the Court finds that Petitioner has failed to make “a substantial showing of the denial of a constitutional right.”

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple,	)	C/A No. 8:18-cv-03258-JFA-JDA
	)	
vs.	)	
	)	
Warden Scott Lewis,	)	REPLY TO PETITIONER'S
	)	AMENDED OBJECTIONS
Respondent.	)	
	)	
_____	)	

Respondent, above-named, by and through the undersigned attorneys, would respectfully Reply to Petitioner's Amended Objections to the Report and Recommendation of the Honorable Magistrate. Petitioner's Objections are without merit.

First, Petitioner's objections are still general in nature and simply restate his arguments in his federal habeas petition, therefore they must be denied.

Second, for the reasons set forth in the Magistrate's Report and Recommendation and Respondent's Return and Memorandum of Law in Support of the Motion for Summary Judgment, incorporated herein by reference, the Magistrate correctly and appropriately denied Petitioner's Ground one. Respondent need not state any further response to the Amended Objection to Ground one.

Third, for the reasons set forth in the Magistrate's Report and Recommendation and Respondent's Return and Memorandum of Law in Support of the Motion for Summary Judgment, incorporated herein by reference, the Magistrate correctly and appropriately denied Petitioner's Ground two. Further, Petitioner's argument his preliminary hearing transcript should have been included on appeal has no merit because the record reflects probable cause was found at that hearing and several subsequent hearings. And, Petitioner was indicted by the Oconee County

grand jury. Further, as set forth below in the discussion of Ground three, the evidence against Petitioner was not the result of his arrest on his arrest warrants but the result of a search warrant executed on his storage bin, a Schmerber Order obtaining his DNA, and the victim's eyewitness identification. Finally, officers had probable cause to arrest Petitioner without a warrant for a felony.

Fourth, for the reasons set forth in the Magistrate's Report and Recommendation and Respondent's Return and Memorandum of Law in Support of Motion for Summary Judgment, incorporated herein by reference, the Magistrate correctly and appropriately denied Petitioner's Ground two. Respondent would also note, in his Amended Objections, under Ground three, Petitioner now seems to argue he was subject to an unlawful search or seizure under the Fourth Amendment. Such a claim is not cognizable on federal habeas review. Stone v. Powell, 428 U.S. 465 (1976). Further, as noted by the Magistrate in the Report and Recommendation, the original claim, a lack of jurisdiction in the state Court of General Sessions, is not cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67068 (1991); Wright v. Angelone, 151 F.3d 151, 158 (4th Cir. 1991); Wills v. Egeler, 532 F.2d 1058, 1059(6th Cir. 1976)(holding that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary."). Even if such a claim were cognizable in federal habeas review, there is no merit to Petitioner's argument. The Circuit Court of General Sessions has subject matter jurisdiction to try the crimes of CSC 1st, Kidnapping, and Grand Larceny. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)(subject matter jurisdiction is the inherent power of the court to hear a certain class of cases); Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012)(similar). And, the Court of General Sessions for Oconee County had personal jurisdiction over Petitioner as the crimes were committed in Oconee County by Petitioner, he was arrested

there, and he appeared for court and was tried there. State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); Shelton v. State, 239 S.C. 535, 123 S.E.2d 867 (1962); State v. Orr, 225 S.C. 369, 82 S.E.2d 523 (1954) State v. Bethea, 88 S.C. 515, 70 S.E. 11 (1911); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). As a result, there is no merit to this ground and it must be denied and dismissed with prejudice.

In any event, Petitioner's subsequent indictment by the Oconee County Grand Jury cures any alleged deficiencies in the arrest warrants. **(R. 684-91; App. 894-901).** Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968)(indictment by grand jury cures any defect in the arrest warrant). The illegality of an arrest or arrest warrant will not bar a person's subsequent prosecution and conviction if properly indicted by a grand jury with proper jurisdiction. State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1972); State v. Holiday, 255 S.C. 142, 177 S.E.2d 541 (1970); State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). *See also* Frisbie v. Collins, 342 U.S. 519 (1952). The grand jury made independent findings of probable cause on each indictment. Petitioner was indicted by the Oconee County grand jury on September 7, 2010 for CSC 1st, Kidnapping, and Grand Larceny (Ind. #s 2010-GS-37-887, 889, 888, & 886). **(App. 894-901).** Even if there was some error in Petitioner's arrest warrants, Petitioner's indictments supersede the arrest warrants.

In his Amended Objections under Ground three, Petitioner also conflates the probable cause set forth in the arrest warrant affidavits with that set forth in the search warrant affidavit. There is no merit to Petitioner's argument here. The evidence of Petitioner's guilt used at trial was obtained through a lawful search warrant for his storage bin, where the crimes occurred, and

through a lawful Schmerber Order to obtain his blood for DNA purposes. [Petitioner's DNA was found in the rectal swab from the victim's rape protocol kit.] Further, Petitioner was identified by the victim at trial and from a photographic line-up prior to his arrest. As a result, the evidence of Petitioner's guilt was not the result of an illegal or improper arrest, which could be suppressed [See Whiteley v. Sarden, 401 U.S. 560, 564-565 (1971); Overton v. Ohio, 122 S.Ct. 389 (2001)(*Mem. Dec.*); Giordenello v. United States, 357 U.S. 480, 486 (1958)], but through other lawful or independent means, which could not be suppressed.

Finally, a law enforcement officer may make a warrantless arrest where he has probable cause to arrest a suspect for having committed a felony. State v. Retford, 276 S.C. 657, 281 S.E.2d 411 (1981); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Thompson, 304 S.C. 85, 403 S.E.2d 139 (Ct. App. 1991); *see e.g.* State v. Redding, 252 S.C. 312, 166 S.E.2d 219 (1969)(where victim immediately contacted police following rape, and gave detailed description of the suspect, and possible name, officer had reasonable grounds to believe a felony had been committed and that suspect was the person described by the victim); State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974)(detailed description of vehicle, suspect, and contents of vehicle from rape victim supported the arrest of person and driving vehicle matching description); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966)(officer had reason to believe a felony had been committed by defendant where rape victim knew the identity of her assailant, and promptly reported the matter to her neighbor, after being released by defendant). As a result, the investigators in this case could arrest Petitioner without a warrant because they had probable cause to believe Petitioner had committed two (2) felonies, CSC 1st and Kidnapping.

Police had responded to an urgent 911 call of the victim that she had been kidnapped and

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raped in the storage bin across from her storage bin. Police had to physically break into the storage bin where the victim was calling from and found the victim who told them of her abduction and rape by the person who owned the storage bin. She then identified Petitioner from a photographic line-up at the hospital as the person who kidnapped and raped her. Police had probable cause to arrest Petitioner for a felony [kidnapping and CSC] without a warrant. Retford, 276 S.C. 657, 281 S.E.2d 411; Roper, 274 S.C. 14, 260 S.E.2d 705; Jones, 273 S.C. 723, 259 S.E.2d 120; Thomas, 248 S.C. 573, 151 S.E.2d 855; Thompson, 304 S.C. 85, 403 S.E.2d 139; Redding, 252 S.C. 312, 166 S.E.2d 219; Bell, 263 S.C. 239, 209 S.E.2d 890.

Therefore, Petitioner's amended objections to the Report and Recommendation should be overruled and the Report and Recommendation adopted in full.

Respectfully submitted,

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Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
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J. ANTHONY MABRY
Senior Assistant Attorney General
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By: s/J. Anthony Mabry
ATTORNEYS FOR RESPONDENTS

September 9, 2019.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple

Petitioner,

VS.

Warden, Scott Lewis

Respondent.

CIVIL ACTION NO.:

8:18-CV-3258-JFA-JDA

Petitioner's

AMENDED

OBJECTION'S

TO

MAGISTRATE

JUDGE

Report and Recommendation

Petitioner, Dennis Maurice Temple, pursuant to Rules 15(a) and 19(a) Fed. R. Civ. P. requests leave to file an Amended objections To magistrate Judge Report and Recommendation.

1. The petitioner in his original objections to magistrate Judge Report and Recommendation. "Basis for the objection" on Ground one should include the following:

It is beyond dispute that "the Six Amendment safeguards to an accused who faces incarceration the right to counsel at

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The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived the right to counsel prior to trial; ultimately, he rescinded that waiver after the Jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

At trial, Catherine McGough testified that around 4:30 P.M. on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit at All Safe Storage located in Seneca, South Carolina, and then began walking to her car when she encountered a black male (whom she identified as appellant at trial and after viewing a photograph layout after the incident) who wanted her to purchase shoes he was selling at that time. McGough stated that she showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough explained that when she went back to close the door, appellant pushed her down in the unit and managed to place a belt around her neck. Thereafter, appellant managed to guide her to another storage

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unit where in after he placed his penis and a bottle of solution into her vagina, and then kept her tied up inside the storage room while he fled in her vehicle. McGough stated that she managed to call 911 from a cell phone and waited for police to arrive. Tr. 84, 15-P. 124, 1.7.

Oconee officer Neil Burkett testified that he was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. Tr. 158, 1.7-P. 162, 1.6. officer Brian Danielson transported McGough from the incident location to the local hospital. Tr. 214, 1.18-P. 215, 1.21. subsequently, officer Greg Reed created a photographic lay-out, which he showed to McGough, who in turn identified the picture of appellant as the perpetrator. Tr. 259, 1.6-P. 267, 1.21; Tr. 277, 1.23-P. 278, 1.1.

From the outset of the case, appellant expressed his unhappiness with all three of his court appointed attorneys assigned to represent him in the case. At the pretrial hearing dated June 30, 2010, Judge Alexander S. MacColey appointed Wilson Burr to represent

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appellant. Tr. 5.1.5-P. 6.1.14. Later, the case was sent out of Burris office and assigned to trial counsels Sarah Drawdy and Keith Denny. During another pretrial hearing held before Judge Maddox on July 29, 2010, appellant requested that counsels Drawdy and Denny be removed from his case and asked for time in which to obtain private counsel to represent him. Both of appellant's requests were granted by Judge Maddox. Tr. 4.1.3 - P. 10.1.4. On another pretrial hearing held on September 14, 2010, Judge Maddox learned that appellant had not retained private counsel and went on to appoint Kurt Travernier to represent appellant in the case. Tr. 4.1.6-P. 6.1.3; Tr. 9.1.22-P. 12.1.20; Tr. 17.1.6-P. 19.1.7. See Order of Appointment of Counsel dated September 27, 2010. Tr. 78. Then later, during a hearing held on October 21, 2010, Judge Maddox accepted appellant's voiced displeasure with Kurt Travernier and his apparent decision to represent himself at trial by default, and then appointed Kurt Travernier as stand-by counsel for trial. Tr. 3.1.22-P. 23.1.11. See order of appointment of stand-by counsel dated November 8, 2010. Tr. 111-118. On December 7, 2010, Judge Maddox

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accepted appellant's apparent pro se status for trial and again reiterated that Kurt Travernier would remain seated as stand-by counsel at trial. Tr. 79.1.18-P. 87.1.18.

Next, on the actual trial date and minutes after the jury was selected appellant requested the full assistance of appointed of counsel (Presumably Travernier) to represent him at trial, which was in effect appellant's plea to neither proceed pro se nor receive stand-by legal assistance, but rather to receive the full assistance of appointed counsel in the case. Travernier advised the trial judge that appellant was requesting "a continuance or that in some way or form that i might be able to represent him in the trial." Tr. 60.1.7-10. The state argued that this case was fast-tracked due to appellant's speedy trial motion and that a reversal of appellant's waiver of his right to counsel would place an undue burden on the prosecution. Tr. 61.1.10-P. 62.1.10. The court ruled as follows:

The court: I understand your motion. And like i said, one of the main things I want to do is protect your rights, as we talked about last week in answer for an appeal. At this late date, after all the questioning that I've done, I'm gonna

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deny your motion for a continuance
I understand at this point - I've been
concerned all along that we would get up
here and you might be overwhelmed with
the legal proceedings, but I'm gonna
continue to order that Mr. Travernier sit
with you and respond to your questions.
Tr. 66, lines 12-22.

It is well established that Per Faretta
v. California, 422 U.S. 806 (1975). that an
accused may waive his Sixth Amendment
right to counsel and proceed pro se at trial.
State v. Roberts, 369 S.C. 580, 632 S.E. 2d
871 (2007), State v. Thompson, 355 S.C. 255,
584 S.E. 2d 131 (2003), State v. Boykin, 324 S.C.
552, 478 S.E. 2d 689 (1996). To effectuate a
valid waiver of the right to counsel, the
two-pronged Faretta test requires that
the accused be advised of his right to
counsel and adequately waived of the
dangers of self-representation. State
v. Thompson, supra. Although appellant
was advised under the Faretta require-
ments; nonetheless, immediately after
the jury selection, appellant put forth
a waiver of his prior waiver of the right
to trial counsel's assistance at trial, but
the trial judge failed to grant the waiver
of his counsel waiver.

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A waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). Therefore, inasmuch as appellant had a right to waive counsel and appear pro se, he also had a right to waive his right to appear pro se and then re-assert his right to counsel de novo. It is apparent from the record that his second waiver was a valid waiver because appellant stated that he indeed wanted the continuance to consult with Travernier so that he (Travernier) could represent him; however, he "got tied up" on other motions (venue changes and pretrial publicity) and forgot to ask, but he was asking for Travernier to represent him at trial. Tr. 60, l. 24 - P. 61, l. 7; Tr. 62, l. 12 - P. 63, l. 10. Therefore, since appellant validly waived the known right to self representation, which really occurred by default prior to trial, and then chose to re-assert his Sixth Amendment right to counsel, this second waiver (of self representation) should have been received and the full appointment of counsel re-instated as opposed to a summary dismissal of the second waiver.

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Furthermore, it appeared as though appellant's request for counsel was dismissed in part due to the fact that appellant was displeased with all assigned attorneys, which led to the assumption that the counsel issue was being used as a dilatory tactic to delay his trial. However, in cases where it is believed that intentional delay is suspected when a client makes motions regarding counsel's assistance, the trial judge is required to inquire as to the reason for a request regarding counsel and ascertain whether there is good cause for the request. See United States v. Goldberg, 67 F3d. 1092 (3rd cir. 1995). Here, it appears that appellant had good cause for re-asserting his right to counsel to the extent that his pre-occupation with his pre-trial motions rendered him with the inability to approach the court again about his pro se waiver and the re-assertion of his right to the full assistance of counsel in the case.

At best, due process requires a hearing on "the record", especially in waiver of counsel questions "to be sure, the ... record is competent" regarding the matter in keeping with Johnson v. Zerbst, see Super-

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intendant of the Powhatan Correction Center v. Barnes, 221 Va. 780, 273 S.E.2d 558 (1981), and United States v. Goldberg, supra. As it stood, appellant did not receive his required Faretta warnings again prior to trial that he had a right to counsel and that there were dangers and disadvantages associated with self representation.

The Sixth Amendment clearly state that in all criminal cases, the accused shall have the assistance of counsel for his defense and if indigent, the accused shall have appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is per se reversible error and never harmless error, Chapman v. California, 386 U.S. 18 (1967).

The trial judge erred in allowing appellant to be tried without the assistance of counsel because although appellant waived the right to counsel prior to trial, he rescinded that waiver after the jury was selected and re-asserted his right to the assistance of appointed counsel to represent him at trial. This error violated petitioner's Sixth Amendment right to counsel, which is also guaranteed under article 1, § 14 of the South Carolina State Constitution.

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2. The petitioner in his original objections to Magistrate Judge Report and Recommendation. "Basis for the objection" On Ground two should include the following:

The PCR court erred in granting Summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

Petitioner testified that appellate counsel was ineffective for failing to include all of the pre-trial transcripts, including the preliminary hearing transcript, in the record. APP. 856 1. 9- APP. 857 1, 15. In particular, Petitioner alleged that the court did not have jurisdiction to hear his case due to a defect with the arrest warrant, namely that there was a lack of Probable Cause:

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Based on the fact that there was no probable cause to arrest me -- I was arrested on these arrest warrants, detained, A preliminary hearing was held on July the 16th, 2010. A Preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the state presented there probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

APP. 858 11. 6-15.

A transcript from that hearing is unavailable. Petitioner later testified: "I think that my appellate counsel was ineffective by the very fact that she proceeded with my appeal with not receiving all the transcripts. There could have been more motions that was objected to." APP. 866 11. 10-13.

On cross-examination the following exchange took place:

Q: So you're alleging appellate counsel

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was ineffective for not providing the court with all of your preliminary hearing transcripts: is that correct?

A: No. I'm alleging that appellate counsel was not effective because she proceeded on my appeal and not had all the transcripts.

Q: Now, what is this transcript you're speaking of? what date it is?

A: July the 16th, 2010.

Q: What judge was it before?

A: It was before -- I'm not sure because I don't even have the transcript.

Q: You can't remember?

A: No. I don't.

Q: Did you ever request this supposed transcript at your trial?

A: Mr. Welborn, I asked my attorney --

Q: I mean at your trial.

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A: Did I ever request it?

Q: uh-huh (affirmative) A copy of it.

A: It's a part of the record, isn't it?

Q: This July transcript you speak of doesn't exist. That's why I'm asking you. Did you make any effort to locate it or track it down?

A: well, my attorneys requested all the transcript that was available.

APP. 869 l. 15 - APP. 870 l. 15.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); see Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed. 2d 756 (2000) (finding that even where appellate counsel believes his or her client's appeal is without merit and thus files an Anders brief, the appellant may have been

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entitled to a merits brief and the challenge of appellate counsel's performance should be reviewed under Strickland.).

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (2009). In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997),

"under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013).

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

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Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact.

Baughman, 306 S.C. at 115, 410 S.E.2d at 545.

With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party.

Summer v. Carpenter, 328 S.C. 36, 492

S.E.2d 55 (1997). Summary judgment is not appropriate where inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp. 341 S.C. 372, 534 S.E.2d 688 (2000).

Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E. 2d 447 (1976).

If probable cause was established at the preliminary hearing, such a decision could have been the subject of appellate counsel's appeal. Additionally, in the light most favorable to Petitioner, testimony at the preliminary hearing could have indicated that the underlying warrants were unsupported by probable cause. The transcript from this hearing, if available, should have been included in the Record on Appeal in order to allow the South Carolina Court of Appeals the opportunity to conduct meaningful appellate review of the underlying record. Without a copy of that transcript, the court's decision

was made based on an incomplete record.

Furthermore, if Petitioner was unrepresented and proceeded at the preliminary hearing without the assistance of counsel, the probable cause determination may have been exceedingly unfair.

At the time of Petitioner's PCR hearing, there existed a genuine issue of material fact as to the contents of a transcript from the preliminary hearing. Summary judgment was improper, because a triable issue of fact existed regarding the probable cause determination and whether it was supported by facts as required by the Fourth Amendment.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. "A search compromises the individual

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interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed. 2d 112 (1990)).

ARGUMENT II

The PCR court erred in granting Summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

"A new trial is appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." STATE V. Ladson, 373 S.C. 320, 644 S.E.2d 271 (S.C. 2007).

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We conclude from China and its progeny, combined with a review of the law of other jurisdictions, that our supreme court would require a reconstructed record on appeal to allow for "meaningful appellate review." A new trial is therefore appropriate if the appellant establishes that "the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." IN re D.W. 171 N.C. App. 496, 615 S.E. 2d 90, 94 (2005). See also State v. Chanze, 211 W. Va. 257, 565 S.E. 2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from reconstructed record, a new trial is appropriate). See State v. Ladson, 373 S.C. 320, 644 S.E. 2d 271 (S.C. 2007).

Our fourth circuit, stated "A criminal defendant has a right to a meaningful appeal based on a complete transcript. See Hardy v. United States, 375 U.S. 277, 279, 84 S.Ct. 424, 11 L.Ed. 2d 331 (1964). When a transcript is less than complete, the

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Court must determine, whether the alleged omissions or deficiencies justify a new trial. IN United States v. Gillis, we held that whether an omission from a transcript warrants a new trial depends on whether the appellant has demonstrated that the omission "specifically prejudices his appeal . . ." 773 f.2d 549 (4th cir. 1985).

IN violation of Petitioner's fourth and sixth Amendment of the United States Constitutions.

3. The petitioner in his original objections to magistrate Judge Report and Recommendation, "Basis for the Objection" on Ground Three should include the following:

Did the General Session Court have Jurisdiction to hear appellants criminal case. When the Magistrate Court never established it had Probable cause to detain appellant on the arrest warrants.

FACTS

1. Petitioner Dennis M. Temple was a 38 Year-old blackmale from Seneca, South Carolina. In 2009, Petitioner began a small business buying product at low prices and reselling them at higher prices. His business began to do well and he researched different storage facilities. Petitioner selected All safe Storage in Seneca, South Carolina because of the security features it advertised and location. On March 22, 2010 Petitioner went into the All safe storage in Seneca, South Carolina and signed a contract to rent a storage Unit.

2. On April 2010 a 19 year-old white female clemson university student, named catherine mcgough rented a storage unit at the All safe storage in Seneca, South Carolina.

3. On May 10, 2010 catherine mcgough alleged in her seven (7) Page Sworn written statement to police at the Dconee medical Center...

In conclusion that, "On May 9, 2010 she arrived at her storage Unit at the All Safe storage in Seneca, South Carolina at 4:30 P.M. when she noticed a blackman between the

age 20 to 40 walking on site without a car. she became nervous and he tried to sell her some shoes, but she did not want to buy. He then beat her up, dragged her into his storage unit where he raped her, cleaned her out with a blue cloth and stole her car and left her inside his storage unit tied up. Ultimately, she freed herself and found a cell phone inside the storage unit. She then called 911 and a Oconee County Sheriff officer rescued her from the storage unit Afterwards, she was taken to the Oconee County medical center. (APP. P. 789-795).

4. Later that day, On May 10, 2010 a Oconee County Sheriff's officer named Sergeant, Scott Arnold had magistrate Judge Blake Norton issued three (3) arrest warrants for petitioners arrest for allegedly committing the crimes of criminal sexual conduct, first degree, Grand Larceny and kidnapping at the All safe storage in Seneca, South Carolina.

5. On May 10, 2010 Scott Arnold a Oconee County Sheriff officer Swear'd in his arrest warrant affidavit for criminal sexual conduct, first degree that the petitioner Dennis Temple did commit the crime set forth and that probable cause is based on the following, "Quote"

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"The Defendant Did, on 05-09-10, while committing the crime of kidnapping engage in sexual Battery upon the victim, Catherine McGough, by performing sexual intercourse on the victim against her will. The Defendant Did while at Unit 193, All safe storage, 600 Shiloh RD. Seneca, SC in Oconee County force sexual intercourse with the victim, victim was Transported to OMC for examinations. Investigated by OCSO. (A written Report, Photograph and statements are on file. case # 1012105. (APP. P. 796).

6. In addition, On May 10, 2010 Sgt. Scott Arnold Swear in his arrest warrant affidavit for Grand Larceny that there is probable cause to believe that the defendant (or petitioner) Dennis Temple did commit the crime set forth and that probable cause is based on the following: "Quote"

"The Defendant did on 05-09-10 with intent to permanently Deprive the owner. Take and carry away a 2008 Honda accord, West Virginia TAG # NL3593, valued at more Than \$ 5,000.00 which belonged to Catherine McGough. This incident accured at 600 Shiloh RD. Seneca, SC in Oconee County and was investigated by OCSO. A written Report is on file. case # 1012105 (APP. P. 797).

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7. Lastly, on May 10, 2010 Sgt Scott Arnold swore in his arrest warrant affidavit for kidnapping that there is probable cause to believe that the defendant (or petitioner) Dennis Temple did commit the crime set forth and that probable cause is based on the following: "Quote"

"The Defendant Did on 05-09-10 unlawfully and without authority to do so, ABDUCT, confine and inveisle the victim, Catherine McGough against her will while accompanied by aggravated circumstances. This Defendant Did force the victim from her storage unit. Unit 177. To his personal storage unit, Unit 193. Where he committed the crime of criminal sexual conduct against the victim. The victim was Tied up and left inside the Defendants storage unit. This incident occurred at 600 Shiloh RD. Seneca SC in Oconee County and was investigated by DCSO (A written Report, Photographs and statements are on file. case # 1012105. (APP. P. 798)

8. On May 11, 2010 Petitioner was arrested by the Oconee County Sheriff's officer Captain Greg Reed (former Lieutenant Greg Reed) and Sergeant Jerry Moss for allegedly committing the crimes of kidnapping, criminal sexual conduct, first degree and

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Grand Larceny at the All safe storage in Seneca, South Carolina.

9. On May 12, 2010 petitioner was taken before magistrate Judge Blake Norton, which he issued a \$200,000 bond against petitioner to gain his freedom for the charges. (APP. P. 803-804).

10. Petitioner was unable to post bail on the \$200,000 bond and remained in the Oconee County Detention Center.

11. On May 20, 2010 a pretrial hearing was held at the Anderson county court house regarding the state request for Sexual transmitted diseases testing on petitioner. (APP. P. 1-8).

12. On May 22, 2010 at the Oconee County Detention Center Several nurses and Oconee County sheriff officer took blood, head hairs and pubic hairs from the petitioner.

13. On June 30, 2010 a pretrial hearing was held at the Oconee County courthouse regarding the petitioner's bond Reduction and appointment of Counsel. (APP. P. 9-18).

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14. On July 16, 2010 a preliminary hearing was held at the Oconee County Court house regarding probable cause to arrest petitioner. (Courts "may properly take judicial notice of matters of public record"). See. Philips v. Pitt Cnty. mem. Hosp, 572 F.3d 176, 180 (4th cir. 2009). Colonial Penn. Ins. Co v. Coil, 887 F.2d 1236, 1239 (4th cir. 1989).

15. On July 29, 2010 a pretrial hearing was held at the Oconee County Courthouse regarding the petitioner's request to dismiss attorneys Sarah Drawdy and Keith Denny and Request to obtain private counsel. (APP. P. 19-29).

16. On September 7, 2010 petitioner was allegedly indicted by the Grand Jury on two counts of criminal sexual conduct, first degree, kidnapping and Grand Larceny charges. (APP. P. 894-901).

17. On September 14, 2010 a pretrial hearing was held at the Anderson County courthouse regarding the appointment of another counsel. (APP. P. 30-48).

18. On September 22, 2010 a pretrial hearing was held at the Oconee County Courthouse regarding DNA testing pursuant to Schmerber. (APP. P. 49-74).

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19. On October 21, 2010 a pretrial hearing was held at the Anderson County courthouse regarding Pro se representation and stand-by counsel. (APP. P. 75-106).

20. On December 7, 2010 a pretrial hearing was held at the Anderson County courthouse regarding Rope shield statute motion and Pro se Representation. (APP. P. 107-198).

21. On December 13, 2010 Petitioner was coerced by the trial Judge J. Cordell Maddox Jr. to proceed pro se in a Jury Trial at the Deonee County courthouse. (APP. P. 258 1. 3 - P. 261 1. 22).

22. On December 15, 2010 a Partial Jury found petitioner guilty on two counts of criminal sexual conduct, first degree, kidnapping and Grand Larceny charges. Judge maddox sentenced Petitioner to 100 Year in prison. (APP. P. 199-657).

PRELIMINARY HEARING

In a preliminary hearing, the state must show that there was "probable cause" to arrest the defendant for the commission of some crime. Absent this

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showing, the charge must be dismissed.

State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (S.C. 1982). The defendant's right to request a preliminary hearing is provided solely by state statute. It is not required by either the state or Federal Constitution and is not necessary before a grand jury can indict a person for a crime. State v. Irby, 166 S.C. 430, 164 S.E. 912 (1932).

South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases. State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595 (1948). The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. U.S. v. Werbroeck, 589 F.2d 273 (7th Cir. 1978). cert den. 400 U.S. 962, 99 S.Ct. 1507, 59 L.Ed. 2d 776.

Once the accused properly request a preliminary hearing, the magistrate's court retains jurisdiction and the court of General Session is deprived of jurisdiction until such hearing is held. State v. Porcher, 273 S.C. 507, 257 S.E.2d 505 (1979). No indictment may be true billed by the grand jury when the circuit court lack jurisdiction since the grand jury's

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jurisdiction of the court in which it is impaneled and for which it is to make inquiry. State v. Funderburk, 259 S.C. 256, 191 S.E. 2d 520 (1972); State v. Wheeler, 259 S.C. 571, 193 S.E. 2d 515 (1972); But, where the request for preliminary hearing was not properly made in the first place, then the circuit court, and grand jury, is not deprived of jurisdiction even though a preliminary hearing is granted after indictment. State v. Fortner, 266 S.C. 223, 222 S.E. 2d 508 (1976).

LEGAL DISCUSSION

U.S. Constitution, 4th Amendment Search and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon Probable Cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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S.C. Constitution Article 1, section 10. Searches and seizures; invasions of privacy

The right of the people to be secure there persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, the person or thing to be searched, the person or thing to be seized and the information to be obtained.

THE SEARCH

The Constitutions of the United States and the state of South Carolina require that Search warrants be "supported by oath or affirmation". U.S. Const. Amend. IV; S.C. Const. Art. I section 10. This is a minimum standard and state legislatures are free to enact stricter requirements for the issuance of search warrants. State v. York, 250 S.C. 30, 156 S.E. 2d 326 (1967).

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The South Carolina General Assembly has enacted a requirement that search warrants may be issued "only upon affidavit sworn to before the magistrate, . . . establishing the grounds for the warrant." S.C. Code Ann. section 17-13-140 (1985). A search warrant that would survive constitutional scrutiny may still be defective under statute. State v. McKnight, 289 S.C. 167, 337 S.E.2d 208 (1987).

In addition, the statutory requirement that all proceedings before magistrates in criminal cases shall be commenced on information under oath plainly and substantially setting forth the offense charged, upon which and only which, shall a warrant of arrest issue," cannot be waived. Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E.2d 924 (S.C. 1940); S.C. Code Ann § 22-3-710 (1976); Gist v. Berkeley County Sheriff's Department, 336 S.C. 611, 521 S.E.2d 163 (1999). The purpose of the statute requiring that a warrant be issued only upon affidavit is to provide for timely recording of facts presented to a judicial officer. State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (S.C. 1975). A warrant affidavit is "insufficient in itself to establish probable cause may be supple

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mented before a magistrate by sworn oral testimony" State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988). However, a warrant issued upon a statement of facts not sworn to is unconstitutional. State v. Wimbush, 9 S.C. 309 (1878).

An affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an Oath in that an affidavit consists of a statement of fact which is sworn to as the truth. While an Oath is a pledge, while a sworn oral statement may be sufficient to satisfy the Constitutional requirement for Oath or affirmation, it does not satisfy the statutory requirement of an affidavit. State v. Knight, 289 S.C. 167, 337 S.E.2d 208 (1987).

South Carolina is one of the Jurisdictions allowing affidavit set out on information and belief. When the facts are set out on information and belief, the affiant is required to show the source of his knowledge. S.C. Code of Laws § 61-2-220 et seq. (1976); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964); Illinois v. Gates, 402 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).

STANDARD OF REVIEW

In determining the existence of probable cause "the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him... there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). For a magistrate to properly perform this function, the affidavit must contain adequate supporting facts about the underlying circumstances to show that probable cause exists. United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996). A magistrate's findings are entitled to great deference and "the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Gates, 462 U.S. at 238, 103 S.Ct. 2317. Yet "the court must... insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for police." Aguilar v. Texas, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964). A such "deference to the

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issuing magistrate ... is not boundless".
United States v. Leon, 468 U.S. 897, 914, 104
 S.Ct. 3405, 82 L.Ed. 2d 677 (1984).

In this present case, the three arrest warrants affidavit by Sgt. Scott Arnold set forth no facts as to why police believed Temple committed the crimes. State v. Smith, 301 S.C. 371, 373, 392 S.E. 2d 182, 183 (1990); State v. Baccus, 367 S.C. 41, 625 S.E. 2d 216 (S.C. 2006); State v. Jenkins, 398 S.C. 215, 727 S.E. 2d 761 (S.C. App. 2012). The magistrate's "action cannot be a mere ratification of the bare conclusions of other," Illinois v. Gates, 462 U.S. at 239, 103 S.Ct. 2317 (1983); State v. Viard, 276 S.C. 147, 276 S.E. 2d 531 (1981). The affidavits in this case lack specificity and contains nothing more than conclusory statements. The affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter." 367 S.C. at 50-51, 625 S.E. 2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed. 2d 667 (1978)). The affidavit in this case fails to meet the requirement of showing why police believed Temple committed the crimes.

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Sgt. Scott Arnold affidavits are not based on Personal Knowledge, but on information and belief. There is a statutory requirement that an affidavit on information and belief must set forth the source of affiants information is to the end that the magistrate may Judicially weigh not only information, but the source thereof, in determining whether or not there is Probable cause for the issuance of the warrant. See, S.C. code of Laws § 61-2-220 et seq (1976). State v. York, 250 S.C. 30, 156 S.E. 2d 326 (1967). State v. Sachs, 264 S.C. 541, 216 S.E. 2d 501 (S.C. 1975); State v. Hill, 245 S.C. 76, 138 S.E. 2d 829 (1964). Illinois v. Gates, 462 U.S. at 230, 103 S.Ct. 2317 (1983).

In this case, Sgt. Scott Arnold stated his source of his information and belief (or basis of knowledge) at the end of his affidavit statements in all three arrest warrants stating . . . "A written Report, photographs and statements are on file". This may satisfy the source of information and belief requirement; however, the affidavit does not contain even a conclusory assertion that the information is reliable and that its source is credible. Illinois v. Gates, 462 U.S. at 238, 103 S.Ct.

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2317 (1983) (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based). "without any information concerning the credibility of the informant and the reliability of his information, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the Constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime . . . " State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167 (1990). (citation and quotation marks omitted).

moreover, when these arrest warrants were issued by the magistrate Judge Blake Norton on May 10, 2010 and at the time of Dennis Temple's arrest on May 11, 2010. The only "Written Report, Photographs and statement on file was the alleged victim's seven (7) page statement and a photo lineup of six black males; however, this Sworn written statement by the alleged victim or the source of Sgt. Scott Arnold information and belief: (1) did not state that Dennis Temple was

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identified in the photo lineup as the assailant or blackman; (2) it did not connect any criminal activity to storage unit # 193; (3) it did not connect any criminal activity to Dennis Temple; (4) it did not connect Dennis Temple to storage unit # 193.

CONCLUSION

Therefore, the information that was included in Sgt. Scott Arnold's affidavits that was never mentioned in the statement by the alleged victim (or source of information) was misleading and false. In Young, the court stated that, "A facially valid search warrant will be found to violate the Fourth Amendment if it contains false or misleading statements that are "necessary to the finding of probable cause." See. Wilkes v. Young, 28 F.3d 1362, 1365 (4th cir. 1994), cert. denied, 513 U.S. 1151 (1995) (quoting Franks v. Delaware, 438 U.S. 154, 156 (1978).

viewing these deficiencies together and considering the totality of the circumstances, we find that Sgt. Arnold did not provide the magistrate judge a

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substantial basis on which to find probable cause to believe Temple committed these crimes, and that Sgt. Scott Arnold committed perjury and the magistrate Judge Blake Norton was not impartial. In addition, the General sessions court did not have Jurisdiction over this case and the indictments were void.

RELIEF REQUESTED

Ground three is not procedurally barred because it is interwoven with state and federal laws and the state gave a post card denial. Petitioner has shown a miscarriage of Justice to overcome a procedural bar. Respondent did not file a reply brief to the petitioner's Ander's brief on direct appeal, and did likewise. When the petitioner submitted a Johnson petition for writ of certiorari (PCR Appeal) and again regarding Petitioner pro se Response in the states highest courts. As a result, Petitioner believe that respondent are procedurally barred or waived there rights to raise a argument Ground one, two and three in this Habeas

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Corpus appeal. See, Nelson v. Adams USA, Inc., 120 S.Ct. 157 (2000). In addition, Ground one, two and three has merit and there are genuine issues of material facts present, which prevent summary Judgment. Therefore, Respondents motion for summary Judgment should be denied. The District court should grant petitioner the writ of Habeas corpus and a new trial or release from prison.

Respectfully submitted,


Dennis M. Temple # 274862
Lee CORR. Inst. F31130
990 Wisacky Highway
Bishopville, SC 29010

August 23, 2019

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple,	)	C/A No. 8:18-cv-03258-JFA-JDA
	)	
vs.	)	
	)	
Warden Scott Lewis,	)	RESPONSE TO PETITIONER'S
	)	OBJECTIONS
Respondent.	)	
	)	
_____	)	

Respondent, above-named, by and through the undersigned attorneys, would respectfully respond to Petitioner's Objections to the Report and Recommendation of the Honorable Magistrate. Petitioner's Objections are without merit.

First, Petitioner's objections are general and simply restate his argument in his federal habeas petition, therefore they must be denied.

Second, Petitioner is incorrect in his general assertion that the Honorable Magistrate unreasonably applied United States Supreme Court precedent and/or reached an unreasonable determination of the facts in denying each of his claims. For the reasons set forth in the Magistrate's Report and Recommendation and Respondent's Return and Memorandum of Law in Support of the Motion for Summary Judgment, incorporated herein by reference, the Magistrate correctly and appropriately denied all of Petitioner's claims. And, the Magistrate did not unreasonably apply United States Supreme Court precedent and/or reach an unreasonable determination of the facts as Petitioner asserts in his objections.

Therefore, Petitioner's objections to the Report and Recommendation should be overruled and the Report and Recommendation adopted in full.

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Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

MELODY J. BROWN
Senior Assistant Deputy Attorney General
ID No. 07979

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Senior Assistant Attorney General
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By: s/J. Anthony Mabry
ATTORNEYS FOR RESPONDENTS

July 24, 2019.

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

2019 JUL 19 PM 3:18

Dennis Maurice Temple

Petitioner,

vs.

Warden, Scott Lewis

Respondent,

CIVIL ACTION NO:

8:18-CV-3258-JFA-JDA

petitioner

OBJECTION

TO

Magistrate

JUDGE

REPORT AND RECOMMENDATION

To: THE Honorable Joseph F. Anderson Jr.

This matter is before the District Court Judge, the Honorable Joseph F. Anderson Jr., regarding Petitioner objection to the U.S. Magistrate Judge Jacquelyn D. Austin Report and Recommendation (MJRR) pursuant to 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Petitioner is a state prisoner who seeks relief under 28 U.S.C. § 2254. Magistrate Judge granted Respondents motion for Summary Judgment on all of petitioner Grounds 1, 2 & 3 erroneously and with biasness.

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PROCEDURAL BACKGROUND

In 2010, Dennis Temple a 38 year-old black man from Seneca, South Carolina was convicted and sentenced to 100 years in prison for Raping a 19-years-old white female clemson University student. APP. 646-656. However, Temple was never identified as the assailant by the alleged victim prior to trial. APP. 769-775. Trial Judge J. Cordell Maddox Jr. forced Temple to represent himself during a Jury trial, APP. 258-261. and denied Temple to call any witness in his defense. APP. 605 1, 14-15.) see. Dennis M. Temple vs. State of South Carolina, 2016-002254.

GROUND ONE OBJECTION

Petitioner, Dennis Temple objects to the magistrate Judges Report and Recommendation, P. 18 2nd Paragraph as follows:

GROUND ONE

In Ground one, Petitioner asserts that the trial court erred by effectively coercing petitioner to proceed pro se at trial [Doc 1-1 at 5-12] Although petitioner acknowledges

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that he waived his right to counsel before trial and expressed his desire to proceed pro se, he contends that he rescinded that waiver after the jury was selected and requested that he receive the full assistance of appointed counsel at trial. [Id.]. The court concludes that petitioner is not entitled to federal habeas corpus relief on this claim.

"The sixth and fourteenth Amendments of our constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment." Faretta v. California, 422 U.S. 806, 807 (1975). On the other hand, "Courts must take care not to force counsel upon a defendant, because in addition to the right to the assistance of counsel, the sixth Amendment implicitly provides an affirmative right to self-representation." United State v. Singleton, 107 F.3d 1091, 1095-96 (4th Cir. 1997) (citing Faretta, 422 U.S. at 806). A defendant may waive his right to counsel; however, a waiver of counsel "must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or

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abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case, including the background experience, and conduct of the accused." Edwards v. Arizona, 451 U.S. 477, 482 (1981).

Although no "precise procedure or litany for this evaluation" is required, the court must consider the record as a whole, including "the defendant's background capabilities and understanding of the dangers and disadvantages of self-representation." Singleton, 107 F.3d at 1097-98.

Here, petitioner concedes that he waived his right to counsel before trial; however, petitioner contends that he subsequently rescinded that waiver and re-asserted his right to counsel after the jury had been selected. [Doc 1-1 at 5-12] The United States Supreme Court "has never explicitly addressed a criminal defendant's ability to reassert his right to counsel once he has validly waived it." Marshall v. Rodgers, 569 U.S. 58, 62 (2013) (internal quotation marks omitted). Because the Supreme Court has never squarely addressed the issue, the state court's decision not to continue petitioner's trial so that he could proceed

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with counsel is not contrary to clearly established federal law. Lopez v. Smith, 574 U.S. 1, 2 (2014); Marshall, 569 U.S. at 64. Accordingly, Respondent's motion for Summary Judgment should be granted as to Ground One.

BASIS FOR THE OBJECTION

The magistrate Judge granted Respondent's motion for Summary Judgment and denied Petitioner Habeas Corpus petition. ^{Ground one} It resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.

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GROUND TWO OBJECTION

Petitioner, Dennis Temple objects to the magistrate Judges Report and Recommendation, P. 19 3rd paragraph as follows:

GROUND TWO

In Ground Two, Petitioner argues that the PCR court erred in granting summary judgment to the state regarding Petitioner's claim that appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause and for failing to submit the preliminary hearing transcript as part of the record on appeal. [Doc. 1-1 at 14-30] The court concludes that petitioner is not entitled to federal habeas corpus relief on this claim.

A defendant has a constitutional right to the effective assistance of appellate counsel. Evitts v. Luce, 469 U.S. 387, 396-97 (1985). To demonstrate ineffective assistance of appellate counsel, a petitioner must satisfy the two-prong test enunciated in Strickland v. Washington, 466 U.S. 668 (1984).⁸

See Williams v. Taylor, 529 U.S. 362, 391 (2000) (stating that "the strickland test provides sufficient guidance for resolving virtually all ineffective - assistance - of - counsel claims"). Stated differently, a petitioner must demonstrate "a reasonable probability that, but for his counsel's unreasonable failure... he would have prevailed on his appeal." Smith v. Robbins, 528 U.S. 259, 285 (2000). There is a "presumption that [appellate counsel] decided which issues were most likely to afford relief on appeal." Bell v. Jarvis, 236 F.3d 149, 164 (4th cir. 1993) (en banc) (quoting Pruett v. Thompson, 996 F.2d 1560, 1568 (4th cir. 1993)). Moreover, counsel is not obligated to assert all nonfrivolous issues on appeal, as there can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review." Id. (quoting Jones v. Barnes, 463 U.S. 745, 752 (1983) (second alteration in Bell)).

In Strickland, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. at 687. To satisfy the first prong, a prisoner must show that

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Here, the PCR court evaluated appellate counsel's performance under the standard set forth in *Strickland*. [see App. 889 (finding that petitioner "had failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted"). With respect to Ground Two, the PCR court found,

In this case, Applicant alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. This issue was raised in Applicant's pro se brief on direct appeal, and therefore considered and determined to be without merit by the appellate court pursuant to Anders. Applicant's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record is an extension of this argument. Applicant has failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.⁵

"counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To satisfy the second prong, a prisoner must show that "there

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The record clearly establishes that Applicant's arrest was supported by probable cause. Following a hearing on May 20, 2012, after hearing testimony that the victim identified the Applicant in a photo-lineup and that the assault took place in the Applicant's storage unit, the presiding judge determined that there was probable cause to believe he committed the assault. R. P. 5-7. In any event, the Applicant's subsequent indictment by the Grand Jury cures any deficiencies in the arrest warrant. R. P. 684-91; see Thompson v. State . . . 164 S.E.2d 760, 761 (1968).

[APP. 889 & n.5] The PCR court's denial of petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the court applied the applicable Supreme Court precedent. Second, the record fails to demonstrate that the PCR court confronted a set of facts that was materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from Supreme Court precedent.

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

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There is no indication that appellate counsel's representation was deficient or that petitioner was prejudiced as a result. Although appellate counsel failed to raise the probable cause issue in her brief, petitioner has failed to show that he was prejudiced by that omission. The South Carolina Court of Appeals was obligated under Anders to conduct a full review of the record to determine whether there were any meritorious issues on appeal. See *Anders*, 386 U.S. at 744. Further, Petitioner raised this issue in his pro se brief on direct appeal [APP. 676-83], and his pro se brief was a part of the record that the South Carolina Court of Appeals considered when it dismissed Petitioner appeal.

BASIS FOR THE OBJECTION

The magistrate Judge granted Respondent's motion for summary judgment and denied Petitioner Habeas Corpus Petition on Ground Two. It resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

would have been different." *Id.* at 694. The Supreme Court has cautioned that "judicial scrutiny of counsel's

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GROUND THREE OBJECTION

Non-Cognizable Ground

In Ground Three, Petitioner contends that the trial court did not have jurisdiction to hear his case because the magistrate court did not have probable cause to issue arrest warrants. [Doc. 1-1 at 32-50] However, federal habeas actions provide for review of solely federal law claims. See 28 U.S.C. § 2254(a) (stating that federal court will review only petitions alleging violations of federal law). Subject matter jurisdiction of a state court is a state law issue not cognizable in this federal habeas action. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Wright v. Angelone, 151 F.3d 151, 158 (4th Cir. (1998) (holding that a federal habeas court is bound, for federal habeas purposes, by a state appellate court's determination of state law). Therefore, Petitioner has not presented a claim that is cognizable under § 2254 and Respondent's motion for summary judgment should be granted as to Ground Three.

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BASIS FOR THE OBJECTION

The magistrate Judge granted Respondent's motion for summary Judgment and denied Petitioner habeas Corpus petition on Ground three. It resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States, and

It resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

CONCLUSION

WHEREFORE, based on the foregoing written specific objections Petitioner should be entitled to a district Judge's de novo review on the magistrate Judge's report and Recommendation denying his habeas Corpus Petition.

Dennis M Temple
Dennis M. Temple # 274802
Lee CORR. Inst F31130
990 Wisacky Highway
Bishopville SC 29010

July 14, 2019

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON/GREENWOOD DIVISION

Dennis Maurice Temple,	)	C/A No. 8:18-cv-03258-JFA-JDA
	)	
Petitioner,	)	
	)	
v.	)	<u>REPORT AND RECOMMENDATION</u>
	)	<u>OF MAGISTRATE JUDGE</u>
Warden Scott Lewis,	)	
	)	
Respondent.	)	
	)	

This matter is before the Court on Respondent's motion for summary judgment. [Doc. 25.] Petitioner is a state prisoner who seeks relief under 28 U.S.C. § 2254. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B), and Local Civil Rule 73.02(B)(2)(c), D.S.C., this magistrate judge is authorized to review post-trial petitions for relief and submit findings and recommendations to the District Court.

Petitioner filed this Petition for writ of habeas corpus on November 29, 2018.¹ [Doc. 1.] On April 1, 2019, Respondent filed a return and memorandum to the Petition and a motion for summary judgment. [Docs. 24; 25.] The next day, the Court filed an Order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), advising Petitioner of the summary judgment procedure and of the possible consequences if he failed to adequately respond to the motion. [Doc. 26.] On April 25, 2019, Petitioner's response in opposition was entered on the docket. [Doc. 31.] On May 2, 2019, Respondent filed a reply. [Doc. 33.]

¹A prisoner's pleading is considered filed at the moment it is delivered to prison authorities for forwarding to the court. *See Houston v. Lack*, 487 U.S. 266, 270 (1988). Accordingly, this action was filed on November 29, 2018. [Doc. 1-2 at 1, 3 (envelopes stamped received by prison mailroom on November 29, 2018).]

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Having carefully considered the parties' submissions and the record in this case, the Court recommends Respondent's motion for summary judgment be granted.

BACKGROUND

Petitioner is presently confined in the South Carolina Department of Corrections pursuant to an order of commitment of the Oconee County Clerk of Court. [Doc. 1 at 1.] In September 2010, Petitioner was indicted for kidnapping; grand larceny, value of \$5,000 or more; and two counts of criminal sexual conduct, first degree. [App. 894–901.²]

On June 30, 2010, a hearing was held regarding Petitioner's bond. [App. 9–18.] Petitioner retained Robert Mills Ariail to represent him for the purposes of bond. [App. 11–12.] At the hearing, the state informed the court that Petitioner wished to proceed pro se. [App. 12–13.] The court, however, appointed Wilson Burr to represent Petitioner, and informed Petitioner that he was no longer entitled to pro se filings. [App. 14.] Burr subsequently sent the case to Sarah G. Drawdy and Keith Denny to represent Petitioner. [App. 22.]

On July 29, 2010, a hearing was held on Petitioner's pro se motion to have Drawdy and Denny relieved as counsel. [App. 19–29.] The court relieved Drawdy and Denny and gave Petitioner 30 days to retain counsel. [App. 24–25.] On September 14, 2010, another hearing was held regarding whether Petitioner wanted to proceed with counsel or represent himself. [App. 30–48.] The court appointed Kurt Tavernier to represent Petitioner. [App. 45–47.]

²The Appendix can be found at Docket Entry Numbers 24-1 through 24-8.

On September 22, 2010, a *Schmerber*³ hearing was held. [App. 49–74.] Tavernier represented Petitioner at the *Schmerber* hearing. At this hearing, the court also addressed Petitioner’s motion to dismiss the indictments, Petitioner’s competency, Petitioner’s desire to speak to the press, and the prohibition against communicating with the court other than through counsel. [App. 62–72.]

On October 21, 2010, a hearing was held on Petitioner’s pro se motion to relieve Tavernier as counsel. [App. 75–106.] The court refused to appoint new counsel for Petitioner and instead ordered Tavernier to serve as standby counsel. [App. 95–97, 101.] On December 7, 2010, a pretrial hearing was held. [App. 107–98.] At the pretrial hearing, Petitioner represented himself. [App. 108–98.] During the hearing, the court noted that Tavernier had been sitting through the hearing, asked Petitioner if he still planned to represent himself at trial, and gave Petitioner and Tavernier an opportunity to talk. [App. 182–86.] Petitioner decided to proceed pro se with Tavernier as advisory counsel, including meeting with Tavernier leading up to trial to assist Petitioner with trial preparation. [App. 188–93.]

On December 13, 2010, Petitioner proceeded to trial representing himself with Tavernier serving as advisory counsel. [App. 199–657.] Following jury selection, Petitioner moved for a continuance so that Tavernier could represent him at trial. [App. 258–59.] The court denied Petitioner’s motion. [App. 261.] The trial continued, and on December 15, 2010, the jury found Petitioner guilty on all charges. [App. 646–47.] Petitioner was

³In *Schmerber v. California*, 384 U.S. 757 (1966), the United States Supreme Court held that the identification of a defendant arrested upon probable cause becomes a matter of legitimate state interest such that taking a blood sample for purposes of criminal investigation does not offend the due process clause.

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sentenced to consecutive sentences of thirty years on each criminal sexual conduct count, thirty years on the kidnapping count, and ten years on the grand larceny count. [App. 656.]

Direct Appeal

Petitioner appealed his conviction. Wanda H. Carter of the South Carolina Commission on Indigent Defense filed an *Anders*⁴ brief on Petitioner's behalf in the South Carolina Court of Appeals, dated September 28, 2012, raising the following issue:

The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial; ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

[App. 661.] At the same time she filed the *Anders* brief, Carter submitted a petition to be relieved as counsel. [App. 668.]

Petitioner filed a pro se brief on November 1, 2012, raising the following issues, quoted substantially verbatim:

Did the judge err when he failed to suppress the evidence obtained from the arrest warrants that was issued upon a supporting affidavit that did not link Appellant to the criminal activity or storage unit # 193, and failed to link the storage unit # 193 to appellant.

Did the state commit perjury upon the court when it contended that this case was fast-tracked due to appellant's speedy trial motion.

⁴A brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), effectively concedes the appeal lacks a meritorious claim.

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[App. 674.] On September 11, 2013, the South Carolina Court of Appeals dismissed Petitioner's appeal and granted counsel's motion to be relieved. [App. 704–05.] Remittitur was issued on September 27, 2013. [App. 706.]

PCR Proceedings

Petitioner, proceeding pro se, filed an application for post-conviction relief ("PCR") on October 15, 2013. [App. 707–37.] The PCR application alleged Petitioner was being held in custody unlawfully based on fourteen grounds. [App. 714–23.] Petitioner subsequently moved twice to amend his PCR application. [App. 738–41, 743–47.]

On March 5, 2014, Petitioner filed a motion for and memorandum in support of summary judgment. [App. 748–84.] On March 19, 2014, he filed an affidavit. [App. 785–804.] On May 12, 2014, Petitioner filed a motion for and memorandum in support of default judgment. [App. 805–23.] On May 21, 2014, Hugh W. Welborn, who had been appointed to represent Petitioner during his PCR proceedings, moved to be relieved as counsel. [App. 824–25.]

The State filed a return and partial motion to dismiss and motion for a more definite statement dated July 7, 2014. [App. 826–34.] A hearing was held on July 28, 2014, and Petitioner was represented at the hearing by Welborn.⁵ [App. 835–83.] On October 24, 2016, the PCR court issued an order denying and dismissing the PCR application with prejudice. [App. 884–93.] The PCR court addressed the following allegations: ineffective assistance of appellate counsel for failing to submit the preliminary hearing transcript as

⁵At the hearing, Welborn indicated that, although he had filed a motion to be relieved as counsel, he was prepared to go forward with representing Petitioner at the hearing. [App. 838–41.] Petitioner stated that he would let Welborn represent him, and the PCR court directed Welborn to represent Petitioner at the hearing. [App. 843–44.]

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part of the record on appeal; failing to argue that there was no probable cause to issue an arrest warrant; and failing to argue that Petitioner did not freely and voluntarily waive the right to counsel. [App. 888–89.] The PCR court further found that two issues were barred by res judicata and that six issues were direct appeal issues that were procedurally barred. [App. 890–91.]

Petitioner appealed. Taylor D. Gilliam of the South Carolina Commission on Indigent Defense filed on Petitioner’s behalf a *Johnson*⁶ petition for writ of certiorari in the Supreme Court of South Carolina, dated August 2, 2017. [Doc. 24-9.] The petition asserted the following as the sole issue presented:

Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

[*Id.* at 3.] At the same time he filed the *Johnson* petition, Gilliam submitted a petition to be relieved as counsel. [*Id.* at 18.] Petitioner filed a pro se response to the petition and raised the following issue:

Did the General Sessions Court have jurisdiction to hear appellant’s criminal case? When the magistrate court never established it has probable cause to detain appellant on the arrest warrants.

[Doc. 24-10 at 4.]

⁶A *Johnson* petition is the state PCR appeal analogue to a brief filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), and effectively concedes the appeal lacks a meritorious claim. See *Johnson v. State*, 364 S.E.2d 201 (S.C. 1988).

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The appeal was transferred to the South Carolina Court of Appeals, which denied the petition and granted counsel's request to withdraw on October 16, 2018. [Doc. 24-11.] Remittitur was issued on November 9, 2018. [Doc. 24-12.]

Petition for Writ of Habeas Corpus

Petitioner filed this Petition for writ of habeas corpus on November 29, 2018. [Doc. 1.] Petitioner raises the following grounds for relief, quoted substantially verbatim, in his Petition pursuant to 28 U.S.C. § 2254:

GROUND ONE: The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

GROUND TWO: The PCR court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the record on appeal.

GROUND THREE: Did the General Sessions Court have jurisdiction to hear appellant's criminal case when the magistrate court never established it had probable cause to detain appellant on the arrest warrants.

[Doc. 1-1 at 5–51.] As stated, on April 1, 2019, Respondent filed a motion for summary judgment. [Doc. 25.] On April 25, 2019, Petitioner's response in opposition was entered on the docket. [Doc. 31.] And on May 2, 2019, Respondent filed a reply. [Doc. 33.] Accordingly, the motion for summary judgment is ripe for review.

APPLICABLE LAW**Liberal Construction of Pro Se Petition**

Petitioner brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, the pro se petition is still subject to summary dismissal. *Id.* at 520–21. The mandated liberal construction means only that if the court can reasonably read the pleadings to state a valid claim on which the petitioner could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the petitioner’s legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417–18 (7th Cir. 1993). Nor should a court “conjure up questions never squarely presented.” *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure states, as to a party who has moved for summary judgment:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(a). A fact is “material” if proof of its existence or non-existence would affect disposition of the case under applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is “genuine” if the evidence offered is such

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that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. When determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings. *Id.* at 324. Rather, the non-moving party must demonstrate specific, material facts exist that give rise to a genuine issue. *Id.* Under this standard, the existence of a mere scintilla of evidence in support of the non-movant's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* Further, Rule 56 provides in pertinent part:

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1). Accordingly, when Rule 56(c) has shifted the burden of proof to the non-movant, he must produce existence of a factual dispute on every element essential to his action that he bears the burden of adducing at a trial on the merits.

Habeas Corpus

Generally

Because Petitioner filed the Petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Williams v. Taylor*, 529 U.S. 362, 411 (2000). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision,” and “even a strong

case for relief does not mean the state court's contrary conclusion was unreasonable.” *Harrington v. Richter*, 562 U.S. 86, 101–02 (2011). Moreover, state court factual determinations are presumed to be correct, and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

Procedural Bar

Federal law establishes this Court's jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person “is in custody in violation of the Constitution or laws or treaties of the United States” and requires that a petitioner present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this Court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

Exhaustion

Section 2254 contains the requirement of exhausting state-court remedies and provides as follows:

- (b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
 - (A) the applicant has exhausted the remedies available in the courts of the State; or
 - (B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254. The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. *Id.* § 2254(b)(1)(A). “To satisfy the exhaustion requirement, a habeas petitioner must fairly present his claim to the state’s highest court.” *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011). Thus, a federal court may consider only those issues that have been properly presented to the highest state courts with jurisdiction to decide them.

In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds for relief be stated in the direct appeal or PCR application. S.C. App. Ct. R. 203; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767, 770 (S.C. 1976). If the PCR court fails to address a claim as required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the

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judgment. S.C. R. Civ. P. 59(e). Failure to do so will result in the application of a procedural bar to that claim by the Supreme Court of South Carolina. *Marlar v. State*, 653 S.E.2d 266, 267 (S.C. 2007).⁷ Further, strict time deadlines govern direct appeal and the filing of a PCR application in the South Carolina courts. For direct appeal, a notice of appeal must be filed and served on all respondents within ten days after the sentence is imposed or after receiving written notice of entry of the order or judgment. S.C. App. Ct. R. 203(b)(2), (d)(1)(B). A PCR application must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

If any avenue of state relief is still available, the petitioner must proceed through the state courts before requesting a writ of habeas corpus in the federal courts. *Richardson v. Turner*, 716 F.2d 1059, 1062 (4th Cir. 1983); *Patterson v. Leeke*, 556 F.2d 1168 (4th Cir. 1977). Therefore, in a federal petition for habeas relief, a petitioner may present only those issues that were presented to the Supreme Court of South Carolina through direct appeal or through an appeal from the denial of a PCR application, regardless of whether the Supreme Court actually reached the merits of the claim.

⁷In *Bostick v. Stevenson*, 589 F.3d 160 (4th Cir. 2009), the Fourth Circuit found that, prior to the Supreme Court of South Carolina's November 5, 2007, decision in *Marlar*, South Carolina courts had not uniformly and strictly enforced the failure to file a motion pursuant to Rule 59(e) as a procedural bar. 589 F.3d at 162–65. Accordingly, for matters in which there was a PCR ruling prior to November 5, 2007, the Court will not consider any failure to raise issues pursuant to Rule 59(e) to effect a procedural bar.

Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner seeks habeas corpus relief based on an issue he failed to raise at the appropriate time in state court, removing any further means of bringing that issue before the state courts. In such a situation, the petitioner has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. See *Smith v. Murray*, 477 U.S. 527, 533 (1986). The United States Supreme Court has stated that the procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. See *id.* Bypass can occur at any level of the state proceedings if a state has procedural rules that bar its courts from considering claims not raised in a timely fashion. *Id.*

The Supreme Court of South Carolina will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. See S.C. Code Ann. § 17-27-90; *Aice v. State*, 409 S.E.2d 392, 394 (S.C. 1991). Further, if a prisoner has failed to file a direct appeal or a PCR application and the deadlines for filing have passed, he is barred from proceeding in state court. S.C. App. Ct. R. 203(d)(3), 243. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. See *Reed v. Ross*, 468 U.S. 1, 11 (1984); see also *Kornahrens v. Evatt*, 66 F.3d 1350, 1357 (4th Cir. 1995). As the United States Supreme Court explained:

. . . [State procedural rules promote] not only the accuracy and efficiency of judicial decisions, but also the finality of those decisions, by forcing the defendant to litigate all of his claims together, as quickly after trial as the docket will allow, and while the attention of the appellate court is focused on his case.

Reed, 468 U.S. at 10–11.

However, if a federal habeas petitioner can show both (1) “‘cause’ for noncompliance with the state rule” and (2) “‘actual prejudice resulting from the alleged constitutional violation[,]” the federal court may consider the claim. *Smith*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). Further, if the petitioner does not raise cause and prejudice, the court need not consider the defaulted claim. See *Kornahrens*, 66 F.3d at 1363.

If a federal habeas petitioner has failed to raise a claim in state court and is precluded by state rules from returning to state court to raise the issue, he has procedurally bypassed his opportunity for relief in the state courts and in federal court. *Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Absent a showing of cause and actual prejudice, a federal court is barred from considering the claim. *Wainwright*, 433 U.S. at 87. In such an instance, the exhaustion requirement is technically met, and the rules of procedural bar apply. *Teague v. Lane*, 489 U.S. 288, 297–98 (1989); *Matthews*, 105 F.3d at 915 (citing *Coleman*, 501 U.S. at 735 n.1; *Teague*, 489 U.S. at 297–98; *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)).

Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this Court may consider claims that have not been presented to the Supreme Court of South Carolina in limited circumstances—where a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or where a

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“fundamental miscarriage of justice” has occurred, *Carrier*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim, where the novelty of the constitutional claim is such that its legal basis is not reasonably available to the petitioner’s counsel. *Id.* at 487–89; *Reed*, 468 U.S. at 16. Absent a showing of “cause,” the court is not required to consider “actual prejudice.” *Turner v. Jabe*, 58 F.3d 924, 931 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice to excuse a default. *Carrier*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error. *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982).

DISCUSSION

Non-Cognizable Ground

In Ground Three, Petitioner contends that the trial court did not have jurisdiction to hear his case because the magistrate court did not have probable cause to issue arrest warrants. [Doc. 1-1 at 32–50.] However, federal habeas actions provide for review of solely federal law claims. See 28 U.S.C. § 2254(a) (stating that federal court will review only petitions alleging violations of federal law). Subject matter jurisdiction of a state court is a state law issue not cognizable in this federal habeas action. *Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.”); *Wright v. Angelone*, 151 F.3d 151, 158 (4th Cir. 1998) (holding that a federal habeas court is bound, for federal habeas purposes, by a state appellate court’s determination of state law). Therefore, Petitioner has not

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presented a claim that is cognizable under § 2254, and Respondent's motion for summary judgment should be granted as to Ground Three.

Merits of Remaining Grounds

Under the AEDPA, a federal court may not grant habeas relief unless the underlying state court decision was contrary to or an unreasonable application of federal law, as determined by the United States Supreme Court, 28 U.S.C. § 2254(d)(1), or based on an unreasonable determination of the facts before the court, *id.* § 2254(d)(2). The Supreme Court has held the "contrary to" and "unreasonable application of" clauses present two different avenues for relief. *Williams*, 529 U.S. at 405. The Court stated there are two instances when a state court decision will be contrary to Supreme Court precedent:

A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Id. at 405–06. Additionally, a state court decision is an unreasonable application of Supreme Court precedent when the decision "correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case." *Id.* at 407–08; see also *Richter*, 562 U.S. at 102 ("Under § 2254(d), a habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court. . . . It bears repeating that even a strong case for relief does not mean the state

court's contrary conclusion was unreasonable.”). Finally, a decision cannot be contrary to or an unreasonable application of Supreme Court precedent unless applicable Supreme Court precedent exists; without applicable Supreme Court precedent, there is no habeas relief for petitioners. *Virsnieks v. Smith*, 521 F.3d 707, 716 (7th Cir. 2008) (citing *Lockhart v. Chandler*, 446 F.3d 721, 724 (7th Cir. 2006); *Simpson v. Battaglia*, 458 F.3d 585, 597 (7th Cir. 2006)); see *Bustos v. White*, 521 F.3d 321, 325 (4th Cir. 2008).

Ground One

In Ground One, Petitioner asserts that the trial court erred by effectively coercing Petitioner to proceed pro se at trial. [Doc. 1-1 at 5–12.] Although Petitioner acknowledges that he waived his right to counsel before trial and expressed his desire to proceed pro se, he contends that he rescinded that waiver after the jury was selected and requested that he receive the full assistance of appointed counsel at trial. [*Id.*] The Court concludes that Petitioner is not entitled to federal habeas corpus relief on this claim.

“The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment.” *Faretta v. California*, 422 U.S. 806, 807 (1975). On the other hand, “courts must take care not to force counsel upon a defendant, because in addition to the right to the assistance of counsel, the Sixth Amendment implicitly provides an affirmative right to self-representation.” *United States v. Singleton*, 107 F.3d 1091, 1095–96 (4th Cir. 1997) (citing *Faretta*, 422 U.S. at 806). A defendant may waive his right to counsel; however, a waiver of counsel “must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case ‘upon the

particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). Although no “precise procedure or litany for this evaluation” is required, the court must consider the record as a whole, including “the defendant’s background capabilities and understanding of the dangers and disadvantages of self-representation.” *Singleton*, 107 F.3d at 1097–98.

Here, Petitioner concedes that he waived his right to counsel before trial; however, Petitioner contends that he subsequently rescinded that waiver and re-asserted his right to counsel after the jury had been selected. [Doc. 1-1 at 5–12.] The United States Supreme Court “has never explicitly addressed a criminal defendant’s ability to reassert his right to counsel once he has validly waived it.” *Marshall v. Rodgers*, 569 U.S. 58, 62 (2013) (internal quotation marks omitted). Because the Supreme Court has never squarely addressed the issue, the state court’s decision not to continue Petitioner’s trial so that he could proceed with counsel is not contrary to clearly established federal law. *Lopez v. Smith*, 574 U.S. 1, 2 (2014); *Marshall*, 569 U.S. at 64. Accordingly, Respondent’s motion for summary judgment should be granted as to Ground One.

Ground Two

In Ground Two, Petitioner argues that the PCR court erred in granting summary judgment to the state regarding Petitioner’s claim that appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause and for failing to submit the preliminary hearing transcript as part of the record on appeal. [Doc. 1-1 at 14–30.] The Court concludes that Petitioner is not entitled to federal habeas corpus relief on this claim.

A defendant has a constitutional right to the effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387, 396–97 (1985). To demonstrate ineffective assistance of appellate counsel, a petitioner must satisfy the two-prong test enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984).⁸ See *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (stating that “the *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims”). Stated differently, a petitioner must demonstrate “a reasonable probability that, but for his counsel’s unreasonable failure . . . , he would have prevailed on his appeal.” *Smith v. Robbins*, 528 U.S. 259, 285 (2000). There is a “presumption that [appellate counsel] decided which issues were most likely to afford relief on appeal.” *Bell v. Jarvis*, 236 F.3d 149, 164 (4th Cir. 2000) (en banc) (quoting *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir. 1993)). Moreover, “[c]ounsel is not obligated to assert all nonfrivolous issues on appeal, as ‘[t]here can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.’” *Id.* (quoting *Jones v. Barnes*, 463 U.S. 745, 752 (1983)) (second alteration in *Bell*).

⁸In *Strickland*, the United States Supreme Court established that to challenge a conviction based on ineffective assistance of counsel, a prisoner must prove two elements: (1) his counsel was deficient in his representation and (2) he was prejudiced as a result. 466 U.S. at 687. To satisfy the first prong, a prisoner must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. To satisfy the second prong, a prisoner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The Supreme Court has cautioned that “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689.

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Here, the PCR court evaluated appellate counsel's performance under the standard set forth in *Strickland*. [See App. 889 (finding that Petitioner "ha[d] failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted").] With respect to Ground Two, the PCR court found,

In this case, Applicant alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. This issue was raised in Applicant's *pro se* brief on direct appeal, and therefore considered and determined to be without merit by the appellate court pursuant to *Anders*. Applicant's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record is an extension of this argument. Applicant has failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.⁵

⁵The record clearly establishes that Applicant's arrest was supported by probable cause. Following a hearing on May 20, 2012, after hearing testimony that the victim identified the Applicant in a photo-lineup and that the assault took place in the Applicant's storage unit, the presiding judge determined that there was probable cause to believe he committed the assault. R. p.5-7. In any event, the Applicant's subsequent indictment by the Grand Jury cures any deficiencies in the arrest warrant. R. p. 684-91; see *Thompson v. State*, . . . 164 S.E.2d 760, 761 (1968).

[App. 889 & n.5.] The PCR court's denial of Petitioner's ineffective assistance claim was neither contrary to nor an unreasonable application of applicable Supreme Court precedent. First, the court applied the applicable Supreme Court precedent. Second, the record fails to demonstrate that the PCR court confronted a set of facts that was materially indistinguishable from those considered in a decision of the Supreme Court but arrived at a result different from Supreme Court precedent. There is no indication that appellate counsel's representation was deficient or that Petitioner was prejudiced as a result.

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Although appellate counsel failed to raise the probable cause issue in her brief, Petitioner has failed to show that he was prejudiced by that omission. The South Carolina Court of Appeals was obligated under *Anders* to conduct a *full review* of the record to determine whether there were any meritorious issues on appeal. See *Anders*, 386 U.S. at 744. Further, Petitioner raised this issue in his pro se brief on direct appeal [App. 676–83], and his pro se brief was a part of the record that the South Carolina Court of Appeals considered when it dismissed Petitioner’s appeal. Finally, as the PCR court recognized, that an arrest warrant was improperly issued “is no bar to a prosecution on a subsequent indictment by which the court acquires jurisdiction over the person.” *State v. McCoy*, 177 S.E.2d 601, 602 (S.C. 1970). As stated, Petitioner was indicted for all charges on which we was convicted. [App. 894–901.] Therefore, appellate counsel could not have been ineffective for failing to raise the probable cause issue because even if the arrest warrants were improper, the prosecution could have proceeded on the indictment. Accordingly, Respondent’s motion for summary judgment should be granted as to Ground Three.

CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the Court recommends that Respondent’s motion for summary judgment [Doc. 25] be GRANTED and the Petition [Doc. 1] be DENIED.

IT IS SO RECOMMENDED.

s/Jacquelyn D. Austin
United States Magistrate Judge

June 20, 2019
Greenville, South Carolina

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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dennis Maurice Temple,	)	C/A No. 8:18-cv-3258-JFA-JDA
	)	
	)	
Petitioner,	)	
	)	
vs.	)	RETURN AND MEMORANDUM OF LAW
	)	IN SUPPORT OF MOTION
Warden Scott Lewis,	)	FOR SUMMARY JUDGMENT
	)	(Rule 56, F.R.C.P.)
Respondent.	)	
_____	)	

Respondent, by and through the undersigned attorneys, hereby makes a Return to the Rule to Show Cause issued by the Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued in response to the *pro se* petition for federal habeas corpus relief filed by Petitioner on November 29, 2018 according to Petitioner's envelope. Respondent would show the Court there is no genuine issue of material fact and Respondent is entitled to judgment as a matter of law pursuant to Rule 56, F.R.C.P. In support of its Motion for Summary Judgment, Respondent would show this Court as follows:

PROCEDURAL HISTORY

Petitioner is presently confined in the Perry Correctional Institution of the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. Petitioner was indicted at the September 2010 term of the Court of General Sessions by the Oconee County grand jury for Kidnapping (Ind. # 2010-GS-37-888), two (2) counts of Criminal Sexual Conduct (CSC), first-degree (Ind. #s 2010-GS-37-887, 889), and Grand Larceny, valued Five-thousand Dollars or more (Ind. # 2010-GS-37-886). (App. 894-901).

Petitioner initially retained Robert Mills Ariel, Esq., to represent him at a motion hearing regarding his bond. A hearing on the matter was convened on June 30, 2010 before the

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Honorable Alexander S. Macaulay, Circuit Court Judge. Petitioner insisted on self-representation for future matters. Out of an abundance of caution, Judge Macaulay appointed counsel. Sarah Drawdy, Esq., and Keith Denny, Esq., were appointed to represent Petitioner on his charges. On July 29, 2010, a motion hearing was convened on Petitioner's *pro se* motion to have his attorneys relieved from the case. Petitioner argued the motion was based on a breach of trust with his attorneys. The Honorable J. Cordell Maddox, Jr., Circuit Court Judge, ultimately discharged attorneys Drawdy and Denny from the case and gave Petitioner thirty (30) days to retain private counsel. On September, 9, 2010, another motion hearing was reconvened before Judge Maddox to revisit lingering issues concerning Petitioner's Sixth Amendment right to counsel. As a result of Petitioner's wavering on the matter, Judge Maddox appointed Kurt Tavernier, Esq., as Petitioner's fourth and final attorney on the case. Judge Maddox issued several rulings concerning other *pro se* motions brought to the Court by Petitioner. On September 22, 2010, a Schmerber¹ hearing was convened before Judge Macaulay. Petitioner was present and was represented by Mr. Tavernier. On October 21, 2010, another motion hearing was convened pursuant to Petitioner's *pro se* motion to have Mr. Tavernier relieved before Judge Maddox. Petitioner apprised Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." Mr. Tavernier apprised Judge Maddox the allegation was entirely false and based upon Petitioner's ulterior disappointment in Tavernier's decision not to raise frivolous arguments and objections. Petitioner explained to Judge Maddox that: "I have fifteen [15] years' experience in the law." Judge Maddox ruled that he would not appoint a fifth attorney to Petitioner's case. Judge Maddox warned Petitioner: "you're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've

¹ Schmerber v. California, 384 U.S. 757 (1966).

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appointed for you.” On November 15, 2010, Judge Maddox issued an Order titled “Amended Order Appointing Standby Counsel on November 8, 2010.” On December 7, 2010 a final pre-trial motions hearing was convened before Judge Maddox to conclude all substantive preliminary matters. Petitioner was present and proceeded *pro se* with Mr. Tavernier as “advisory counsel.” Judge Maddox warned Petitioner that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation. During the course of the hearing, Judge Maddox commented that “I’ve gone over exhaustively your right to counsel.” Based on exhaustive inquiries regarding Petitioner’s Sixth Amendment rights, Petitioner made the final determination to proceed to trial *pro se* with the assistance of Mr. Tavernier as advisory counsel. Petitioner apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial *pro se*.

On December 13, 2010, the State called its case to trial. Petitioner was present and proceeded *pro se* with Mr. Tavernier as advisory-counsel. After selection of the jury, Petitioner attempted to rescind his waiver of right to counsel and asked the trial court to re-appoint Mr. Tavernier to represent him and continue the case. Judge Maddox denied the motion to reappoint Mr. Tavernier and continue the case. The trial continued to its conclusion with Petitioner representing himself *pro se*. On December 15, 2010, after fifteen (15) minutes of jury deliberations, Petitioner was found guilty as indicted. Judge Maddox sentenced Petitioner to a term of thirty (30) years imprisonment for CSC, first-degree (Ind. # -887), a term of thirty (30) years imprisonment for CSC, first-degree (Ind. # -889), a term of thirty (30) years imprisonment for Kidnapping (Ind. # -888), and a term of ten (10) years imprisonment for Grand Larceny,

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greater than \$5,000 (Ind # -886). All sentences were to be served consecutively for an aggregate term of one-hundred (100) years imprisonment.²

Respondent's Statement of Facts

Catherine McGough, a Clemson University student, was preparing to leave South Carolina for the summer and travel to Ireland. Around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit, Unit 177, at All Safe Storage located in Seneca, South Carolina. She then began walking to her car when she encountered a male (whom she identified as Petitioner at trial and after viewing a photograph line-up after the incident)¹ who wanted her to purchase shoes he was selling at that time. McGough showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough went back to close the door. Petitioner pushed her down in the unit and managed to place a belt around her neck. Petitioner then dragged her against her will to another storage unit, Unit 193, where he bound her and raped her and later placed a bottle of solution into her vagina after ejaculating in her. He then kept her tied up inside the storage room and locked in the storage bin while he fled in her vehicle, stealing it. McGough remained in the storage room for hours until she was able to free herself from her bindings. McGough then eventually managed to call 911 from a cell phone, reported the kidnapping and rape, and waited for police to arrive. (Tr. 84, 1. 5- 124, 1. 7).

² Petitioner had an extensive criminal record which was provided to the court at sentencing. Petitioner was convicted in 1993 of possession of cocaine and possession with intent to distribute. Petitioner was convicted in 1995 of possession with intent to distribute or distribution of drugs within proximity of a school, simple assault, DUS 2nd, and malicious injury to personal property. Petitioner was convicted in 2001 of strong armed robbery and received a sentence of ten (10) years. Petitioner was convicted in 2007 of fraudulent check and in 2009 of petit larceny. And, Petitioner was convicted in 1992 in Rome, Georgia of providing false information to police. (App. 652-53).

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Oconee Officer Neill Burkett was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. (Tr. 158, 1. 7 - 162, 1. 6). Oconee police had to break into Storage Unit 193 where they discovered the victim. Officer Brian Danielson transported McGough from the incident location to the local hospital. (Tr. 214, 1. 18 - 215, 1. 21). At the hospital a rape or sexual assault kit was performed.

The victim was treated at the hospital for injuries she sustained in the kidnapping and sexual assault. The victim had a swollen nose and a contusion over her eye. She also had a bruise on her arm consistent with having been tied up. She had a similar bruise to her forearm and wrist. She also had multiple bruises or abrasions to her left shoulder. She also had abrasions on the lower part of her abdomen and back consistent with being dragged by her assailant as she described at trial. Her left thigh and left knee and lower leg had multiple scrapes and abrasions on it also consistent with being dragged. The victim also had a ligature mark around her neck consistent with her report of being strangled or dragged with a belt tied around her neck. (Tr. pp. 188-95).

Subsequently, Officer Greg Reed created a photographic lay-out, which he showed to McGough, who in turn identified the picture of Petitioner as the perpetrator of her kidnapping and rape. (Tr. 259, 1. 6 - 267, 1).

Police executed a search warrant on Petitioner's storage unit, Unit 193. Petitioner had rented this storage unit in his own name, Dennis Temple. The owner of the storage facility identified Petitioner from a photo line-up as the person who rented Unit 193. Records produced by the storage facility also showed Petitioner recently rented Unit 193, and Petitioner entered the storage facility approximately two (2) to three (3) minutes after the victim entered the facility on the day of the crimes. The owner of the storage facility also testified Petitioner operated a tennis

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shoe business and stored tennis shoes in his storage bin in the storage facility and had attempted to sell her tennis shoes in the past as well. Inside Petitioner's storage unit, police found strips of clothing consistent with those described by the victim as used by Petitioner to bind the victim. Police also found a bottle as described by the victim. Police also found socks, similar to those described by the victim as used to gag her during the sexual assault and kidnapping, and police found a leather belt, similar to that described by the victim as that placed around her neck during the kidnapping and sexual assault. Forensic testing determined the victim's DNA was on the socks and on the belt recovered by police. Petitioner's DNA was also found on several of the items as well. Petitioner's DNA was found in the rape victim's stolen car after it was recovered by police. The car was valued at \$19,000. It was recovered abandoned in Anderson County. Petitioner's DNA was also found in a rectal swab from the victim's rape protocol kit taken at the hospital after the rape and kidnapping. (Tr. 84-149, 158-235, 236-41; 243-301, 303-33, 341-72, 373-403).

The Direct Appeal

Petitioner directly appealed his convictions and sentences to the South Carolina Court of Appeals. Petitioner was represented in the direct appeal by Wanda H. Carter, Esq., of the South Carolina Office of Appellate Defense. Ms. Carter filed a brief on Petitioner's behalf pursuant to Anders v. California³ on September 29, 2012.⁴ (Anders brief, Appendix). In the Anders brief, Petitioner raised the following issue to the South Carolina Court of Appeals:

The trial judge erred by what was in effect coercing appellant to appear *pro se* at trial because although appellant waived his right to counsel prior to trial; ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting representation of appointed counsel for his trial.

³ Anders v. California, 386 U.S. 738 (1967)

⁴ Faretta v. California, 422 U.S. 806 (1975).

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(Anders brief, p. 3). **Appellate counsel certified to the Court of Appeals the appeal was without merit and asked to be relieved as counsel. (Anders brief, p. 10).** Petitioner also filed a seventy-eight (78) page *pro se* Response to the Anders brief where he raised the two (2) following issues:

1. “Did the judge err when he failed to suppress the evidence obtained from the arrest warrants that was issued upon a supporting affidavit that did not link Appellant to the criminal activity or storage unit #193, and failed to link the storage unit #193 to Appellant.” (*Pro Se* Response pp. 1-12).
2. “Did the state commit perjury upon the court when it contended that this case was fast-tracked due to appellant’s speedy trial motion.” (*Pro Se* Response pp. 13-16).

On September 11, 2013, after careful consideration of the entire record as required by Anders, the Court of Appeals denied and dismissed the appeal in an unpublished opinion and granted appellate counsel’s request to withdraw. State v. Temple, Unpublished Opinion No. 2013-UP-350 (Ct. App. filed September 11, 2013). The Opinion read as follows:

PER CURIAM: Dismissed after consideration of Appellant’s *pro se* brief and review pursuant to Anders v. California, 386 U.S. 738 (1967). Counsel’s motion to be relived is granted.¹ [fn. 1 We decide this case without oral argument pursuant to Rule 215, SCACR.].

APPEAL DISMISSED.

SHORT, WILLIAMS, and THOMAS, JJ., concur.

State v. Temple, *supra*. The Remittitur was issued on September 27, 2013.

The PCR Action

Petitioner then filed an application for post-conviction relief (PCR) on October 15, 2013. (Civil Action # 2013-CP-37-729). Respondent filed its responsive pleadings on July 8, 2014. An evidentiary hearing into the matter was convened on July 28, 2014, at the Oconee County Courthouse before the Honorable Edgar W. Dickson, Circuit Court Judge (“the PCR Court”).

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Petitioner was present at the hearing and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. On October 24, 2016, the PCR Court issued an Order of Dismissal denying and dismissing the application with prejudice. The Order was filed with the Oconee County Clerk of Court's Office on October 31, 2016.

*The Order of Dismissal*⁵

[Beginning of pertinent portion of the Order of Dismissal]

This matter comes before the Court by way of a post-conviction relief (PCR) application filed on October 15, 2013. Respondent filed its responsive pleadings on July 8, 2014. An evidentiary hearing into the matter was convened on July 28, 2014, at the Oconee County Courthouse. Applicant was present at the hearing and was represented by Hugh W. Welborn, Esquire. Respondent was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office.

PROCEDURAL BACKGROUND

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Oconee County. The Applicant was indicted at the September 2010 term of the Court of General Sessions for Oconee County for grand larceny, valued five-thousand dollars or more (2010-GS-37-886), kidnapping (2010-GS-37-888), and two counts of criminal sexual conduct (CSC), first-degree (2010-GS-37-887, -889). The Applicant was initially retained Robert Mills Ariel, Esq., to represent him at motion hearing regarding his bond. A hearing on the matter was convened on June 30, 2010 before the Honorable Alexander S. Macaulay. **R. pp. 11-20.** Applicant insisted on self-representation for

⁵ Respondent believes it has set forth the Order of Dismissal verbatim for the convenience of this Court; however, the signed Order of Dismissal is contained in the attached Appendix.

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future matters. **R. p. 18.** Out of an abundance of caution, Judge Macaulay appointed counsel. **R. p. 18.**

Sarah Drawdy, Esq., and Keith Denny, Esq., were appointed represent him on his case. On July 29, 2010, a motion hearing was convened on Applicant's pro se motion to have his attorneys relieved from the case. **R. pp. 21-31.** Applicant argued the motion was based on a breach of trust.⁶ **R. p. 24.** The Honorable J. Cordell Maddox, Jr., ultimately discharged Attorney Drawdy and Attorney Denny from the case and gave Applicant thirty (30) days to retain private counsel. **R. p. 27.**

On September, 9, 2010, another motion hearing was reconvened before Judge Maddox to revisit lingering issues concerning Applicant's Sixth Amendment Right to counsel. **R. pp. 20-50.** As a result of Applicant's wavering on the matter, Judge Maddox appointed Kurt Tavernier, Esq., as Applicant's fourth and final attorney on the case. **R. p. 48.** Judge Maddox issued several rulings concerning other pro se motions brought to the court by Applicant.

On September 22, 2010, a Schmerber⁷ hearing was convened before Judge Macaulay. Applicant was present and was represented by Attorney Tavernier. **R. pp. 52-77.** On October 21, 2010, another motion hearing was convened pursuant to Applicant's pro se motion to have Attorney Tavernier relieved before Judge Maddox. **R. pp. 79-110.** Applicant apprised Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." **R. p. 82.** Judge Maddox warned Applicant on the perils of self-representation. **R. pp. 82-83.** Applicant explained to Judge Maddox that "I have fifteen years experience in the law." **R. p. 84.** Attorney Tavernier apprised Judge Maddox that the allegation was entirely false

⁶ Applicant was unable to articulate the basis other than he was generally unhappy in the manner his attorneys were proceeding with his case. [PCR Court's footnote].

⁷ Schmerber v. California, 384 U.S. 757 (1966).

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and based upon Applicant's ulterior disappointment in Attorney Tavernier's decision not to raise frivolous arguments and objections. **R. pp. 85-86.** Judge Maddox ruled that he would not appoint a fifth attorney to Applicant's case. Judge Maddox commented, "you're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." **R. p. 89.** On November 15, 2010, Judge Maddox issued an order titled "Amended Order Appointing Standby counsel" on November 8, 2010. **R. pp. 111-18.**

On December 7, 2010 a final pre-trial motions hearing was convened before Judge Maddox to conclude all substantive preliminary matters. Applicant was present and proceeded pro se with Attorney Tavernier as "advisory counsel." **R. pp. 119-210.** Judge Maddox continued to warn Applicant of the inherent risks of self-representation and apprised Applicant that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation. **R. p. 131; p. 134; p. 145.** During the course of the hearing, Judge Maddox commented that "I've gone over exhaustively your right to counsel." **R. p. 202.** Based on exhaustive inquiries regarding Applicant's Sixth Amendment rights, he made the final determination to proceed to trial pro se with the assistance of Attorney Tavernier as advisory counsel. **R. p. 204.** Applicant apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial pro se. **R. p. 202.**

On December 13, 2010, the State called its case to trial. Applicant was present and proceeded pro se with Attorney Tavernier as advisory-counsel. **R. pp. 211-657.** On December 15, 2010, after fifteen minutes of jury deliberations, Applicant was found guilty as indicted. **R. p. 657.** Judge Maddox sentenced Applicant to a term of thirty (30) years imprisonment for CSC, first-degree (-887), a term of thirty (30) years imprisonment for CSC, first-degree (-889), a term of thirty (30) years imprisonment for kidnapping (-888), and a term of ten (10) years

imprisonment for grand larceny, greater than \$5,000. All sentences were to be served consecutively for an aggregate term of 100 (one-hundred) years imprisonment.

A timely Notice of Appeal was filed on the Applicant's behalf and an appeal was perfected by Wanda H. Carter, Esq., of the Office of Appellate Defense, pursuant to Anders v. California⁸ on September 29, 2012. Appellate counsel Carter raised the issue that the trial judge erred in denying Applicant's request for counsel in the middle of trial because the trial judge's prior waiver colloquy on the matter was insufficient pursuant to Faretta v. California⁹. **FBOA pp. 1-10.** Applicant additionally filed a seventy-eight page pro se brief on October 29, 2012 to the South Carolina Court of appeals where he raised the two following issues:

1. "Did the judge err when he failed to suppress the evidence obtained from the arrest warrants that was issued upon a supporting affidavit that did not link Appellant to the criminal activity or storage unit #193, and failed to link the storage unit #193 to Appellant." **Pro Se FBOA pp. 1-12.**
2. "Did the state commit perjury upon the court when it contended that this case was fast-tracked due to appellant's speedy trial motion." **Pro Se FBOA pp. 13-16.**

The Court of Appeals dismissed the appeal. **State v. Temple, No. 2013-UP-350 (filed September 11, 2013).** The Remittitur was issued on September 27, 2013.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witnesses presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the prior PCR proceedings, the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and

⁸ Anders v. California, 386 U.S. 738 (1967). [PCR Court's footnote].

⁹ Faretta v. California, 422 U.S. 806 (1975). [PCR Court's footnote].

documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2016), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Appellate Counsel

Applicant alleged that his appellate counsel was ineffective for failing to submit the preliminary hearing transcript as part of the record on appeal; failing to argue that there was no probable cause to issue an arrest warrant; and failing to argue he did not freely and voluntarily waive the right to counsel. The State moved for summary dismissal on this allegation. This Court finds summary judgment is appropriate and grants the State's motion.

Under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

This Court first notes that in spite of Applicant's belief concerning the strength of the omitted arguments, his appeal was submitted pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Where appellate counsel submits an Anders brief, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. State v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 813 (2009) (citing State v. Williams, 305 S.C.

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116, 406 S.E.2d 357 (1991)). If an issue is found which has arguable merit, the appellate court will direct the parties to file merit briefs, and the case will proceed under the normal appellate process. Id. On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. Id. Applicant's appeal was dismissed after review pursuant to Anders, reflecting that "the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." Id.

In this case, Applicant alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. This issue was raised in Applicant's *pro se* brief on direct appeal, and therefore considered and determined to be without merit by the appellate court pursuant to Anders. Applicant's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record is an extension of this argument. Applicant has failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.¹⁰

Applicant has also alleged that his appellate counsel was ineffective for failing to argue that he was forced to represent himself. There is no factual basis for this claim – the issue was raised by appellate counsel in its Anders brief. Had the issue been meritorious, then the appellate court would have ordered a brief on the merits. As discussed above, the record is replete with discussions concerning the dangers of self-representation. This Court is of the firm opinion that the Applicant waived his right to counsel with his eyes wide open and in compliance with

¹⁰ The record clearly establishes that Applicant's arrest was supported by probable cause. Following a hearing on May 20, 2012, after hearing testimony that the victim identified the Applicant in a photo-lineup and that the assault took place in the Applicant's storage unit, the presiding judge determined that there was probable cause to believe he committed the assault. **R. pp. 5-7.** In any event, the Applicant's subsequent indictment by the Grand Jury cures any deficiencies in the arrest warrant. **R. pp. 684-91;** see Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968). [PCR Court's footnote].

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Faretta. Because Applicant has failed to raise any meritorious arguments that his appellate counsel omitted, this allegation is summarily denied and dismissed.

Res Judicata

Applicant has also raised the following allegations:

1. “Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest arrests that was issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to criminal activity, (2). There was no facts connecting applicant to the storage unit #193, (3). There was no facts connecting storage unit #193 to any criminal activity, (4). There was no facts under by the alleged victim stating the applicant was identified as the accused, (5). There was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7). There was no probable cause to arrest.” **APCR p. 11;** further more redundantly repeated in allegations (b), (f), (g), (h), & (m) on **APCR p. 12; pp. 14-15; p. 17.**

2. “Applicant was coerced to represent himself during trial.” **APCR p. 12**

This Court agrees with the state that these allegations are procedurally barred by *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. Bell v. Bennett, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. Foran v. USAA Casualty Ins. Co., 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. Id. This application presents allegations that could have been and were in fact raised in those prior collateral proceedings. In Appellate counsel’s Anders brief, she presented an issue concerning Applicant’s self-representation to the Court of Appeals. The Court subsequently dismissed Applicant’s appeal. Therefore, the issue has been raised and ruled upon. This Court will not revisit those rulings.

Subsequent to Appellate counsel perfecting Applicant's appeal pursuant to Anders on September 28, 2012 and motion to be relieved as Applicant's appellate attorney, he filed a pro se brief and presented an issue concerning the admissibility of evidence obtained from the search warrant to the Court of Appeals. The matter was properly raised by Applicant at that juncture and was considered by the Court of Appeals. Similarly, *res judicata* bars further litigation on that matter. Therefore, summary dismissal is appropriate.

Direct Appeal Issues

The remainder of Applicant's allegations are direct appeal issues that are procedurally barred direct by S.C. Code Ann. § 17-27-20(b) (2003).

1. "indictments were not issued within 90 days." **APCR p. 12.**
2. "The six man photo lineup of the applicant and five other black was assemble and shaded in a unduly and suggestive way, that gave way to irreparable misidentification and (2) the trial court judge failed to make specific findings of facts to mixed questions of law before its ruling in suppression hearing on the photo lineup. **APCR pp. 13-14.**
3. "once the state presented its case against applicant during trial, the applicant was denied by judge to present witnesses for his defense." **Application for Post-Conviction Relief 'APCR' p. 16.**
4. "The State failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the State further failed to disclose other materials in it's possession or control to the applicant which would have contradicted the state's claims or cleared the defendant of blame. **APCR pp. 15-16.**
5. "one of the initial jurors started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrences." **APCR p. 16.**
6. "Trial Judge and solicitor leading the state witness on what to testify to or say on cross examination." **APCR p. 17.**

Post-conviction relief is not a substitute for an appeal.¹¹ Simmons v. State, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. Drayton v. Evatt, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Summary dismissal is therefore appropriate.

Applicant's Motion for Summary Judgment

The Applicant also moved for summary judgment on the ground that the Attorney General's Office did not file its Return in a timely manner, and failed to respond to his summary judgment motion. This motion is denied. Applicant has failed to show or allege any prejudice from Respondent's delay. See Kneece v. State, 269 S.C. 177, 178, 236 S.E.2d 746, 747 (1977).

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

CONCLUSION [to the Order of Dismissal]

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

This Court notes that Applicant must file and serve a notice of intent to appeal within thirty (30) days from receipt of this Order to secure the appropriate appellate review. See Rule 203, SCACR. Rule 71.1(g), SCRCP; Bray v. State, 336 S.C. 137, 620 S.E.2d 743 (2005), for the

¹¹ Regardless, as discussed above, the record in Applicant's case has been thoroughly reviewed by the Court of Appeals and no meritorious issues were discovered. [PCR Court's footnote].

obligation of Applicant's counsel to file and serve notice of appeal. The Applicant's attention is also directed to South Carolina Appellate Court Rule 243 for appropriate procedures after notice has been timely filed.

IT IS THEREFORE ORDERED

1. That the Application for Post-Conviction Relief be, and hereby is, denied and dismissed with prejudice; and
2. Applicant be, and hereby is, remanded to the custody of the South Carolina Department of Corrections.

AND IT IS SO ORDERED.

[End of pertinent portion of the Order of Dismissal]

The Appeal from the Denial of PCR

Petitioner appealed from the denial of PCR by way of a Johnson Petition for Writ of Certiorari. In the Johnson Petition for Writ of Certiorari, Petitioner raised the following issue to the South Carolina Supreme Court:

Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

(Johnson Petition for Writ of Certiorari, p. 1). **Collateral appellate counsel certified to the Supreme Court the appeal was without merit and asked to withdraw from the case.**

(Johnson Petition for Writ of Certiorari). Petitioner filed a *pro se* Response to the Johnson Petition. In the *pro se* Response, Petitioner raised the following issue(s) to the South Carolina Supreme Court:

Did the General Sessions Court have jurisdiction to hear appellant's criminal case? When the Magistrate Court never established, it had probable cause to detain appellant on the arrest warrants.

(*Pro se* Response, p. 2). The appeal was transferred to the South Carolina Court of Appeals by the South Carolina Supreme Court. On October 16, 2018, after careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Court of Appeals denied certiorari and granted counsel's request to be relieved. The Remittitur was issued on November 9, 2018 and filed on November 13, 2018. (Attached).

ATTACHMENTS

Appendix, the Honorable Edgar W. Dickson (2 Volumes)

Johnson Petition for Writ of Certiorari (PCR Appeal)

Pro se Response to Johnson Petition for Writ of Certiorari (PCR Appeal)

Order of the S.C. Court of Appeals denying certiorari (PCR Appeal)

Remittitur (PCR Appeal)

FEDERAL HABEAS GROUNDS

Ground one: The trial judge erred by what was in effect coercing appellant to appear *pro se* at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.
Supporting facts: (See p. 4).

Ground two: The PCR Court erred in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.
Supporting facts: (See p. 13).

Ground three: Did the General Sessions Court have jurisdiction to hear appellant's criminal case when the magistrate never established it had probable cause to detain appellant on the arrest warrants.
Supporting facts: (See p. 31).

APPLICABILITY OF THE AEDPA

This petition was filed November 29, 2018, according to Petitioner's envelope. As a result, the provisions of the AEDPA apply. Lindh v. Murphy, 521 U.S. 320 (1997). Under the

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AEDPA, claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of “clearly established federal law as decided by the United States Supreme Court, or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.” 28 U.S.C. Section 2254(d). State court factual findings are presumed to be correct and the Petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. Section 2254(e)(1).

STATUTE OF LIMITATIONS

Petitioner’s conviction was final when the direct appeal ended on September 11, 2013. The AEDPA one (1) year statute of limitations began to run fifteen (15) days later on September 27, 2013 [giving Petitioner fifteen (15) days to file a petition for rehearing which was not filed]. The AEDPA one (1) year statute of limitations continued to run until the filing of the PCR application on October 15, 2013. As a result, eighteen (18) days of un-tolled time expired on the AEDPA one (1) year statute of limitations. Petitioner had eleven (11) months and twelve (12) days remaining within which timely file his federal habeas petition. The PCR action tolled the statute of limitations until the PCR appeal ended. On October 16, 2018, the South Carolina Court of Appeals denied certiorari in the PCR appeal. The Remittitur was issued on November 9, 2018 and filed on November 13, 2018. This federal habeas petition followed on November 29, 2018. As a result, Petitioner **is not** in violation of the AEDPA one (1) year statute of limitations.

EXHAUSTION

Petitioner has exhausted his state remedies. Petitioner was tried, convicted and sentenced. Petitioner’s direct appeal was denied and his convictions and sentences affirmed. Petitioner filed a PCR action which was denied and his PCR appeal was denied. Petitioner has

exhausted his state remedies. As to his grounds, Petitioner exhausted Ground one on direct appeal. As to Ground two, Petitioner exhausted Ground two at PCR and on appeal from the denial of PCR. Ground three is simply not cognizable on federal habeas review.

PROCEDURAL BAR AND DEFAULT

Ground three is procedurally barred because it is not cognizable on federal habeas review. Petitioner alleges a lack of jurisdiction in the state court. Whether the Court of General Sessions had jurisdiction to hear Petitioner's case is a matter of state law and therefore not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62 (1991)(We have stated many times that federal habeas corpus relief does not lie for errors of state law). This claim is not cognizable in federal habeas corpus, as it depends entirely on a state court's determination of its own laws. See Wright v. Angelone, 151 F.2d 151 (4th Cir. 1998)(noting that while habeas may be granted for a lack of jurisdiction in the sentencing court, relief may not be granted where alleged jurisdictional defect depends on interpretation of state law, unless result in complete miscarriage of justice defined as actual innocence); Wills v. Egeler, 532 F.2d 1058, 1059(6th Cir. 1976) (holding that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary.").

Cause and Prejudice

Petitioner cannot overcome the procedural bar because the claim is a direct appeal claim and not cognizable on federal habeas review. Martinez v. Ryan, 566 U.S. 1 (2012) does not apply to such claims.

Even if it did apply to such claims, the claim has no merit. The Circuit Court of General Sessions has subject matter jurisdiction to try the crimes of CSC 1st, Kidnapping, and Grand

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Larceny. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)(subject matter jurisdiction is the inherent power of the court to hear a certain class of cases). The illegality of an arrest or arrest warrant will not bar a person’s subsequent prosecution and conviction if properly indicted by a grand jury with proper jurisdiction. Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968)(indictment by grand jury cures any defect in the arrest warrant); State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1972).

Miscarriage of Justice/Actual Innocence

Petitioner cannot show actual innocence on this record. (See Respondent’s Statement of Facts & Appendix [trial transcript]). Bousley v. United States, 523 U.S. 614, 623 (1998); Schlup v. Delo, 513 U.S. 298, 327 (1995). Petitioner was identified by the victim at trial and from a photo line-up shortly after the crimes as the person who kidnapped and raped her. The victim identified Petitioner’s storage bin as the place of her eventual confinement and rape. The victim’s DNA was found on items belonging to Petitioner. Petitioner’s DNA was found in the victim’s rape protocol rectal swab. Petitioner’s DNA was also found in the victim’s stolen car. Petitioner cannot show actual innocence on this record. Ground three remains procedurally barred. Id.

THE MERITS

Standard of Review

The standard of review to be applied in habeas is “quite deferential to the rulings of state courts” and as described by the United States Supreme Court in Harrington v. Richter, 131 S.Ct. 770 (2011) “is difficult to meet[.]” Burch v. Corcoran, 273 F.3d 577, 583 (4th Cir. 2001); Richter, 131 S.Ct. at 786.

To prevail on an ineffective assistance of counsel (“IAC”) claim, Petitioner must show (1) that his counsel’s performance fell below an objective standard or reasonableness, and (2) that a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1985). Petitioner bears the burden of proving an error and prejudice in his ineffective assistance of counsel claim. Id.

Petitioner also bears the burden of showing he is entitled to habeas corpus relief. Smith v. North Carolina, 528 F.2d 807, 809 (4th Cir. 1975). To obtain relief, Petitioner must show the state court unreasonably applied federal law, as determined by the U.S. Supreme Court, or show by clear and convincing evidence the relevant state court made “an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” 28 U.S.C. Section 2254(d); Carey v. Musladin, 127 S.Ct. 649, 653-54 (2007). As explained in Richter, a state court’s determination is reasonable under Section 2245(d) so long as “fair minded jurists could disagree on the correctness of the state court’s decision.” Richter, 131 S.Ct. at 786 (internal quotations omitted). In other words, a state court determination that a claim lacks merit is unreasonable only where fair-minded jurists would agree the state court decision was incorrect. Id. Here, Petitioner has shown neither. The state court did not unreasonably apply clearly established federal law, as decided by the U.S. Supreme Court, nor has Petitioner shown by clear and convincing evidence that the state court’s factual determinations were unreasonable in light of the facts and evidence before it.

Pursuant to Section 2254(d)(1), a state court ruling is “contrary to clearly established federal law, as determined by the Supreme Court of the United States” where the ruling “arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law[.]” Williams v. Taylor, 529 U.S. 362, 413 (2000). Likewise, a state court ruling is “contrary to

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clearly established federal law, as determined by the Supreme Court of the United States” where “the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” Id. “[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the U.S. Supreme Court].” Knowles, v. Mirzayance, 556 U.S. 111, 122 (2009)(quotation marks omitted). This is because the phrase “clearly established Federal law” refers “to the holdings, as opposed to dicta, of [the U.S. Supreme Court’s] decisions as of the time of the relevant state-court decision.” Williams v. Taylor, 529 U.S. 362, 412 (2000). Similarly, when the Supreme Court has not yet “confront[ed] ‘the specific question presented by [a particular] case,’ the state court’s decision [cannot] be ‘contrary to’ any holding” of the Supreme Court. Lopez v. Smith, 135 S.Ct. 1, 4 (2014)(*per curiam*); Morva v. Zook, 821 F.3d 517, 524 (4th Cir. 2016).

This Court may not “consult [its] own precedents, rather than those of [the U.S. Supreme Court] in assessing a habeas claim governed by Section 2254.” White v. Woodall, 572 U.S. ___, 134 S.Ct. 1697, 1702, n. 2 (2014)(quotation marks and alteration omitted). Therefore, circuit court precedent may not be used “to refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [the Supreme Court] has not announced.” Marshall v. Rodgers, 133 S.Ct. 1446, 1450, *reh’g denied* 133 S.Ct. 2408 (2013). Also a circuit court “may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted among the Federal Circuits that it would, if presented to [the Supreme Court], be accepted as correct.” Id. at 1451.

To establish an unreasonable application of federal law, Petitioner must show more than “..an incorrect or erroneous application of federal law.” Williams v. Taylor, 529 U.S. at 413.

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Thus, “a federal court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather that application must also be ‘unreasonable’ for habeas relief to be granted.” Id. at 410. “This is a substantially higher threshold.” Id. at 410.

Further detailing the limited scope of federal habeas review, the Richter court explained that Section 2254(d) “reflects the view that habeas corpus is ‘a guard against extreme malfunctions in the state criminal justice system,’ not a substitute for ordinary error correction through appeal.” Id. (*quoting Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979)(Stevens J. concurring)). Thus, for relief under Section 2254(d)(1), Richter concludes “a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fair-minded disagreement.” Id. Accordingly, pursuant to Section 2254(d)(1), state court rulings “must be granted deference and latitude that are not in operation” on direct review of the same claim and “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” Id., 131 S.Ct. at 785-86.

Like its counterpart, Section 2254(d)(2)’s requirement that a petitioner prove the state court made “an unreasonable determination of the facts in light of the evidence presented in state court proceedings” is difficult to meet. *See Richter*, 131 S.Ct. at 786 (“If [Section] 2254(d)’s standard is difficult to meet, that is because it was meant to be.”). This is evidenced in Section 2254(e)(1)’s “presumption of correctness” given to state court factual determinations as well as its requirement that the petitioner can only rebut such a presumption by, “clear and convincing evidence.” *See* 28 U.S.C. Section 2254(e)(1)(stating determination of factual issue made by a state court is presumed to be correct and the petitioner must rebut the presumption by clear and

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convincing evidence). Accordingly, a habeas petitioner is entitled to relief under Section 2254(d)(2) only if he can prove, by clear and convincing evidence, that the state court unreasonably determined the facts in light of the evidence presented in state court.

When evaluating whether a state court's application of a legal rule of the U.S. Supreme Court was unreasonable, and thus warrants federal habeas relief, a court must consider the rule's specificity; the more general the rule, the more leeway state courts have in reaching outcomes in case by case determinations. Richter, 131 S.Ct. at 788. As explained in Richter, the Strickland standard for ineffective assistance of counsel, "is a general one, so the range of reasonable applications is substantial. Id., 131 S.Ct. at 788. Thus, when reviewing ineffective assistance of counsel claims under Section 2254(d), review is "doubly" deferential. See Id. ("The standards created by Strickland and Section 2254(d) are both highly deferential, and when the two apply in tandem, review is doubly so.")(emphasis in original)(internal citations omitted)(internal quotations omitted). Moreover, "federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under Section 2254(d)." Id. Accordingly, where Section 2254(d) applies, "the question is not whether counsel's actions were reasonable[,]" but rather, "whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. As to this issue, Respondent submits the state court correctly denied Petitioner relief and did not unreasonably apply U.S. Supreme Court precedent.

When "assessing prejudice under Strickland, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel had acted differently." Richter, 131 S.Ct. at 791-92 (citing Wong v. Belmontes, 130 S.Ct. 383, 390 (2009)(*per curiam*)(slip op., at 13); Strickland, 466 U.S. at 693. Rather Strickland asks whether it is "reasonably likely the result would have

been different.” *Id.* (*quoting Strickland*, 466 U.S. at 696 (internal quotations omitted)). Indeed *Strickland* dictates do “not require a showing that counsel’s actions more likely than not altered the outcome,” but instead asks whether “the likelihood of a different result” is substantial, as opposed to conceivable. *Id.* (*quoting Strickland*, 466 at 693, 697 (internal quotations omitted)).

Under 28 U.S.C. Section 2254, “federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.” *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) *quoting Marshall v. Lonberger*, 459 U.S. 422, 434 (1983)(alteration in original). “Credibility determinations such as those the state . . . court made regarding [a witness], are factual determinations. As such, they ‘are presumed to be correct absent clear and convincing evidence to the contrary, and a decision adjudicated on the merits and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding.’” *Wilson v. Ozmint*, 352 F.3d 847, 858 (4th Cir. 2003) *quoting Miller-El*, 537 U.S. at 340). “For a federal habeas court to overturn a state court’s credibility judgments, the state court’s error must be stark and clear.” *Cagle*, 520 F.3d at 3243.

The standard of Section 2254(d) is “difficult to meet ... because it was meant to be.” *Burt v. Titlow*, 134 S.Ct. 10, 16 (2013)(quotation marks omitted). “State courts are adequate forums for the vindication of federal rights ..., AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Id.*, at 15-16. This “highly deferential standard” demands that “[t]he petitioner carries the burden of proof,” *Cullen v. Piinholster*, 131 S.Ct. 1388, 1398 (2011)(quotation marks omitted), and “that state-court decisions be given the benefit of the doubt,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). Under these standards of review, there is no merit to any of Petitioner’s grounds.

The Lack of Merit of Petitioner's Grounds

Ground one: The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.
Supporting facts: (See p. 4).

There is no merit to this ground. This direct appeal issue was addressed by the Court of Appeals in Petitioner's direct appeal because this is the exact issue raised by appellate counsel in her Anders brief to the South Carolina Court of Appeals. (Anders brief).¹² The Court of Appeals conducted an Anders review and found there was no preserved issue of arguable merit and denied and dismissed the appeal. By necessity, the Court of Appeals would have addressed this issue on the merits because it was raised during Petitioner's trial and ruled on by the trial judge, Judge Maddox, and raised in the Anders brief. State v. Temple, supra. (See also Anders brief) The Court of Appeals determination of this issue is entitled to deference by this Court. Harrington v. Richter, supra. That determination is fully supported by the record.

Petitioner initially appeared before Circuit Court Judge R. Lawton McIntosh on May 20, 2012 at which the State requested a STD [sexually transmitted disease sample]. Petitioner proceeded *pro se* at that hearing and informed Judge McIntosh he did not trust attorneys from Oconee County because of his past dealings with them. (App. 1-8). Petitioner initially retained Robert Mills Ariel, Esq., to represent him at a motion hearing regarding his bond. A hearing on the matter was convened on June 30, 2010 before the Judge Macaulay. (App. 9-18). At that hearing, Petitioner informed Judge Macaulay that he was representing himself in a civil matter in federal court. (App. 9-18). Out of an abundance of caution, Judge Macaulay appointed counsel.

¹² In his federal habeas brief, in raising this ground, Petitioner has quoted verbatim from his appellate counsel's Anders brief. (Anders brief, pp. 1-10, Appendix). As a result, this is the exact issue raised by appellate counsel to the South Carolina Court of Appeals in the direct appeal.

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(App. 9-18). Sarah Drawdy, Esq., and Keith Denny, Esq., were eventually appointed represent him on his charges.¹³ Petitioner insisted on self-representation for future matters. Petitioner actually served the State with notice that he intended to represent himself. On July 29, 2010, a motion hearing was convened on Petitioner's *pro se* motion to have his attorneys relieved from the case. (App. 19-29). Petitioner argued the motion was based on a breach of trust with his attorneys. (App. 19-29). Judge Maddox ultimately discharged attorneys Drawdy and Denny from the case and gave Petitioner thirty (30) days to retain private counsel. (App.19-29). On September 14, 2010, another motion hearing was reconvened before Judge Maddox to revisit lingering issues concerning Petitioner's Sixth Amendment Right to Counsel. (App. 30-48). Petitioner had not hired a private attorney. As a result of Petitioner's wavering on the matter, Judge Maddox appointed Kurt Tavernier, Esq., as Petitioner's fourth and final attorney on the case. (App. 30-48). Judge Maddox issued several rulings concerning other *pro se* motions brought to the Court by Petitioner. On September 22, 2010, a Schmerber¹⁴ hearing was convened before Judge Macaulay. (App. 49-74). Petitioner was present and was represented by Mr. Tavernier. (App. 49-74). On October 21, 2010, another motion hearing was convened pursuant to Petitioner's *pro se* motion to have Mr. Tavernier relieved before Judge Maddox. (App. 75-106). Petitioner apprised Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." (App. 75-106). Petitioner explained to Judge Maddox that: "I have fifteen [15] years experience in the law." (App. 75-106). Mr. Tavernier apprised Judge Maddox that the allegation was entirely false and based upon Petitioner's ulterior disappointment in Tavernier's decision not to raise frivolous arguments and

¹³ The Oconee County Public Defender was originally appointed to represent Petitioner but he had a conflict and the case was reassigned to outside attorneys Sarah Drawdy and Keith Denny, Esquires.

¹⁴ Schmerber v. California, 384 U.S. 757 (1966).

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objections. (App. 75-106). Mr. Tavenier also informed Judge Maddox he had an investigator present with him each time he met with Petitioner and he did not threaten Petitioner or his family and did not care one way or the other whether Petitioner pled guilty or proceeded to trial. (App. 75-106) Judge Maddox ruled that he would not appoint a fifth attorney to Petitioner's case. Judge Maddox commented: "you're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." (App. 75-106). On November 15, 2010, Judge Maddox issued an Order titled "Amended Order Appointing Standby Counsel on November 8, 2010." On December 7, 2010 a final pre-trial motions hearing was convened before Judge Maddox to conclude all substantive preliminary matters. Petitioner was present and proceeded *pro se* with Mr. Tavernier as "advisory counsel." (App. 107-98). Judge Maddox warned Petitioner that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation. (App. 107-98). During the course of the hearing, Judge Maddox commented that "I've gone over exhaustively your right to counsel." (App. 107-98). Based on exhaustive inquiries regarding Petitioner's Sixth Amendment rights, Petitioner made the final determination to proceed to trial *pro se* with the assistance of Mr. Tavernier as advisory counsel. (App. 107-98). The Court informed Mr. Tavernier that he would not be required to be prepared for trial but would be serving only in an advisory capacity, i.e. answer Petitioner's questions if asked about procedure, such as issue preservation, Rules of Evidence, and courtroom decorum. (App. 107-98). Petitioner apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial *pro se*. (App. 107-98).

On December 13, 2010, the State called its case to trial. Petitioner was present and proceeded *pro se* with Mr. Tavernier as advisory-counsel. (App. 199-261). It was only after

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selection of the jury, that Petitioner then notified the Court he wanted to move for a continuance, and rescind his previous waiver of counsel and assertion of his right to represent himself, and he now wanted Mr. Tavenier to represent him. (App. 199-261). Petitioner had previously moved for a motion for a speedy trial. Witnesses were present, including the victim, and the State was ready to proceed with Petitioner's trial, including the presentation of DNA evidence linking Petitioner directly to the crimes. (App. 199-261). The jury had been selected and was waiting to begin the trial Petitioner had asked for. (App. 199-261).

Petitioner admits in this Ground that he waived his right to counsel and asserted his right to represent himself prior to the day of his trial and did not attempt to reassert his right to counsel and rescind his exercise of his right to represent himself until after the jury was selected for the trial of his case. (See Attachment to Federal Habeas Petition [Federal Habeas Brief], Ground one & see Ground one above). Petitioner also admitted in his Anders brief, that he executed a voluntary and intelligent waiver of his right to counsel prior to trial. (Anders brief, pp. 1-10). Petitioner also admitted in his Anders brief, Petitioner waived his right to counsel by conduct, i.e. continually firing or dismissing appointed counsel, including Mr. Tavernier. (Anders brief, pp. 1-10). Appellate counsel raised this very issue on direct appeal and certified to the Court of Appeals the appeal was without merit and asked to be allowed to withdraw as counsel. (Anders brief). As a result of all of the above, Judge Maddox did not err in denying Petitioner's motion to reappoint Mr. Tavernier and the motion for a continuance so Mr. Tavenier could represent Petitioner in full as counsel of record at some future date. (App. 258-61). More importantly, the Court of Appeals did not unreasonably apply United States Supreme Court precedent or reach an unreasonable determination of the facts in affirming Judge Maddox on this issue. State v. Temple, *supra*.

The Sixth and Fourteenth Amendments of our Constitution guarantee that a person brought to trial in any state or federal court must be afforded the right to the assistance of counsel before he can be validly convicted and punished by imprisonment. Faretta v. California, 422 U.S. 806, 807, 95 S.Ct. 2525, 2527 (1975). It is well established that an accused may waive the right to counsel and proceed *pro se*. Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525 (1975); State v. Fuller, 337 S.C. 236, 523 S.E.2d 168 (1999). Although a defendant's decision to proceed *pro se* may be to the defendant's detriment, it "must be honored out of that respect for the individual which is the lifeblood of the law." Id. at 834, 95 S.Ct. 2525. There is no prohibition against even a capital defendant knowingly and intelligently waiving the right to counsel. State v. Brewer, 328 S.C. 117, 492 S.E.2d 97 (1997).

Once waived, the right to counsel is no longer absolute. State v. Reed, 332 S.C. 35, 44, 503 S.E.2d 747, 751 (1998); State v. Cabrera-Pena, 350 S.C. 517, 534, 567 S.E.2d 472 (Ct. App. 2000), *reversed in part on other issue; affirmed in result*, 361 S.C. 372, 605 S.E.2d 522 (2004). While there is a presumption that a defendant's ***post-trial*** request for the assistance of counsel should not be refused, "there are times when the criminal justice system would be poorly served by allowing the defendant to reverse his waiver at the last minute particularly where delay would result." State v. Reed, 332 S.C. at 44, 503 S.E.2d 747; State v. Cabrera-Pena, 350 S.C. at 534, 567 S.E.2d 472. In Reed, 332 S.C. 35, 503 S.E.2d 747, the South Carolina Supreme Court held the trial judge did not abuse his discretion in denying the defendant's request for re-appointment of counsel, where defendant elected to proceed *pro se* in his capital murder trial and was found guilty, and on evening before the sentencing phase, the defendant asked that a standby counsel be appointed as counsel. The trial judge denied the request, noting that the defendant's request occurred during a continuing, and not separate, proceeding and that counsel was not prepared).

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Furthermore, in Cabrera-Pena, 350 S.C. at 527-34, 567 S.E.2d at 478-82, the South Carolina Court of Appeals held the trial judge did not abuse his discretion in denying the defendant's request for re-appointment of counsel, where defendant elected to proceed *pro se* in his murder trial, and requested reappointment in the middle of trial which would have impermissibly resulted in hybrid representation. The facts of this case are almost exactly the same as these two (2) cases.

Petitioner had been represented by four (4) attorneys prior to his trial. Petitioner insisted over and over again that he wished to represent himself. Petitioner was informed several times of the trial date. Petitioner fired each attorney who represented him, including Mr. Tavernier, for reasons the trial judge found were not credible.¹⁵ Petitioner was given the opportunity to retain private counsel, but he did not do so. It was explained to Petitioner over and over again Petitioner needed counsel to assist him, but Petitioner insisted on representing himself. Petitioner acknowledged at one hearing that he understood it was dangerous to represent himself on these charges and it was not a good idea. However, Petitioner requested to represent himself at his trial and filed a motion to represent himself at trial. Petitioner fired Mr. Tavernier shortly before trial after being informed if he fired Mr. Tavernier he would have to hire an attorney or represent himself. Petitioner chose to represent himself. Petitioner had books found in his storage bin on representing yourself at trial. (App. 87-88). Those books were marked as exhibits

¹⁵ Petitioner repeatedly sought to have something that he was not constitutionally entitled to, an attorney he could dictate to. The right of an accused to effective assistance of counsel does not extend to the appointment of counsel of choice, or to special rapport or even a meaningful relationship with appointed counsel. United States v. Gonzalez-Lopez, 548 U.S. 140, 151, 126 S.Ct. 2557 (2006); Williams v. United States, 486 U.S. 153 (1988); Morris v. Slappy, 461 U.S. 1, 14, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983).

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at one hearing prior to trial. (App. 87-88).¹⁶ Petitioner was given his expressed wish by the trial judge. Petitioner exercised his constitutional right to represent himself. Faretta. Petitioner admits he waived his right to counsel before trial. (See Ground one & Attachment to Ground One & Anders brief). It was only after his trial began, and after his jury was selected, that Petitioner changed his mind and wanted his stand-by or advisory counsel [who was there only to advise Petitioner on Rules of Evidence, courtroom decorum, and other such matters in Petitioner's self-representation] who was not prepared to represent Petitioner in a trial, to become his attorney in fact. See McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441 (1970)(the right to counsel includes the right to effective assistance of counsel).¹⁷

The trial court did not err in declining Petitioner's change of heart during the trial. Reed, 332 S.C. 35, 503 S.E.2d 747; Cabrera-Pena, 350 S.C. 517, 567 S.E.2d 472. Petitioner had moved for a speedy trial in August. The trial date had been set for months. At this point, advisory or stand-by counsel would not have been prepared to represent Petitioner in his trial that day as he had been advised previously he was not going to be representing Petitioner at trial. Advisory or stand-by counsel had not prepared for trial. The case would have to have been continued for several weeks to allow stand by or advisory counsel to prepare for trial. The selected jury would have to have been released and sent home. All of the witnesses there for Petitioner's trial, which were numerous, and included the rape and kidnapping victim, would have to have been released and sent home. As a result, the Court of Appeals did not abuse its

¹⁶ The books were entitled *The Jailhouse Lawyer* and *How and When to be Your Own Lawyer*, the *Georgetown Law Journal*. (App. 87).

¹⁷ Mr. Tavernier informed Judge Maddox prior to the trial date that he was not prepared to represent Petitioner and the case would have to be continued if he was going to represent Petitioner as counsel of record.

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discretion in affirming the trial court, Judge Maddox, on this issue. Reed, *supra*; Cabrera-Pena, *supra*.

Petitioner has failed to show the Court of Appeals or the trial court unreasonably applied United States Supreme Court precedent in deciding this issue. Petitioner has also failed to show by clear and convincing evidence that the Court of Appeals or the trial court reached an unreasonable determination of the facts given the evidence and record before the state court. As a result, Petitioner has failed to overcome the deference granted the state court's determination of this direct appeal issue. Harrington v. Richter, *supra*. Therefore, this ground has no merit and must be denied and dismissed with prejudice.

Ground two: The PCR Court erred in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.
Supporting facts: (See p. 13).

There is no merit to this ground. The PCR Court decided this issue of *ineffective assistance of counsel (IAC)* [i.e. ineffective assistance of appellate counsel] and found it had no merit. That determination is entitled to *double deference* by this Court. Harrington v. Richter. That determination is fully supported by the record. The PCR Court also found Petitioner's testimony was not credible. That determination is also entitled to deference by this Court. Cagle v. Branker. That determination is fully supported by the record.

The Law

A criminal defendant is entitled to the effective assistance of appellate counsel; however, appellate counsel may make a reasonable strategic choice not to appeal every non-frivolous argument requested by the defendant. Jones v. Barnes, 463 U.S. 745 (1983). In Jones, the Supreme Court noted: "the importance of winnowing out weaker arguments on appeal and

focusing on one central issue if possible.” *Id.* at 751. *See also Thrift v. State*, 302 S.C. 535, 397 S.E.2d 523 (1990). Appellate counsel is not ineffective for failing to file a “kitchen sink” brief. *Smith v. Stewart*, 140 F.3d 1267, 1274 n. 4 (9th Cir. 1988). Appellate counsel’s representation will not be deemed ineffective if he makes an informed decision based on reasonable professional judgment not to pursue a particular issue on appeal. *Griffin v. Aiken*, 775 F.2d 1226 (4th Cir. 1985).

Further under the two (2) part test of *Strickland*, *supra*, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced his defense, i.e. he would have prevailed on appeal. *Jones v. Barnes*, *supra*; *Strickland v. Washington*. In order to show prejudice from appellate counsel’s performance when an *Anders* brief is filed, the test enunciated in *Strickland v. Washington*, 466 U.S. 668, 2014 S.Ct. 2052 (1984) should be applied. *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746 (2000)(even if appellate counsel believes an appeal is without merit and files an *Anders* brief, the appellant may have been entitled to a merits brief, and the challenge to appellant counsel’s performance should be reviewed under *Strickland*.); *Bennett v. State*, 383 S.C. 303, 680 S.E.2d 272 (2009)(even where an *Anders* brief is filed, when analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test). *Strickland* holds a PCR applicant must show there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. To prove appellate counsel was ineffective, the applicant must show appellate counsel’s performance was deficient and, but for appellate counsel’s errors, the result of the appeal would have been different. *Ezell v. State*, 345 S.C. 312, 548 S.E.2d 852 (2001).

Petitioner has failed to show appellate counsel’s performance was deficient and that Petitioner was prejudiced in anyway by his appellate attorney’s performance. *Id.*; *Strickland v.*

Washington.¹⁸

The PCR Court's Ruling

In its Order of Dismissal, the PCR Court noted that Petitioner alleged that his appellate counsel was ineffective for failing to submit the preliminary hearing transcript as part of the record on appeal; failing to argue that there was no probable cause to issue an arrest warrant; and failing to argue an unrelated ground. The State moved for summary dismissal on this allegation. The PCR Court found and concluded summary judgment was appropriate and granted the State's motion.

The Court noted that under Rule 56, SCRCP, a party is entitled to a judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, showed that there is no genuine issue as to any material fact. *Citing Law v. South Carolina Dept. of Corrections*, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). And, in determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Citing Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002).

The PCR Court first noted that in spite of Petitioner's belief concerning the strength of the omitted arguments, his appeal was submitted pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). The PCR Court pointed out that where appellate counsel submits an Anders brief, the role of the appellate court is to review the brief submitted by counsel, any *pro se* response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. *Citing State v. Lyles*, 381 S.C. 442, 444, 673 S.E.2d 811,

¹⁸ Respondent is aware the South Carolina Supreme Court in one (1) unpublished opinion reversed one (1) case where ineffective assistance of appellate counsel was alleged where the PCR Court relied on the wrong standard of review. See Pantovich v. State, 2015 WL 504779 (2015)(*Unpublished*).

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813 (2009) (*citing* State v. Williams, 305 S.C. 116, 406 S.E.2d 357 (1991)). The PCR Court noted that if an issue is found which has arguable merit, the appellate court will direct the parties to file merit briefs, and the case will proceed under the normal appellate process. Id. On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. Id. The PCR Court pointed out that Petitioner's appeal was dismissed after review pursuant to Anders, reflecting that "the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merit brief." Id.

The PCR Court also noted that in this case, Petitioner alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. The PCR Court pointed out this issue was raised in Petitioner's *pro se* brief on direct appeal, and therefore considered and determined to be without merit by the appellate court, the South Carolina Court of Appeals pursuant to Anders. The PCR Court noted that Petitioner's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record was an extension of this argument. The PCR Court found and concluded that Petitioner had failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.

The PCR Court also found the record clearly established that Petitioner's arrest was supported by probable cause so the issue Petitioner claimed appellate counsel should have raised on appeal was without merit. The Court noted that following a hearing on May 20, 2012, after hearing testimony that the victim identified Petitioner in a photo-lineup and that the assault took place in Petitioner's storage unit, the presiding judge determined that there was probable cause to believe Petitioner committed the assault. (Citing **R. pp. 5-7**). In any event, the PCR Court found

Petitioner's subsequent indictment by the Grand Jury cured any deficiencies in the arrest warrant. (Citing **R. pp. 684-91**; referencing Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968). Therefore, there was no merit to Petitioner's argument of ineffective assistance of appellate counsel with regard to failing to raise this ground on appeal.

Analysis

Petitioner has failed to show appellate counsel was ineffective in failing to raise on appeal whether probable cause existed for his arrest or was established at a pre-trial hearing [a preliminary hearing] and where the transcript from that hearing was not included in the Record on Appeal. Whether probable cause was established for petitioner's arrest or at a preliminary hearing and whether that transcript was or was not included in the Record on Appeal is irrelevant. Petitioner was true-bill indicted by the Oconee County grand jury on September 7, 2010 for CSC 1st (2 Counts), Kidnapping, and Grand Larceny > \$5,000 (Ind. #s 2010-GS-37-887, 889, 888, & 886). (**R. pp. 684-91; App. 894-901**). Petitioner was tried, convicted, and sentenced on those indictments, not the arrest warrants. (**App., Trial Transcript**). Further, the grand jury made an independent and separate determination of probable cause as to each indictment before Petitioner's case proceeded to trial. (**App. 894-901**)

Petitioner's subsequent indictment by the Oconee County Grand Jury cures any alleged deficiencies in the arrest warrants. (**R. pp. 684-91; App. 894-901**). Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968)(indictment by grand jury cures any defect in the arrest warrant). The illegality of an arrest or arrest warrants will not bar a person's subsequent prosecution and conviction if properly indicted by a grand jury with proper jurisdiction. State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1972); State v. Holiday, 255 S.C. 142, 177 S.E.2d 541 (1970); State v. McCoy, 255 S.C. 160,

177 S.E.2d 601 (1970); Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761; State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). *See also* Frisbie v. Collins, 342 U.S. 519 (1952). Petitioner was indicted by the Oconee County grand jury for CSC 1st (2 Counts), Kidnapping, and Grand Larceny. **(App. 894-901)**. Even if there was some error in Petitioner's arrest warrants, Petitioner's indictments supersede the arrest warrant or warrants. Id. And, Petitioner was convicted and sentenced on the indictments not on the arrest warrants. (See Appendix, Trial Transcript). Therefore, Petitioner cannot show deficient performance or resulting prejudice on the part of appellate counsel in failing to raise this issue.¹⁹ Smith v. Robbins; Jones v. Barnes; Strickland v. Washington. Appellate counsel was not deficient in failing to raise this non-meritorious issue and Petitioner cannot show there is a reasonable probability the result of his direct appeal would have been different if this issue had been raised. Smith; Jones; Strickland.

Further, Petitioner is wrong; the Circuit Court of General Sessions has subject matter jurisdiction to try the crimes of CSC 1st, Kidnapping, and Grand Larceny. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)(subject matter jurisdiction is the inherent power of the court to hear a certain class of cases); Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012)(the Supreme

¹⁹ Petitioner also cannot show deficient performance or resulting prejudice pursuant to Jones v. Barnes and Strickland where the evidence of Petitioner's guilt was obtained through a lawful search warrant for his storage bin and a lawful Schmerber Order to obtain his blood for DNA purposes. [Petitioner's DNA was found in the rectal swab from the victim's rape protocol kit.] Further, Petitioner was identified by the victim at trial and from a photographic line-up prior to his arrest. As a result, the evidence of Petitioner's guilt was not the result of an illegal or improper arrest, which could be suppressed [See Whiteley v. Sarden, 401 U.S. 560, 564-565 (1971); Overton v. Ohio, 122 S.Ct. 389 (2001)(*Mem. Dec.*); Giordenello v. United States, 357 U.S. 480, 486 (1958)], but through other lawful or independent means, which could not be suppressed. As a result, Petitioner cannot show ineffective assistance of appellate counsel for not raising the issue he alleges counsel should have raised on appeal where Petitioner was indicted and then properly convicted. Strickland; Jones.

Court in applying the reasoning of State v. Gentry to summary courts, held that the subject matter jurisdiction of the magistrate court or municipal court (i.e., the power of such courts to hear and determine cases of a general class) is conferred by statutes enacted by the General Assembly. Subject matter jurisdiction is not conferred by written process, that is, an arrest warrant or ticket served upon a defendant). And, the Court of General Sessions for Oconee County had personal jurisdiction over Petitioner as the crimes were committed in Oconee County by Petitioner, he was arrested there, and he appeared for court and was tried there. State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); Shelton v. State, 239 S.C. 535, 123 S.E.2d 867 (1962); State v. Orr, 225 S.C. 369, 82 S.E.2d 523 (1954) State v. Bethea, 88 S.C. 515 , 70 S.E. 11 (1911); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). As a result, there is no merit to this ground of ineffective assistance of appellate counsel and it must be denied and dismissed with prejudice. Appellate counsel was neither deficient nor has Petitioner proven resulting prejudice. Smith v. Robbins; Jones v. Barnes; Strickland v. Washington.

Additionally, as the PCR Court found, there was probable cause for Petitioner's arrest. The victim identified Petitioner from a photographic line-up prior to Petitioner's arrest. (**App. 138-56**). The victim had given a sworn multi-page statement detailing her kidnapping and rape and that it was committed in the storage unit belonging to Petitioner. Police executed a search warrant on Petitioner's storage bin and discovered evidence of the crime. At the preliminary hearing, the magistrate found probable cause to support the arrest. (**App. 133**). At an STD hearing, Judge McIntosh found probable cause Petitioner committed the crime and ordered STD testing. (**R. pp. 5-7**). Judge Macaulay found probable cause at the Schmerber hearing. (**App. 49-73; 133**). A magistrate had also issued a search warrant for Petitioner's storage bin supported

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by probable cause evidence of a crime would be found there. Trial counsel [Mr. Tavernier] conceded at the Schmerber hearing the State had sufficient evidence to show probable cause to obtain Petitioner's DNA. (**App. 49-73; see also App. 100; 130; 133**). The magistrate found probable cause to issue the arrest warrants. The warrants themselves are supported by probable cause. (**See App. 698-703**). Judge Maddox denied Petitioner's motion with regard to the arrest warrants finding they were supported by probable cause. (**App. 157-58**). Judge Maddox denied Petitioner's motion that the search warrants were not supported by probable cause. (**App. 158-63**). Finally, Judge Maddox denied Petitioner's motion the Schmerber order was not supported by probable cause. (**App. 133-35**). There was no ineffective assistance of appellate counsel for failing to raise this issue given this record. Smith v. Robbins; Jones v. Barnes; Strickland v. Washington. There simply is no merit to this ground.

Finally, a law enforcement officer may make a warrantless arrest where he has probable cause to arrest a suspect for having committed a felony. State v. Retford, 276 S.C. 657, 281 S.E.2d 411 (1981); State v. Roper, 274 S.C. 14, 260 S.E.2d 705 (1979); State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966); State v. Thompson, 304 S.C. 85, 403 S.E.2d 139 (Ct. App. 1991); *see e.g.* State v. Redding, 252 S.C. 312, 166 S.E.2d 219 (1969)(where victim immediately contacted police following rape, and gave detailed description of the suspect, and possible name, officer had reasonable grounds to believe a felony had been committed and that suspect was the person described by the victim); State v. Bell, 263 S.C. 239, 209 S.E.2d 890 (1974)(detailed description of vehicle, suspect, and contents of vehicle from rape victim supported the arrest of person and driving vehicle matching description); State v. Thomas, 248 S.C. 573, 151 S.E.2d 855 (1966)(officer had reason to believe a felony had been committed by defendant where rape victim knew the identity of her assailant,

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and promptly reported the matter to her neighbor, after being released by defendant). As a result, the investigators in this case could arrest Petitioner without a warrant because they had probable cause to believe Petitioner had committed two (2) felonies, CSC 1st and Kidnapping.

Police had responded to an urgent 911 call of the victim that she had been kidnapped and raped in the storage bin across from her storage bin. Police had to physically break into the storage bin where the victim was calling from and found the victim who told them of her abduction and rape by the person who owned the storage bin. She then identified Petitioner from a photographic line-up at the hospital as the person who kidnapped and raped her. Police had probable cause to arrest Petitioner for a felony [kidnapping and CSC] without a warrant. Retford, 276 S.C. 657, 281 S.E.2d 411; Roper, 274 S.C. 14, 260 S.E.2d 705; Jones, 273 S.C. 723, 259 S.E.2d 120; Thomas, 248 S.C. 573, 151 S.E.2d 855; Thompson, 304 S.C. 85, 403 S.E.2d 139; Redding, 252 S.C. 312, 166 S.E.2d 219; Bell, 263 S.C. 239, 209 S.E.2d 890. There was no ineffective assistance of appellate counsel in not raising this issue on appeal. Smith; Jones; Strickland.

Petitioner has failed to show the PCR Court unreasonably applied United States Supreme Court precedent in deciding this ground. Petitioner has failed to show by clear and convincing evidence the PCR Court reached an unreasonable determination of the facts given the evidence and record before the PCR Court. As a result, Petitioner has failed to overcome the *double deference* granted the PCR Court's determination of this issue of *ineffective assistance counsel (IAC)*. Richter, *supra*. Therefore, there is no merit to this ground and it must be denied and dismissed with prejudice.

Ground three: Did the General Sessions Court have jurisdiction to hear appellant's criminal case when the magistrate never established it had probable cause to detain appellant on the arrest warrants.

Supporting facts: (See p. 31).

There is no merit to this ground. This ground is not cognizable on federal habeas review. Whether the Court of General Sessions for Oconee County had jurisdiction to hear Petitioner's case, i.e. his trial on his indictments, is a matter of state law and therefore not cognizable on federal habeas review. See Estelle v. McGuire, 502 U.S. 62 (We have stated many times that federal habeas corpus relief does not lie for errors of state law). This claim is not cognizable in federal habeas corpus, as it depends entirely on a state court's determination of its own laws. See Wright v. Angelone, 151 F.2d 151 (4th Cir. 1998)(noting that while habeas may be granted for a lack of jurisdiction in the sentencing court, relief may not be granted where alleged jurisdictional defect depends on interpretation of state law, unless result in complete miscarriage of justice defined as actual innocence); Wills v. Egeler, 532 F.2d at 1059 (holding that a "[d]etermination of whether a state court is vested with jurisdiction under state law is a function of the state courts, not the federal judiciary.").

Furthermore, there is no factual or legal merit to this ground. As the PCR Court correctly found, the record clearly establishes that Petitioner's arrest was supported by probable cause. Following a hearing on May 20, 2012, after hearing testimony that the victim identified Petitioner in a photo-lineup and that the assault took place in Petitioner's storage unit, the presiding judge determined that there was probable cause to believe Petitioner committed the assault. (**R. pp. 5-7**).

In any event, Petitioner's subsequent indictment by the Oconee County Grand Jury cures any alleged deficiencies in the arrest warrants. (**R. pp. 684-91; App. 894-901**). Thompson v. State, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968)(indictment by grand jury cures any defect in the arrest warrant). The illegality of an arrest or arrest warrant will not bar a person's subsequent prosecution and conviction if properly indicted by a grand jury with proper

jurisdiction. State v. Biehl, 271 S.C. 201, 246 S.E.2d 859 (1978); State v. Carpenter, 257 S.C. 162, 184 S.E.2d 715 (1972); State v. Holiday, 255 S.C. 142, 177 S.E.2d 541 (1970); State v. McCoy, 255 S.C. 160, 177 S.E.2d 601 (1970); State v. Swilling, 246 S.C. 144, 142 S.E.2d 864 (1965); State v. Walker, 232 S.C. 290, 101 S.E.2d 826 (1958); State v. Waitus, 226 S.C. 44, 83 S.E.2d 629 (1954). *See also* Frisbie v. Collins, 342 U.S. 519 (1952). The grand jury made independent findings of probable cause on each indictment.

Petitioner was indicted by the Oconee County grand jury on September 7, 2010 for CSC 1st, Kidnapping, and Grand Larceny (Ind. #s 2010-GS-37-887, 889, 888, & 886). (**App. 894-901**). Even if there was some error in Petitioner's arrest warrants, Petitioner's indictments supersede the arrest warrants. Thompson, 251 S.C. at 596, 164 S.E.2d at 761 (1968); Biehl, 271 S.C. 201, 246 S.E.2d 859; Carpenter, 257 S.C. 162, 184 S.E.2d 715; Holiday, 255 S.C. 142, 177 S.E.2d 541; McCoy, 255 S.C. 160, 177 S.E.2d 601; Swilling, 246 S.C. 144, 142 S.E.2d 864; Walker, 232 S.C. 290, 101 S.E.2d 826; Waitus, 226 S.C. 44, 83 S.E.2d 629. *See also* Frisbie, 342 U.S. 519. And, Petitioner was convicted on the indictments, not the arrest warrants. (Appendix). As a result, this ground has no merit and must be denied and dismissed with prejudice. Id.²⁰

²⁰ And, as previously shown, a law enforcement officer may make a warrantless arrest where he has probable cause to arrest a suspect for having committed a felony. Retford, *supra*; Roper, *supra*; Jones, *supra*; Thomas, *supra*; Thompson, *supra*; *see e.g.* Redding, *supra* (where victim immediately contacted police following rape, and gave detailed description of the suspect, and possible name, officer had reasonable grounds to believe a felony had been committed and that suspect was the person described by the victim); Bell, *supra* (detailed description of vehicle, suspect, and contents of vehicle from rape victim supported the arrest of person and driving vehicle matching description); Thomas, *supra* (officer had reason to believe a felony had been committed by defendant where rape victim knew the identity of her assailant, and promptly reported the matter to her neighbor, after being released by defendant). As a result, the investigators in this case could arrest Petitioner without a warrant because they had probable cause to believe Petitioner had committed two (2) felonies, CSC 1st and Kidnapping; Police had responded to an urgent 911 call of the victim that she had been kidnapped and raped in the storage bin across from her storage bin; police had to physically break into the storage bin where the victim was calling from and found the victim who told them of her abduction and rape by the

Further, the Circuit Court of General Sessions has subject matter jurisdiction to try the crimes of CSC 1st, Kidnapping, and Grand Larceny. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005)(subject matter jurisdiction is the inherent power of the court to hear a certain class of cases); Bayly v. State, 397 S.C. 290, 724 S.E.2d 182 (2012)(similar). And, the Court of General Sessions for Oconee County had personal jurisdiction over Petitioner as the crimes were committed in Oconee County by Petitioner, he was arrested there, and he appeared for court and was tried there. State v. Dudley, 364 S.C. 578, 614 S.E.2d 623 (2005); State v. Douglas, 245 S.C. 83, 138 S.E.2d 845 (1964); Shelton v. State, 239 S.C. 535, 123 S.E.2d 867 (1962); State v. Orr, 225 S.C. 369, 82 S.E.2d 523 (1954) State v. Bethea, 88 S.C. 515, 70 S.E. 11 (1911); State v. Langford, 223 S.C. 20, 73 S.E.2d 854 (1953). As a result, there is no merit to this ground and it must be denied and dismissed with prejudice.

This ground is not cognizable on federal habeas review. Furthermore, Petitioner has failed to show any state court unreasonably applied United States Supreme Court precedent in deciding this issue; and, Petitioner has also failed to show by clear and convincing evidence that any state court reached an unreasonable determination of the facts given the evidence and record before the state court. Petitioner has failed to overcome the deference granted the state court's determination of this issue. Richter. Finally, Petitioner has failed to show under this ground that he is entitled to federal habeas corpus relief. Williams v. Taylor. As a result, there is no merit to this ground and it must be denied and dismissed with prejudice.

person who owned the storage bin; she then identified Petitioner from a photographic line-up at the hospital as the person who kidnapped and raped her. Police had probable cause to arrest Petitioner for a felony [kidnapping and CSC 1st] without a warrant. Retford; Roper; Jones; Thomas; Thompson; Redding; Bell.

CONCLUSION

Ground three of this petition is procedurally barred because it is not cognizable on federal habeas review and Petitioner cannot show cause and prejudice or actual innocence to overcome the procedural bar. Ground three must also be denied and dismissed because it is not cognizable on federal habeas review. Finally, there is no merit to any of Petitioner's grounds in this setting. Richter, *supra*. For the above stated reasons, Respondent's Motion for Summary Judgment must be granted and this petition denied and dismissed with prejudice.

Respectfully Submitted,

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Attorney General

DONALD J. ZELENKA
Deputy Attorney General

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By: s/ J. Anthony Mabry
ATTORNEYS FOR RESPONDENT

April 1, 2019.

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PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court		District: <u>South Carolina</u>
Name (under which you were convicted): <u>Dennis Maurice Temple</u>		Docket or Case No.: <u>2011-182806</u>
Place of Confinement: <u>Perry Correctional Institution</u>		Prisoner No.: <u>SCDC # 274802</u>
Petitioner (include the name under which you were convicted) <u>Dennis M. Temple</u>	Respondent (authorized person having custody of petitioner) <u>v. warden, Scott Lewis</u> <u>Attorney General, Alan Wilson</u>	
The Attorney General of the State of <u>South Carolina</u>		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Oconee County Court
208 Booker Drive, Walhalla, SC 29691-2278
- (b) Criminal docket or case number (if you know): 2010 GS-3700886-87-88-89
2. (a) Date of the judgment of conviction (if you know): December 15, 2010
- (b) Date of sentencing: December 15, 2010
3. Length of sentence: 100 years
4. In this case, were you convicted on more than one count or of more than one ☒ Yes ☐ No
5. Identify all crimes of which you were convicted and sentenced in this case:
(1) Criminal sexual conduct 1st degree
(2) Criminal sexual conduct 1st degree
(3) Kidnapping
(4) Grand Larceny
6. (a) What was your plea? (Check one)
☒ (1) Not guilty ☐ (3) Nolo contendere (no contest)
☐ (2) Guilty ☐ (4) Insanity plea
- (b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? NDN - Applicate (N/A)

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Plead not guilty to all charges

(c) If you went to trial, what kind of trial did you have? (Check one)

☒ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☒ Yes ☐ No

8. Did you appeal from the judgment of conviction?

☒ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: court of appeals of South Carolina(b) Docket or case number (if you know): Anders brief 2011-182806 and Pro se brief(c) Result: appeal dismissed(d) Date of result (if you know): September 11, 2013(e) Citation to the case (if you know): State v. Dennis Temple 2013 WL8539492(f) Grounds raised: The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial. (see Appendix p 658-669)(g) Did you seek further review by a higher state court? ☐ Yes ☒ No

If yes, answer the following:

(1) Name of court: N/A(2) Docket or case number (if you know): N/A(3) Result: N/A(4) Date of result (if you know): N/A(5) Citation to the case (if you know): N/A(6) Grounds raised: N/A

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(h) Did you file a petition for certiorari in the United States Supreme Court?

☐ Yes☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

N/A

(2) Result:

N/A

(3) Date of result (if you know):

N/A

(4) Citation to the case (if you know):

N/A

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court?

☒ Yes☒ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court:

Oconee County Court of Common Plea

(2) Docket or case number (if you know):

Dennis Temple v. State, 2013-CP-37-729

(3) Date of filing (if you know):

October 15, 2013

(4) Nature of the proceeding:

Post-Conviction Relief (PCR)

(5) Grounds raised:

• Appellate counsel was not effective because she
proceeded on my appeal and not had all the
transcripts.
• Probable cause to arrest

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☒ Yes☐ No

(7) Result:

granted the state motion to dismiss

(8) Date of result (if you know):

October 24, 2016

(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court:

N/A

(2) Docket or case number (if you know):

N/A

(3) Date of filing (if you know):

N/A

(4) Nature of the proceeding:

N/A

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(5) Grounds raised:

N/A

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result:

none

(8) Date of result (if you know):

none

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court:

none

(2) Docket or case number (if you know):

none

(3) Date of filing (if you know):

none

(4) Nature of the proceeding:

none

(5) Grounds raised:

none

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☒ No

(7) Result:

N/A

(8) Date of result (if you know):

N/A

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

NO

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- (1) First petition: ☐ Yes ☐ No
 (2) Second ☐ Yes ☐ No
 (3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE:

See petition for Writ of Habeas Corpus brief, p. 4

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

see petition for Writ of Habeas Corpus brief p. 4

(b) If you did not exhaust your state remedies on Ground One, explain why:

See petition for Writ of Habeas Corpus brief p. 11

(c) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: I raised it

Appellate Case No. 2011-182806 ANDERS BRIEF

See, Appendix p.

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

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Type of motion or petition: Post-Conviction Relief

Name and location of the court where the motion or petition was filed: _____

Dconee County Courthouse, 208 Booker Driver, Walhalla SC, 29691Docket or case number (if you know): 2013 - CP - 37 - 00729Date of the court's decision: October 24, 2016Result (attach a copy of the court's opinion or order, if available): DismissedSee Appendix (Appellate case NO. 2016 - 002254) p. 884 - 893

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☐ Yes ☒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the

☐ Yes ☒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: n/ADocket or case number (if you know): n/ADate of the court's decision: n/AResult (attach a copy of the court's opinion or order, if available): n/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

n/A(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground NONE

GROUND TWO:

see petition for writ of Habeas Corpus brief page p. 13

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

See petition for writ of Habeas Corpus brief page 13

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(b) If you did not exhaust your state remedies on Ground Two, explain why:

see petition for Writ of Habeas Corpus brief page 29

(c) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No(2) If you did not raise this issue in your direct appeal, explain why: I did not have a ineffective assistance of appellate counsel issue until after direct appeal

(d) Post-Conviction Proceedings:

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: post-conviction ReliefName and location of the court where the motion or petition was filed: Dconee county court, 208 Booker Drive, Whalhall, South Carolina 29691Docket or case number (if you know): 2013-CP-32-00729Date of the court's decision: October 24, 2016Result (attach a copy of the court's opinion or order, if available): Dismissedsee Appendix (Appellate case NO. 2016-002254) p. 884-893

(3) Did you receive a hearing on your motion or petition?

☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition?

☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the

☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: THE Supreme Court of South Carolina, 1231 Gervais Street, Columbia, South Carolina 29201Docket or case number (if you know): Appellate Case NO. 2016-002254, Pro se Response and Supplement Pro se brief

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Date of the court's decision: October 16, 2018Result (attach a copy of the court's opinion or order, if available): the petition for a writ of certiorari is denied and counsel's request to withdraw is granted (see EXHIBIT # 27)

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

- (e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two pro se Response and a supplemental pro se brief was filed in the Supreme Court of South Carolina. see EXHIBITS # 28 & 30.

GROUND THREE:

see, petition for Writ of Habeas Corpus brief, page 31

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

see, petition for Writ of Habeas Corpus brief page 31

(b) If you did not exhaust your state remedies on Ground Three, explain

see, petition for Writ of Habeas Corpus brief p. 50

(c) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

☒ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

see, pro se brief on direct appeal
Appendix p. 671-690

(d) Post-Conviction Proceedings:

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(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?
☒ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: oconee county court of common plea
 Name and location of the court where the motion or petition was filed: oconee county court
208 Booker Drive, Wohalla, South Carolina 29691
 Docket or case number (if you know): 2013-CP-37-00729
 Date of the court's decision: October 24, 2016
 Result (attach a copy of the court's opinion or order, if available): Dismissed
see appendix p. 714 - 723

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the ☒ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: The Supreme Court of South
Carolina, 1231 Gervais Street, Columbia, SC. 29201
 Docket or case number (if you know): 2016-002254
 Date of the court's decision: October 16 2018
 Result (attach a copy of the court's opinion or order, if available): see, EXHIBIT # 27

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

N/A

(c) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground

Three:

I submitted a Pro se
Response to the South Carolina Supreme Court regarding
this issue, see, EXHIBIT # 28

GROUND FOUR:

- NONE -

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

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(b) If you did not exhaust your state remedies on Ground Four, explain why: N/A

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

☐ Yes☐ No

(2) If you did not raise this issue in your direct appeal, explain why: N/A

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: N/A

Name and location of the court where the motion or petition was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(3) Did you receive a hearing on your motion or petition?

N/A☐ Yes☐ No

(4) Did you appeal from the denial of your motion or petition?

N/A☐ Yes☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the

N/A☐ Yes☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N/A

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Docket or case number (if you know): N/A

Date of the court's decision: N/A

Result (attach a copy of the court's opinion or order, if available): N/A

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:
N/A

(c) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: N/A

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☒ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, ground or grounds have not been presented, and state your reasons for not presenting them:

All ground have been present on one round of appellate proceeding in the court of appeals and the S.C. Supreme Court.

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☒ Yes ☐ No

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If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

See Attachment

See EXHIBIT # 31

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☒ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the raised.

N/A

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging: Keith G. Denny Esq. 30 Short Street, Walhalla SC 29691
- (a) At preliminary hearing: Sarah Ganss Drawdy Esq.; The Regency Building; 2315 N. Main St. Ste 117; Anderson, SC 29621
- (b) At arraignment and plea: Sarah Ganss Drawdy and Keith G. Denny
- (c) At trial: pro se (Kurt Traverter) standby counsel
- (d) At sentencing: pro se (Kurt Traverter) standby counsel
- (e) On appeal: Wanda H. Carter, S.C. Commission on Indigent Defense P.O. Box 11589, Columbia, SC 29211-1589 (803) 734-1343
- (f) In any post-conviction proceeding: Hugh W. Welborn, 913 Carolina Circle Anderson, South Carolina 29622 (864) 226-5787
- (g) On appeal from any ruling against you in a post-conviction proceeding: Taylor D. Gilliam, S.C. Commission on Indigent Defense, P.O. Box 11589, Columbia, South Carolina 29211-1589

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17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☐ Yes ☒ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

N/A

(b) Give the date the other sentence was imposed:

N/A

(c) Give the length of the other sentence:

N/A

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☐ Yes ☒ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

N/A

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
 - (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
 - (C) the date on which the constitutional right asserted was initially recognized by the Supreme if the right has been newly recognized by the Supreme Court and made retroactively applicable cases on collateral review; or
 - (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- Court, to
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: that the convictions and sentences to be vacated, and that he be given a new trial or released from prison.

or any other relief to which petitioner may be entitled.

Dennis M. Temple
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition Writ of Habeas Corpus was placed in the prison mailing system on 11/29/18 (month, date, year).

Executed (signed) on 11/29/18 (date).

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Dennis M Temple

Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Dennis M. Temple, # 274802

Petitioner,

v.

Warden, Scott Lewis;
Attorney General, Alan Wilson;

Respondent,

Petition
for

WRIT

of

Habeas Corpus

TO: THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF SOUTH CAROLINA.

RESPONDENTS, Warden, Scott Lewis; attorney
General, Alan Wilson;

YOU WILL PLEASE TAKE NOTICE that pursuant
to 28 U.S.C. § 2254 Petitioner requests upon
the United States District Court for the
District of South Carolina for a petition of
Writ of Habeas Corpus.

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CERTIFICATE OF APPEALABILITY

The governing law provides that:

(c)(2) A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right.

(c)(3) The certificate of appealability . . . shall indicate which specific issue or issues satisfy the showing required by paragraph (2)

28 U.S.C. § 2253 (c). A prisoner satisfies this standard by demonstrating that reasonable Jurists would find this court's assessment of his Constitutional claims to be debatable or wrong and deem any dispositive procedural ruling by this court to be likewise debatable. See. Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001).

STATEMENT OF THE CASE

Appellant Dennis Temple was convicted per jury trial of two counts of first degree criminal sexual conduct, grand larceny, and kidnapping during the December 2010 term of the Oconee County General Sessions Court before Judge J. Cordell Maddox. Appellant appeared pro se at trial. Kurt Travernier appeared as stand-by counsel at trial. Appellant was sentenced to imprisonment for a period of one-hundred (100) Years.

Appellant appealed. This brief follows.

GROUND ONE

The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

FACTS

At trial, Catherine McGough testified that around 4:30 P.M. on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit at All Safe Storage located in Seneca, South Carolina, and then began walking to her car when she encountered a black male (whom she identified as appellant at trial and after viewing a photograph layout after the incident)¹ who wanted her to purchase shoes he was selling at that time. McGough stated that she showed no interest, and entered her car and began to leave until she realized that she left open the door. Appellant pushed her down in the unit and managed to place a belt around her neck.

1. Tr. 259, l. 6 - P. 267, l. 21; Tr. 227, l. 23 - P. 278, l. 1.

Thereafter, appellant managed to guide her to another storage unit wherein after he placed his penis and a bottle of solution into her vagina, and then kept her tied up inside the storage room while he fled in her vehicle. McGough stated that she managed to call 911 from a cell phone and waited for police to arrive. Tr. 84, l. 5 - P. 124, l. 7.

Oconee officer Neil Burkett testified that he was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. Tr. 158, l. 7 - P. 162, l. 6. Officer Brian Danielson transported McGough from the incident location to the local hospital. Tr. 214, l. 18 - P. 215, l. 21. Subsequently, officer Greg Reed created a photographic lay-out, which he showed to McGough, who in turn identified the picture of appellant as the perpetrator. Tr. 259, l. 6 - P. 267, l. 21; Tr. 277, l. 23 - P. 278, l. 1.

From the outset of the case, appellant expressed his unhappiness with all three of his court appointed attorneys assigned to represent him in the case. At the pretrial hearing dated June 30, 2010, Judge Alexander S. MacCaulay appointed Wilson Burr to represent appellant. Tr. 5, l. 5 - P. 6, l. 14. Later, the case was sent out of Burr's office and assigned to trial counsels Sarah Drawdy and Keith Denny. During another Pretrial hearing

held before Judge Maddox on July 29, 2010, appellant requested that counsels Drawdy and Denny be removed from his case and asked for time in which to obtain private counsel to represent him. Both of appellant's requests were granted by Judge Maddox. Tr. 4, 1.3 - P. 10, 1.4. On another Pretrial hearing held on September 14, 2010, Judge Maddox learned that appellant had not retained private counsel and went on to appoint Kurt Travernier to represent appellant the case. Tr. 4, 1.6 - P. 6, 1.3; Tr. 9, 1.22 - P. 12, 1.20; Tr. 17, 1.6 - P. 19, 1.7. See Order of Appointment of Counsel dated September 27, 2010. Tr. 78. Then later, during a hearing held on October 21, 2010, Judge Maddox accepted appellant's voiced displeasure with Kurt Travernier and his apparent decision to represent himself at trial by default, and then appointed Kurt Travernier as stand-by counsel for trial. Tr. 3, 1.22 - P. 23, 1.11. See Order of Appointment of Stand-by Counsel dated November 8, 2010. Tr. 111-118. On December 7, 2010, Judge Maddox accepted appellant's apparent pro se status for trial and again reiterated that Kurt Travernier would remain seated as stand-by counsel at trial. Tr. 79, 1.18 - P. 87, 1.18.

Next, on the actual trial date and minutes after the jury was selected appellant requested the full assistance of appointed of counsel (Presumably Travernier) to represent him at trial, which was in effect appellant's plea to neither proceed pro se

nor receive stand-by legal assistance, but rather to receive the full assistance of appointed counsel in the case. Travernier advised the trial judge that appellant was requesting "a continuance or that in some way or form that I might be able to represent him in the trial." Tr. 60, l. 7-10. The state argued that this case was fast-tracked due to appellant's speedy trial motion and that a reversal of appellant's waiver of his right to counsel would place an undue burden on the prosecution. Tr. 61, l. 10-P. 62, l. 10. The Court ruled as follows:

The Court: I understand your motion. And like I said, one of the main things I want to do is protect your rights, as we talked about last week in answer for an appeal. At this late date, after all the questioning that I've done, I'm gonna deny your motion for a continuance... I understand at this point - I've been concerned all along that we would get up here and you might be overwhelmed with the legal proceedings, but I'm gonna continue to order that Mr. Travernier sit with you and respond to your questions. Tr. 66, lines 12-22.

It is well established that Per Foretta v. California, 422 U.S. 806 (1975), that an accused may waive his Sixth Amendment right to counsel and proceed pro se at trial. State v. Roberts, 369 SC 580, 632 S.E. 2d 871 (2007), State v. Thompson, 355 SC 255, 584 S.E. 2d 131 (2003), State v. Boykin, 324 SC 552, 478 S.E. 2d 689 (1996). To effectuate a valid waiver of the right to counsel, the two-pronged Foretta test requires that the accused be advised of his right to counsel and adequately waived of the dangers of self-representation. State v. Thompson, supra. Although appellant was advised under the Foretta requirements; nonetheless, immediately after the jury selection, appellant put forth a waiver of his prior waiver of the right to trial counsel's assistance at trial, but the trial judge failed to grant the waiver of his counsel waiver.

A waiver is the intentional relinquishment of a known right. Johnson v. Zerbst, 304 U.S. 458 (1938). Therefore, inasmuch as appellant had a right to waive counsel and appear pro se, he also had a right to waive his right to appear pro se and then re-assert his right to counsel de novo. It is apparent from the record that his second waiver was a valid waiver because appellant stated that he indeed wanted the continuance to

consult with Travernier so that he (Travernier) could represent him; however, he "got tied up" on other motions (venue changes and pretrial publicity) and forgot to ask, but he was asking for Travernier to represent him at trial. Tr. 60, l. 24-P. 61, l. 7; Tr. 62, l. 12-P. 63, l. 10. Therefore, since appellant validly waived the known right to self representation which really occurred by default prior to trial, and then chose to re-assert his Sixth Amendment right to counsel, this second waiver (of self representation) should have been received and the full appointment of counsel re-instated as opposed to a summary dismissal of the second waiver.

Furthermore, it appeared as though appellant's request for counsel was dismissed in part due to the fact that appellant was displeased with all assigned attorneys, which led to the assumption that the counsel issue was being used as a dilatory tactic to delay his trial. However, in cases where it is believed that intentional delay is suspected when a client makes motions regarding counsel's assistance, the trial judge is required to inquire as to the reason for a request regarding counsel and ascertain whether there is good cause for the request. See United States v. Goldberg, 67 F.3d 1092 (3rd

cir. 1995). Here, it appears that appellant had good cause for re-asserting his right to counsel to the extent that his pre-occupation with his pre-trial motions rendered him with the inability to approach the court again about his pro se waiver and the re-assertion of his right to the full assistance of counsel in the case.

At best, due process requires a hearing on "the record," especially in waiver of counsel questions "to be sure, the . . . record is competent" regarding the matter in keeping with Johnson v. Zerbst, *supra*, see Superintendent of the Powhatan Correction Center v. Barnes, 221 Va. 780, 273 S.E.2d 558 (1981), and United States v. Goldberg, *supra*. As it stood, appellant did not receive his required Faretta warnings again prior to trial that he had a right to counsel and that there were dangers and disadvantages associated with self representation.

The Sixth Amendment clearly states that in all criminal cases, the accused shall have the assistance of counsel for his defense and if indigent, the accused shall have appointed counsel. Gideon v. Wainwright, 372 U.S. 335 (1963).

The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error and never harmless error. Chapman v. California, 386 U.S. 18 (1967).

The trial judge erred in allowing appellant to be tried without the assistance of counsel because although appellant waived the right to counsel prior to trial, he rescinded that waiver after the jury was selected and re-asserted his right to the assistance of appointed counsel to represent him at trial. This error violated appellant's Sixth Amendment right to counsel, which is also guaranteed under article 1, §14 of the South Carolina State Constitution.

EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted Ground one because it was presented to the court of appeals of the State of South Carolina. (See, Anders Brief in appendix P. 658-669.)

RELIEF REQUESTED

Petitioner is requesting that the convictions and sentences to be vacated, and that he be given a new trial or released from prison.

STATEMENT OF THE CASE

Petitioner, Dennis Temple Post-conviction Relief action was filed on October 15, 2013. Hugh Welborn, Esquire was appointed to represent Petitioner on the action. A Return was filed by the states attorney, John W. Whitmire on July 7th 2014. A hearing was held before the Honorable Judge Edger W. Dickson at the Oconee County courthouse on July 24, 2014. Petitioner filed motions with the Court and presented issues in the hearing. On October 24, 2016 the Court issued a order of dismissal on Petitioner's PCR action. Petitioner, PCR counsel timely filed a Notice of appeal and a motion to be Relieved as Counsel on all Parties.

The South Carolina Commission on Indigent defense attorney, Taylor Gilliam was appointed to represent Petitioner on a Petition for Writ of Certiorari to the South Carolina Supreme Court. On August 2, 2017 Petitioner attorney Taylor Gilliam submitted a Johnson Petition on Writ of Certiorari on Petitioner's behalf, to the South Carolina Supreme Court. Petitioner submitted a Pro se Response on August 21, 2017 and a supplemental Pro se brief on May 29, 2018. A order was issued on October 30, 2017 from Chief Justice Donald Beatty Transferring of the Post-conviction Relief Case to the South Carolina Court of Appeals Pursuant to Rule 243 (1) SCALR.

This Johnson Petition for Writ of CERTIORARI, Pro se brief and supplemental brief follows.

GROUND TWO

The PCR COURT erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

FACTS

An Oconee County Grand Jury indicted Petitioner for two counts of criminal sexual conduct in the first degree, kidnapping, and grand larceny, value of five thousand dollars or more, during the September 2010 term of court. Prior to trial, multiple hearings were held regarding Petitioner's right to counsel.

On May 20, 2010, a hearing was held before the Honorable L. Lawton McIntosh, App. 1. Lindsey Simmons represented the state, and Petitioner appeared pro se. The purpose of the hearing was to test Petitioner for sexually transmitted diseases under S.C. code

Ann. § 16-3-740. Petitioner indicated that he chose to represent himself based upon "prior experience with attorneys from Oconee County." APP. 2, 11. 17-20. Judge McIntosh found that petitioner freely, voluntarily, and knowingly waived his right to an attorney in the limited context of the hearing. APP. 3 11. 13-19.

Pursuant to the statute, a finding of Probable cause was necessary before testing could be completed. Therefore, the state offered the testimony of Deputy Scott Arnold, who claimed that the alleged victim, C.M., identified petitioner out of a six-picture photo lineup. APP. 5 1.4 - APP. 6 1.6. Judge McIntosh's findings were as follows:

First, I'm going to find that the victim did make a request for these test under statute, there's Probable cause to believe that [Petitioner] committed this offense, and further, there's Probable cause to find that there were body fluids transmitted and that [Petitioner] received proper notice of this petition as well as waived his right to have an attorney represent him in this matter. I am going to grant the motion and sign the order as we speak.

APP. 7 11. 2-10.

1 Upon information and belief, the transcript contains a scrivener's error: this hearing was held May 20, 2010, not May 20, 2012.

On June 30, another hearing was held before the Honorable Alexander Macaulay. App. 9. Lindsey Simmons appeared on behalf of the State, and Robert Mills Ariail represented Petitioner. At that hearing, Petitioner withdrew his motion for bond reconsideration. App. 12 ll. 2 – 3. Judge Macaulay waived the application for the Public Defender's office and ordered Wilson Burr meet with Petitioner to start his representation. App. 13 l. 5 – App. 14 l. 14.

On July 29, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. App. 19. Lindsey Simmons appeared on behalf of the State, and Sarah G. Drawdy represented Petitioner. Petitioner had moved to relieve his counsel, Sarah Drawdy and Keith Denny. The State also had a motion that Petitioner obtain counsel within thirty days of the date of the hearing. According to the State, Wilson Burr "sent the case out of his office to Ms. Drawdy and Mr. Denny." App. 22 ll. 3 – 8. Petitioner indicated that he had not authorized the court to appoint an attorney. App. 22 ll. 11 – 13. Judge Maddox advised Petitioner against proceeding *pro se*. App. 23 ll. 18 – 23. Judge Maddox granted both parties' motions. App. 24 l. 21 – App. 25 l. 21.

On September 14, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. App. 30. Lindsey Simmons appeared on behalf of the State, and Dennis Temple appeared *pro se*. The State claimed that it received a fax from Petitioner requesting a speedy trial and indicating that he was going to proceed *pro se*. App. 33 ll. 6 – 11. Judge Maddox told Petitioner that he had a right to represent himself. App. 33 l. 20 – App. 34 l. 7. At this hearing, Petitioner contested the validity of the indictments under the South Carolina Rules of Criminal Procedure. App. 35 – 37. Regarding Petitioner's representation status, Judge Maddox stated:

Well, see, the option I got is I can let you go forward and sit at the table and represent yourself or I can appoint what's basically in my mind a shadow counsel. In other words, I'll appoint a lawyer to sit there with you. He doesn't represent you.

If you are dead set on going and representing yourself then I'm going to appoint somebody to sit with you so that you can answer questions - - you can ask questions, they can answer questions. That's only - - that's what I'm comfortable with.

App. 39 ll. 10 – 19.

Petitioner agreed that it would be unwise to represent himself but claimed that past hardships with attorneys who did not act as zealous advocates on his behalf prevented him from proceeding with their representation. App. 39 l. 4 – App. 41 l. 5. Judge Maddox appointed Petitioner another attorney:

Well, let me just tell you generic, generic. I'm not talking about your case. If I appointed you Johnny Cochran and he was still alive and he sat down with you and told you that, take this road, and you think you were going to [take] the other road, that's something you got to work out with your attorney. So every time you have a dispute with an attorney you can't come back and ask for another one.

In fact, what I'm going to do is I'm going to appoint you a lawyer. There's a list of lawyers who have agreed to be appointed. They are outside the public defender's office. I don't know who is next on that list but I'm going to appoint them with the caveat that this case is going to be tried December 13th.

App. 41 ll. 6 – 20.

Judge Maddox appointed Kurt Tavernier to represent Petitioner. App. 46 ll. 14 – 15.

On September 22, 2010, a Schmerber hearing was held before the Honorable Alexander S. Macaulay.² Chrissy Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier represented Petitioner. App. 49. Counsel for Petitioner stated that blood, buccal swabs, and hair samples were requested. App. 54 ll. 13 – 20. Counsel indicated that Petitioner refused to consent and would not consent to the issuance of the Schmerber order. App. 54 l. 22 – App. 55 l. 12. Counsel was unaware of any legal objection that prevented the samples from being taken. App. 55 ll. 9 – 12. However, counsel for Petitioner also sought to suppress any and

² Schmerber v. California, 384 U.S. 757 (1966).

all DNA which was taken in accordance with a May 13, 2010 search warrant. App. 55 ll. 14 – 22. Based on the premise that those were taken illegally, counsel requested that all of those samples be suppressed and that the search warrant be quashed. App. 56 ll. 2 – 18; App. 57 ll. 9 – 14. The State claimed that those samples were never taken to SLED and would not be used. App. 56 ll. 23 – 24.

Judge Macaulay granted Petitioner's motion, quashed the search warrant, and suppressed anything obtained. App. 58 ll. 4 – 15; App. 59 ll. 2 – 6. Counsel renewed Petitioner's motion that the indictments be quashed, based upon Rule 3(c), SCRCrimP. App. 62 l. 12 – App. 66 l. 24. Judge Macaulay denied the motion. App. 66 ll. 11 – 24.

Another hearing was held on October 21, 2010 before the Honorable J. Cordell Maddox, Jr., with Christine Adams appearing on behalf of the State and Kurt Tavernier representing Petitioner, to "deal with [Petitioner's] representations concerns and issues." App. 75; App. 77 ll. 10 – 16. Petitioner indicated that when Mr. Tavernier was appointed by the court, the court did not "have [Petitioner's] best interest[s] at stake." App. 78 ll. 1 – 20. Petitioner alleged that Mr. Tavernier threatened his family if he did not plead guilty and also refused to file a motion on his behalf. App. 78 ll. 5 – 13. The following conversation took place between Judge Maddox and Petitioner:

The Court: Well, what job have you done that was your best? Where did you work that you thought you were most able to do well?

Petitioner: I have done welding. I have done plumbing. I've done structures.

The Court: Okay. Let me tell you a problem I've got. I don't know anything about welding. And if you were out working welding and I came out and showed you - - and had no idea how to weld and started telling you how to weld, you'd think I was an idiot. And I would be an idiot. What I'm telling you is that, you know, this would be -

Petitioner: Are you saying, Your Honor, that I don't have experience in the law? I have fifteen years experience in the law.

App. 79 l. 15 – App. 80 l. 4.

Counsel indicated that Petitioner filed a grievance which claimed that he had threatened to kill him and his family. App. 81 ll. 13 – 24. When asked whether he wanted to represent himself or hire an attorney, Petitioner stated:

Well, Your Honor, according to the Constitution, the United States Constitution, I am entitled to a defense attorney. Just because the Court appoint[ed] me an attorney and he has skills in the law, that doesn't mean he's using those skills to defend me. So I still to this day have not been able to defend myself because you refuse to give me a lawyer to defend me, myself. Refuse. I have had no lawyer to defend me yet to this day.

...

I want Mr. Tavernier off my case because he has no interest, no best interest - - there's no best - - he don't have my best interest at stake. I am furious with his defense. I cannot work with somebody who's not - - have the best interest of my defense.

App. 84 ll. 6 – 14; App. 85 ll. 15 – 20.

Judge Maddox ordered Mr. Tavernier to stay on the case as standby counsel, Petitioner's objections notwithstanding. App. 90 ll. 8 – 21; App. 96 ll. 1 – 9. Judge Maddox told Petitioner "the biggest mistake you can make is to show up on December 13th representing yourself." App. 103 ll. 1 – 2.

On December 7, 2010, a pre-trial hearing was held before the Honorable J. Cordell Maddox, Jr. App. 107. Christina Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier appeared as standby counsel for Petitioner. At this hearing, Petitioner moved to suppress a photographic lineup identification as well as any evidence obtained as a result. App. 136 l. 7 – App. 137 l. 7. The State offered the testimony of Lieutenant Greg Reed, and

Wanda Carter, Deputy Chief of Appellate Defense, filed an Anders³ brief on behalf of Petitioner with the South Carolina Court of Appeals on September 28, 2012. App. 658 – App. 669. Thereafter, Petitioner filed a “Pro Se Brief” on November 1, 2012. App. 671 – App. 690.

By way of unpublished opinion dated September 11, 2013, the Court of Appeals dismissed Petitioner’s appeal. App. 704 – App. 705. The remittitur was issued on September 27, 2013. App. 706.

Petitioner filed an application for post-conviction relief on October 15, 2013. App. 707. His application contained allegations of various constitutional defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714 – App. 735. Petitioner filed a Motion to Amend Application for Post-Conviction Relief on October 31, 2013. App. 738 – App. 739. Petitioner also filed a “Motion to Amend and Supplement” on January 14, 2014. App. 743 – App. 746. He also filed a Memorandum in Support of Summary Judgment on March 5, 2014. App. 748 – 761. Petitioner filed an affidavit on February 27, 2014, presumably in support of his application for post-conviction relief. App. 762 – App. 765. On March 5, 2014, Petitioner filed a Motion for Summary Judgment. App. 783 – App. 784. On March 19, 2014, Petitioner filed an Affidavit, also presumably in support of his motions and application. App. 785 – App. 788. He also filed a Notice of Motion and Motion for Default Judgment on May 12, 2014. App. 805 – App. 806. He filed a Memorandum in Support of Default Judgment at the same time. App. 807 – App. 818. He likewise filed an Affidavit on May 12, 2014. App. 819 – App. 823.

On May 21, 2014, Hugh Welborn, attorney for Petitioner, filed a Notice of Motion and Motion to be Relieved as Counsel. App. 824 – App. 825. The State filed a Return and Partial

³ Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967).

Petitioner questioned him on cross examination. App. 138 – App. 148. C.M. also testified and was questioned by Petitioner. App. 148 – 156.

At the conclusion of the hearing, Judge Maddox discussed with Petitioner his right to counsel:

The second to last thing before I talk about what we're going to do on Monday, Mr. Temple, I've gone over exhaustively your right to counsel. I know you and I don't agree on some of these issues. And that's fine. Unfortunately, the law does basically say that we may not agree, but what I say is final. Mr. Tavernier, who has sat here very quietly all day, deserves to know for his preparation if you have changed your mind about whether or not he's going to represent you or whether you intend on Monday of next week to represent yourself. For my sake, I just need you to tell me, have you changed your mind? You still want to represent yourself?

App. 182 l. 20 – App. 183 l. 7.

Petitioner spoke with Mr. Tavernier, and the latter spoke to the court regarding his representation. App. 186 l. 9 – App. 192 l. 5. Judge Maddox ruled that Petitioner was to proceed *pro se* with Mr. Tavernier to serve as advisory counsel. App. 192 l. 11 – 17.

Petitioner then proceeded to a jury trial on December 13, 2010 before the Honorable J. Cordell Maddox. App. 191. Chrissy Adams and Lindsey Simmons represented the State, and Petitioner represented himself with Kurt Tavernier serving as standby counsel. App. 191.

The jury found Petitioner guilty as indicted. App. 646 ll. 17 – 25. Judge Maddox sentenced Petitioner to thirty years' imprisonment on each of the criminal sexual conduct in the first degree charges, thirty years' imprisonment on the kidnapping charge, and ten years' imprisonment on the grand larceny charges, with the sentences to run consecutive. App. 655 l. 23 – App. 656 l. 5.

Motion to Dismiss and a Motion for a More Definite Statement on or about July 7, 2014. App. 826 – App. 833.

An evidentiary hearing was conducted on July 28, 2014 before the Honorable Edgar Dickson. App. 835. Hugh Welborn represented Petitioner, and John W. Whitmire represented the State. Petitioner testified during the hearing.

In a written order filed on October 31, 2016, Judge Dickson dismissed Petitioner's application, granted summary judgment on the issue of ineffective appellate counsel, and found that some of Petitioner's other allegations were barred by *res judicata*. App. 684 – App. 893. Judge Dickson further ruled that some of Petitioner's other allegations were direct appeal issues and summarily dismissed them. App. 891.

This Petition follows.

ARGUMENT

The PCR Court erred in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

Petitioner testified that appellate counsel was ineffective for failing to include all of the pre-trial transcripts, including the preliminary hearing transcript, in the record. App. 856 l. 9 – App. 857 l. 15. In particular, Petitioner alleged that the court did not have jurisdiction to hear his case due to a defect with the arrest warrant, namely that there was a lack of probable cause:

Based on the fact that there was no probable cause to arrest me - - I was arrested on these arrest warrants, detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

App. 858 ll. 6 – 15.

A transcript from that hearing is unavailable. Petitioner later testified: "I think that my appellate counsel was ineffective by the very fact that she proceeded with my appeal with not receiving all the transcripts. There could have been more motions that was objected to." App. 866 ll. 10 – 13.

On cross-examination the following exchange took place:

Q: So you're alleging appellate counsel was ineffective for not providing the court with all of your preliminary hearing transcripts; is that correct?

A: No. I'm alleging that appellate counsel was not effective because she proceeded on my appeal and not had all the transcripts.

Q: Now, what is this transcript you're speaking of? What date it is?

A: July the 16th, 2010.

Q: What judge was it before?

A: It was before - - I'm not even sure because I don't even have the transcript.

Q: You can't remember?

A: No, I don't.

Q: Did you ever request this supposed transcript at your trial?

A: Mr. Welborn, I asked my attorney - -

Q: I mean at your trial.

A: Did I ever request it?

Q: Uh-huh (affirmative). A copy of it.

A: It's a part of the record, isn't it?

Q: This July transcript you speak of doesn't exist. That's why I'm asking you. Did you make any efforts to locate it or track it down?

A: Well, my attorneys requested all the transcripts that was available.

App. 869 l. 15 – App. 870 l. 15.

For an applicant to be granted post-conviction relief as a result of ineffective assistance of counsel, the applicant must show that 1) counsel's performance was deficient, and 2) he was prejudiced by counsel's deficient performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006); See Smith v. Robbins, 528 U.S. 259, 284, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000) (finding that even where appellate counsel believes his or her client's appeal is without merit and thus files an Anders brief, the appellant may have been entitled to a merits

brief and the challenge of appellate counsel's performance should be reviewed under Strickland).

A criminal defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 398, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). In order to prove that counsel's performance was deficient, an applicant must show that his counsel failed to render reasonably effective assistance under prevailing professional norms. Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (2009). In order to prove that he was prejudiced by his counsel's deficiency, an applicant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997).

"Under the Anders procedure, an appellate court is required to review the entire record, including the complete trial transcript, for any preserved issues with potential merit." McHam v. State, 404 S.C. 465, 475, 746 S.E.2d 41, 46 (2013).

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Id. Under Rule 56(c), the party seeking summary judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Baughman, 306 S.C. at 115, 410 S.E.2d at 545. With respect to an issue upon which the nonmoving party has the burden of proof, this initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case. Id. In determining whether any triable issues of fact exist,

the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E.2d 55 (1997). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Brockbank v. Best Capital Corp., 341 S.C. 372, 534 S.E.2d 688 (2000).

Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 534 S.E.2d 672 (2000). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Williams v. Chesterfield Lumber Co., 267 S.C. 607, 230 S.E.2d 447 (1976).

If probable cause was established at the preliminary hearing, such a decision could have been the subject of appellate counsel's appeal. Additionally, in the light most favorable to Petitioner, testimony at the preliminary hearing could have indicated that the underlying warrants were unsupported by probable cause. The transcript from this hearing, if available, should have been included in the Record on Appeal in order to allow the South Carolina Court of Appeals the opportunity to conduct meaningful appellate review of the underlying record. Without a copy of that transcript, the court's decision was made based on an incomplete record.

Furthermore, if Petitioner was unrepresented and proceeded at the preliminary hearing without the assistance of counsel, the probable cause determination may have been exceedingly unfair.

At the time of Petitioner's PCR hearing, there existed a genuine issue of material fact as to the contents of a transcript from the preliminary hearing. Summary judgment was improper,

because a triable issue of fact existed regarding the probable cause determination and whether it was supported by facts as required by the Fourth Amendment.

The Fourth Amendment to the United States Constitution guarantees the right of the people to be free from unreasonable searches and seizures and provides that no warrants shall be issued except upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized. U.S. Const. amend. IV. "A search compromises the individual interest in privacy; a seizure deprives the individual of dominion over his or her person or property." State v. Wright, 391 S.C. 436, 442, 706 S.E.2d 324, 327 (2011) (quoting Horton v. California, 496 U.S. 128, 133, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)).

ARGUMENT II

The PCR court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.

"A new trial is appropriate if the appellant establishes that the incomplete nature of the transcript prevents the appellate court from conducting a meaningful appellate review." see STATE V. Ladson, 373 S.C. 320, 644 S.E.2d 271 (S.C. 2007).

We conclude from China and its progeny, combined with a review of the law of other jurisdictions, that our supreme court would require a reconstructed record on appeal to allow for "meaningful appellate review." A new trial is therefore appropriate if the appellant establishes that "the incomplete nature of the transcript prevents the

appellate court from conducting a meaningful appellate review." IN re D.W. 171 N.C. APP. 496, 615 S.E. 2d 90, 94 (2005). See also State v. Chanze, 211 W. Va. 257, 565 S.E. 2d 379, 382-83 (2002) (finding criminal defendant is entitled to meaningful appellate review of his lower court proceedings, and if this is not possible from reconstructed record, a new trial is appropriate). See State v. Ladson, 373 S.C. 320, 644 S.E. 2d 271 (S.C. 2007).

Our fourth circuit, stated "A criminal defendant has a right to a meaningful appeal based on a complete transcript. see Hardy v. United States, 375 U.S. 277, 279, 84 S.Ct. 424, 11 L.Ed. 2d 331 (1964). When a transcript is less than complete, the court must determine whether the alleged omissions or deficiencies justify a new trial. IN United States v. Gillis, we held that whether an omission from a transcript warrants a new trial depends on whether the appellant has demonstrated that the omission "specifically prejudices his appeal . . ." 773 F.2d 549 (4th cir. 1985).

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant his Petition for Writ of Certiorari to allow full briefing on this issue, reverse the charges against him, and remand the case for a new trial.

EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted Ground two because it was presented to the State of South Carolina Supreme Court. (see. Exhibit # 25)

RELIEF REQUESTED

Petitioner, is requesting that the convictions and sentences to be vacated, and that he be given a new trial or released from prison.

STATEMENT OF THE CASE

On August 2, 2017 Taylor D. Gilliam of the South Carolina Commission on Indigent Defense submitted a Johnson Petition for Writ of Certiorari and a copy of Appendix on appellants behalf to the Supreme Court of South Carolina.

On August 3, 2017 Daniel E. Shearouse, Clerk of Court for the Supreme Court of South Carolina notified appellant that he may file a Pro se response within 45 days.

This Pro se Response follows.

GROUND THREE

Did the General Session Court have Jurisdiction to hear appellants criminal case. When the Magistrate Court never established it had Probable cause to detain appellant on the arrest warrants.

FACTS

1. Appellant, Dennis M. Temple was a 38 Year old black male from Seneca, South Carolina. In 2009, appellant began a small business buying Product at low prices and reselling them at higher prices. His business began to do well and he researched different storage facilities. Appellant selected All safe storage in Seneca. South Carolina because

of the security features it advertised and location. On March 22, 2010 appellant went into the All safe storage in Seneca, South Carolina and signed a contract to rent a storage unit.

2. On april 2010 a 19 Year - old white female Clemson University student, named catherine mcgough rented a storage unit at the All safe storage in Seneca, South Carolina.

3. On May 10, 2010 the 19 Year - old white female Clemson University student, named catherine McGough alleged in her Seven (7) Page Sworn written statement to police at the Oconee medical Center . . .

IN conclusion that, "On May 9, 2010 she arrived at her storage unit at the All safe storage in Seneca, South Carolina at 4:30 P.m. when she noticed a blackman between the age 20 to 40 walking on site without a car. she became nerious and he

tried to sell her some shoes, but she did not want to buy. He then beat her up, dragged her into his storage unit where he raped her, cleaned her out with a blue cloth and stole her car and left her inside his storage unit tied up. Ultimately, she freed herself and found a cell phone inside the storage unit. She then called 911 and a Oconee County Sheriff officer rescued her from the storage unit. Afterwards, she was taken to the Oconee County Medical Center. (APP. P. 789-795).

4. Later that day, On May 10, 2010 a Oconee County Sheriff's officer named Sergeant, Scott Arnold had magistrate Judge Blake Norton issued three (3) arrest warrants for appellants arrest for allegedly committing the crimes of criminal sexual conduct, first degree, Grand Larceny and kidnapping at the All safe storage in Seneca, South Carolina.

5. On May 10, 2010 Sgt. Scott Arnold a Oconee County Sheriff officer Swears in his arrest warrant affidavit for criminal sexual conduct, first degree that the defendant (or appellant) Dennis Temple did commit the

crime set forth and that probable cause is based on the following, "Quote"

" The Defendant Did, on 05-09-10, while committing the crime of kidnapping engage in sexual Battery upon the victim, Catherine McGough, by performing sexual intercourse on the victim against her will. The Defendant Did, while at Unit 193. All safe storage, 600 Shiloh RD. Seneca, SC in Oconee County force sexual intercourse with the victim, victim was Transported to Omc for examinations. Investigated by OCSO. (A written Report. Photograph and statements are on file. case # 1012105. (APP. P. 796).

6. In addition, on May 10, 2010 Sgt. Scott Arnold Swear in his arrest warrant affidavit for Grand Larceny that there is probable cause to believe that the defendant (or appellant) Dennis Temple did commit the crime set forth and that probable cause is based on the following: "Quote"

"The Defendant did on 05-09-10 with intent to permanently Deprive the owner, TAKE and carry away a 2008 Honda accord, West Virginia Tag # NL3593, valued at more Than \$5,000.00 which belonged to Catherine McGough. This incident occurred at 600 Shiloh RD. Seneca, SC in Oconee County and was investigated by OCSO. A written Report is on file. case # 1012105. (APP. P. 797).

7. Lastly, On May 10, 2010 Sgt. Scott Arnold Swears in his arrest warrant affidavit for kidnapping that there is probable cause to believe that the defendant, (or appellant) Dennis Temple did commit the crime set forth and that probable cause is based on the following: "Quote"

"The Defendant Did on 05-09-10 unlawfully and without authority to do so, ABDUCT, confine and inveigle the victim, Catherine McGough against her will while accompanied by aggravated circumstances. This Defendant Did force the victim from her storage Unit. Unit 177. To his Personal storage Unit. Unit 193. where he committed the crime of criminal sexual conduct against the victim. The victim was Tied up

and left inside the Defendants storage unit.
This incident occurred at 600 Shiloh Rd. Seneca,
Sc in Oconee County and was investigated by OCSO.
(A written Report, Photographs and statements
are on file, case # 1012105. (APP. P. 798)

8. On May 11, 2010 appellant was arrested
by the Oconee County Sheriff's officer Captain
Greg Reed (former Lieutenant Greg Reed) and
Sergeant Terry Moss for allegedly committing
the crimes of kidnapping, criminal sexual
conduct, first degree and Grand Larceny at
the All safe storage in Seneca, South Carolina.

9. On May 12, 2010 appellant was taken
before magistrate Judge Blake Norton, which he
issued a \$200,000 bond against appellant
to gain his freedom for the charges.
(APP. P. 803 - 804.)

10. Appellant was unable to post bail
on the \$200,000 bond and remained in the
Oconee County Detention Center.

11. On May 20, 2010 a pretrial hearing was held at the Anderson County courthouse regarding the state request for Sexual Transmitted diseases testing on appellant. (APP. P. 1-8)

12. On May 22, 2010 at the Oconee County Detention Center several nurses and Oconee County Sheriff officer took blood, head hairs and pubic hairs from the appellant.

13. On June 30, 2010 a pretrial hearing was held at the Oconee County courthouse regarding the appellant's bond reduction and appointment of Counsel. (APP. P. 9-18).

14. On July 16, 2010 a preliminary hearing was held at the Oconee County Courthouse regarding probable cause to arrest appellant. (Courts "may properly take judicial notice of matters of public record"). see, Phillips v. Pitt cnty. mem. Hosp., 572 F.3d 176, 180 (4th cir. 2009). Colonial Penn. Ins. Co v. coil, 887 F.2d 1236, 1239 (4th cir. 1989).

15. On July 29, 2010 a Pretrial hearing was held at the Oconee County courthouse regarding the appellant's request to dismiss attorneys Sarah Drawdy and Keith Denny and Request to obtain private counsel. (APP. P. 19-29)

16. On September 7, 2010 appellant was allegedly indicted by the Grand Jury on two counts of criminal sexual conduct, first degree, kidnapping and Grand Larceny charges. (APP. P. 894 - 901).

17. On September 14, 2010 a Pretrial hearing was held at the Anderson County courthouse regarding the appointment of another counsel. (APP. P. 30-48).

18. On September 22, 2010 a Pretrial hearing was held at the Oconee County Court house regarding DNA testing Pursuant to Schmerber. (APP. P. 49-74).

19. On October 21, 2010 a Pretrial hearing was held at the Anderson County courthouse regarding pro se representation and stand-by counsel. (APP. P. 75-106).

20. On December 7, 2010 a Pretrial hearing was held at the Anderson County Courthouse regarding Rape shield STATUTE motion and pro se Representation. (APP. P. 107-198).

21. On December 13, 2010 appellant was coerced by the trial Judge J. Cordell maddox Jr. to proceed Pro se in a Jury Trial at the Oconee County Courthouse. (APP. P. 25B 1. 3 - P. 261 1. 22).

22. On December 15, 2010 a Partial Jury found appellant guilty on two counts of criminal sexual conduct, first degree, kidnapping and Grand Larceny charges. Judge maddox sentenced appellant to 100 Years in Prison. (APP. P. 199-657).

PREliminary HEARING

In a Preliminary hearing, the state must show that there was "Probable cause" to arrest the defendant for the commission of some crime. Absent this showing, the charge must be dismissed. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (S.C. 1982).

The defendant's right to request a preliminary hearing is provided solely by state statute. It is not required by either the state or Federal Constitution and is not necessary before a grand jury can indict a person for a crime. State v. Irby, 166 S.C. 430, 164 S.E. 912 (1932). South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases. State v. Nesmith, 213 S.C. 60, 48 S.E. 2d 595 (1948). The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. U.S. v. Werbrouck, 589 F.2d 273 (7th Cir. 1978) cert den. 400 U.S. 962, 99 S.Ct. 1507, 59 L.Ed. 2d 776.

Once the accused properly request a preliminary hearing, the magistrate's court retains jurisdiction and the Court of General Sessions is deprived of jurisdiction until such hearing is held. State v. Porcher, 273 S.C. 507, 257 S.E. 2d 505 (1979). No indictment may be true billed by the grand jury when the circuit court lack jurisdiction since the grand jury's jurisdiction of the court in which it is impaneled and for which it is to make inquiry. State v. Funderbuck, 259 S.C. 256,

191 S.E.2d 520 (1972); State v. Wheeler, 259 S.C. 571, 193 S.E.2d 515 (1972); But, where the request for preliminary hearing was not properly made in the first place, then the circuit court, and grand jury, is not deprived of jurisdiction even though a preliminary hearing is granted after indictment. State v. Fortner, 266 S.C. 223, 222 S.E.2d 508 (1976).

LEGAL DISCUSSION

U.S. Constitution, 4th Amendment Search and Seizures

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

S.C. Constitution Article I, Section 10, Searches and seizures; invasions of privacy

The right of the people to be secure there persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, the person or thing to be searched, the person or thing to be seized, and the information to be obtained.

THE SEARCH

The Constitutions of the United States and the state of South Carolina require that Search warrants be "supported by Oath or affirmation". U.S. Const. Amend. IV; S.C. Const. Art. I Section 10. This is a minimum standard and state legislatures are free to enact stricter requirements for the issuance of search warrants. State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967).

The South Carolina General Assembly has enacted a requirement that search warrants may be issued "only upon affidavit sworn to before the magistrate . . . establishing the grounds for the warrant," S.C. Code Ann. Section 17-13-140 (1985). A search warrant that would survive constitutional scrutiny may still be defective under statute. State v. McKnight, 289 S.C. 167, 337 S.E. 2d 208 (1987).

In addition, the statutory requirement that all proceedings before magistrates in criminal cases shall be commenced on information under oath plainly and substantially setting forth the offense charged, upon which and only which, shall a warrant of arrest issue," cannot be waived. Town of Honea Path v. Wright, 194 S.C. 461, 9 S.E. 2d 924 (S.C. 1940); S.C. Code Ann § 22-3-710 (1976); Gist v. Berkeley County Sheriff's Department, 336 S.C. 611, 521 S.E. 2d 163 (1999).

The purpose of the statute requiring that a warrant be issued only upon affidavit is to provide for timely recording of facts presented to a judicial officer. State v. Sachs, 264 S.C. 541, 216 S.E. 2d 501 (S.C. 1975). A warrant affidavit is "insufficient in itself to establish probable cause may be supplemented before a magistrate

by sworn oral testimony" State v. Crane, 296 S.C. 336, 372 S.E.2d 587 (1988). However, a warrant issued upon a statement of facts not sworn to is unconstitutional. State v. Wimbush, 9 S.C. 309 (1878).

An affidavit is a voluntary ex parte statement reduced to writing and sworn to or affirmed before some person legally authorized to administer an Oath in that an affidavit consists of a statement of fact which is sworn to as the truth. While an Oath is a Pledge, while a Sworn, oral statement may be sufficient to satisfy the constitutional requirement for Oath or affirmation, it does not satisfy the statutory requirement of an affidavit. State v. Knight, 289 S.C. 167, 337 S.E.2d 208 (1987).

South Carolina is one of the Jurisdictions allowing affidavit set out on information and belief. When the facts are set out on information and belief, the affiant is required to show the source of his knowledge. S.C. code of Laws § 61-2-220 et seq. (1976); State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964); Illinois v. Gates, 402 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

STANDARD OF REVIEW

In determining the existence of probable cause "the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 402 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983). For a magistrate to properly perform this function, the affidavit must contain adequate supporting facts about the underlying circumstances to show that probable cause exists. United States v. Weaver, 99 F.3d 1372, 1377 (6th Cir. 1996). A magistrate's findings are entitled to great deference and "the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Gates, 402 U.S. at 238, 103 S.Ct. 2317. Yet, "the court must . . . insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for police." Aguilar v. Texas, 378 U.S. 108, 111, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964). A such "deference to the issuing magistrate . . . is not boundless." United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 82 L.Ed. 2d 677 (1984).

IN this present case, the three arrest warrants affidavit by Sgt. Scott Arnold set forth no facts as to why Police believed Temple committed the crimes. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (S.C. 2006); State v. Jenkins, 398 S.C. 215, 727 S.E.2d 761 (S.C. App. 2012). The Magistrate's "action cannot be a mere ratification of the bare conclusions of other," Illinois v. Gates, 462 U.S. at 239, 103 S.Ct. 2317 (1983); State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981). The affidavits in this case lacks specificity and contains nothing more than conclusory statements. The affidavit must set forth particular facts and circumstances underlying the existence of Probable cause to allow the magistrate to make an independent evaluation of the matter." 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978)). The affidavit in this case fails to meet the requirement of showing why Police believed Temple committed the crimes.

Sgt. Scott Arnold affidavits are not based on Personal Knowledge, but on information and belief. There is a statutory requirement that an affidavit on information and belief must set forth the source of affiant's information

is to the end that the magistrate may judicially weigh not only information, but the source thereof, in determining whether or not there is probable cause for the issuance of the warrant. See, S.C. Code of Laws § 61-2-220 et seq (1976). State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967). State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (S.C. 1975); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964). Illinois v. Gates, 462 U.S. at 230, 103 S.Ct. 2317 (1983).

In this case, Sgt. Scott Arnold stated his source of his information and belief (or basis of knowledge) at the end of his affidavit statements in all three arrest warrants stating... "A written Report, Photographs and statements are on file." This may satisfy the source of information and belief requirement; however, the affidavit does not contain even a conclusory assertion that the information is reliable and that its source is credible. Illinois v. Gates, 462 U.S. at 238, 103 S.Ct. 2317 (1983) (stating the circumstances a magistrate must consider include the "veracity" of the persons supplying the information on which the warrant is based). "Without any information concerning the credibility of the informant and the reliability of his information, the inferences from the

facts which lead to the complaint will be drawn not by a neutral and detached magistrate, as the constitution requires, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime. . . . "State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167 (1990). (citation and quotation marks omitted).

Moreover, when these arrest warrants were issued by the magistrate Judge Blake Norton on May 10, 2010 and at the time of Dennis Temple's arrest on May 11, 2010. The only "Written Report, photographs and statement on file was the alleged victim's seven (7) page statement and a photo lineup of six blackmales; however, this Sworn written statement by the alleged victim or the source of Sgt. Scott Arnold information and belief: (1) did not state that Dennis Temple was identified in the photo lineup as the assailant or blackman; (2) it did not connect any criminal activity to storage unit # 193; (3) it did not connect any criminal activity to Dennis Temple; (4) it did not connect Dennis Temple to storage unit # 193.

CONCLUSION

Therefore, the information that was included in Sgt. Scott Arnold's affidavits that was never mentioned in the statement by the alleged victim (or source of information) was misleading and false. In Young, the Court stated that, "A facially valid search warrant will be found to violate the Fourth Amendment if it contains false or misleading statements that are 'necessary to the finding of Probable cause'." See, Wilkes v. Young, 28 F.3d 1362, 1365 (4th cir. 1994), cert. denied, 513 U.S. 1151 (1995) (quoting Franks v. Delaware, 438 U.S. 154, 156 (1978)).

Viewing these deficiencies together and considering the totality of the circumstances, we find that Sgt. Scott Arnold did not provide the magistrate Judge a substantial basis on which to find Probable cause to believe Temple committed these crimes, and that Sgt. Scott Arnold committed perjury and the Magistrate Judge Blake Norton was not impartial. In addition, the General Sessions Court did not have Jurisdiction over this case and the indictments were void.

For the foregoing reasons, Petitioner request that the Court grant his pro se Response by reversing the charges against him, and remand the case for a new trial.

August 16, 2017

Dennis M Temple
Dennis M Temple # 274802
Perry CORR. Inst
430 Oaklawn Road
Pelzer, South Carolina 29669

EXHAUSTION OF STATE REMEDIES

Petitioner has exhausted Ground three because it was presented to the state of South Carolina Supreme Court in his pro se response (see. EXHibit # 28

RELIEF REQUESTED

Petitioner is requesting that the convictions and sentences to be vacated, and that he be given a new trial or released from prison.

Dennis M. Temple

Dennis M. Temple, # 274802
PERRY CORR. INST. Q2A220
430 OAKLAWN ROAD
Pelzer, South Carolina 29669

November 29, 2018

EVIDENCE

- Record on Appeal _____ volume 1 and 2 (EXHIBIT 18)
- APPENDIX _____ volume 1 and 2 (EXHIBIT 24)
- Johnson Petition for Writ of Certiorari (EXHIBIT # 25)
- ORDER Transfer of Post-Conviction Relief Cases
to the South Carolina Court of Appeals (EXHIBIT # 26)
- ORDER denying Johnson Petition for Writ of
Certiorari _____ (EXHIBIT # 27)
- PRO SE RESPONSE _____ (EXHIBIT # 28)
- SUPREME COURT NOTICE _____ EXHIBIT # 29)
- Supplemental Pro Se Brief. (EXHIBIT # 30)
- Habeas CORPUS 2254 _____ (EXHIBIT # 31)

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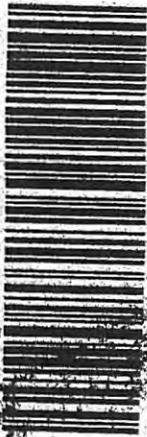
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STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2021 NOV 22 P 1:40

Dennis Maurice Temple, SCDC #274802,

Case No. 2020-CP-37-0695

Applicant,

v.

FINAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Dennis Maurice Temple (Applicant) on January 18, 2020. The State made its return on September 14, 2021, requesting the action be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; for failing to state a cognizable claim under the PCR Act, and because continued litigation by Applicant frustrates the need for finality of litigation.

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 signed September 21, 2021, and filed September 23, 2021, 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 an affidavit of service dated October 7, 2021, serving the above-mentioned conditional order of dismissal on Applicant.

On October 4, 2021, Applicant filed a motion requesting a thirty-day extension in which to file a response to the conditional order of dismissal. He subsequently filed a response on October

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2020-CP-37-0695

27, 2021. In his response, Applicant contends the following five claims raise a genuine issue of material fact regarding the timeliness of the action, successiveness of the action, whether it is barred by *res judicata*, and whether he raises a cognizable claim under the PCR Act (verbatim):

1. In this present case, first we notice that the record shows that applicant has been on six different appeals in five different courts and one after the other with no lapse or pause in between these appeals, see. record; Statute of limitation, S.C. Code § Ann. 17-27-45(A)(C) applies in this case. Specifically applicant received a remittitur from second Federal Habeas Corpus petition.
2. The Second events we notice, it appears on the record that during applicant First PCR action he filed a Motion to Amendments PCR application on October 31, 2013, including adding a "Ineffective Assistance of Counsels" claim which was accepted by the PCR court. Also, Applicant filed Schmerber hearing claim. However, PCR Court never issued any findings of facts and conclusions of law regarding applicant ineffective assistance of counsels claim against Sarah Drawdy and Keith Denny. App. 884- 893.
3. The third relevant events that we notice in this case, in the PCR hearing. The applicant stated on the record that Sarah Drawdy and Keith Denny represented him in a July 16, 2010 Preliminary Hearing at the Oconee County Magistrate Court, (quoting..."If Sarah Drawdy and Keith Denny were his lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective." App. 858. 1. 17.
4. The fourth, event we noticed in the record was the State admitted in the PCR hearing that Applicant July 16, 2010 preliminary hearing does not exist, but the record clearly and convincingly show a preliminary hearing occurred on July 16, 2010, but was covered up or not transcribed. App. 869 1. 15 -App. 8701.15.
5. For a fifth defense, it appear on the record that prior to applicant's Jury trial on September 14, 2010, another hearing was held before the Judge J. Cordell Maddox. Jr. App. 30. Lindsey Simmons appeared on behalf of the State, and Applicant (Dennis Temple) appeared pro se.¹

Applicant then claims the first PCR court denied him a full and fair opportunity to present his claims of ineffective assistance of counsel against Sarah Drawdy and Keith Denny, which he framed in the instant PCR application as a claim of ineffective assistance of PCR counsel. He

¹ Applicant then quotes "App. 32 1. 1-25 -App. 33 1. 1-3."

further states that his motion for a new trial is not untimely because “the State of South Carolina notified Applicant in the July 28, 2014 PCR hearing that the [preliminary hearing] transcript did not exist, 1 year and 10 months after direct appeal.”

This Court disagrees with Applicant’s first claim that the instant action is timely. The statute of limitations for filing a PCR action begins to run “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(A) (emphasis added). Any pending litigation in federal court has no effect on the timeliness of a post-conviction relief action. To the extent Applicant contends the purportedly missing preliminary hearing transcript constitutes newly-discovered evidence, “the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.” S.C. Code Ann. § 17-27-45(C). Thus, any allegation regarding the preliminary hearing transcript should have been brought on or before July 29, 2015. This Court would further note that a motion for a new trial pursuant to Rule 29, SCRCrimP, must be filed in the Court of General Sessions. The remaining claims are successive and barred by *res judicata*, as thoroughly addressed in the conditional order of dismissal.

Finally, this Court would note that Applicant’s claims regarding PCR counsel’s failure to file a 59(e) motion in his first PCR action are meritless. Our Supreme Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). In fact, the Court has consistently vacated and remanded PCR judgments that

do not contain sufficient findings on issues presented. *E.g., Bryson v. State*, 328 S.C. 236, 493 S.E.2d 500, 500 (S.C. 1997); *McCullough v. State*, 320 S.C. 270, 464 S.E.2d 340, 340 (S.C. 1995); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992); *McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (S.C. 1991); *Fishburne v. State*, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019). The Supreme Court clearly could have done so in Applicant's case had the order been insufficient for purposes of certiorari review or inconsistent with Judge Dickson's rulings reflected in the record. The Court did not do so in Applicant's case. Thus, it is clear Applicant enjoyed a complete adjudication on the merits of her original application—"one full bite at the apple."

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that she is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a showing based on the information set forth in his response, and therefore he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

This Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; for failing to state a cognizable claim under the PCR Act, and because continued litigation by Applicant frustrates the need for finality of litigation.

IT IS THEREFORE ORDERED that for the reasons set forth in the 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 17 day of November, 2021.


R. LAWTON MCINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson, South Carolina

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OCCONEE COUNTY, SC

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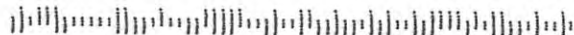


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ATTORNEY GENERAL'S OFFICE
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ADMINISTRATIVE INSTRUCTIONS

Lillian Meadows
PO Box 11549
Columbia, SC 29211

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STATE OF SOUTH CAROLINA
 COUNTY OF OCONEE
 2021 OCT 27 A 11:36
 Dennis Maurice Temple, # 274802
 Applicant,
 V.
 State of South Carolina,
 Respondent,

OCONEE COUNTY, SC
 HENRY A.G. DIXON
 CLERK OF COURT
 IN THE COURT OF COMMON PLEAS
 FOR THE TENTH JUDICIAL CIRCUIT
 Case No. 2020-CP-37-0695
**APPLICANT'S RESPONSE
 TO THE STATE'S CONDITIONAL
 ORDER OF DISMISSAL**

This matter comes before the Court Pursuant to S.C. Code Section 17-27-70 (b) of the South Carolina Uniform Post-Conviction Procedure Act. The Applicant submits the following in response to the State of South Carolina Conditional Order of Dismissal filed on September 21, 2021 requesting a Summary dismissal of the applicant Second Post-Conviction Relief Application on numerous in accurate grounds. However, the applicant herein demonstrate or show that it is apparent on the face of the application and record that there are genuine issues of material facts, which mandates appointment counsel, and a hearing because applicant is entitled to relief as follows:

STATEMENT OF THE CASE

(1). In May 11, 2010, Applicant a 38 year old black male from Seneca, South Carolina was arrested and detained at the Oconee County Detention Center for Raping Catherine Mcgough a 19 year- old white female, Clemson University student at the All Safe Storage Unit in Seneca, South Carolina. On May 12, 2010 arrest warrant numbers N- 136668, N- 136669 & N-136670 was served on applicant for Criminal Sexual Conduct, first degree, Kidnapping and Grand Larceny, more than \$5,000. On May 12, 2010 Applicant was giving a \$200,000 bond to gain his freedom. However, the alleged victim never identified the applicant as the person that committed the crimes against her and there was no DNA linking Applicant to these crimes. On July 16, 2010 a Preliminary hearing was held before Magistrate Judge William Derrick at the Oconee County Magistrate Court regarding arrest

warrants that was lodged against Applicant for allegedly committing the offense Grand Larceny, more than \$ 5,000; Kidnapping and Criminal Sexual Conduct 1ST degree the proceeding was not recorded by way of a transcript and all other hearing after that were recorded and transcribed.

In December 13-15, 2010, the Applicant was coerced to proceed pro se in a Jury trial by Judge J. Cordell Maddox Jr. at the Oconee County Courthouse. On December 15, 2010, 11 whites and 1 black jurors found applicant guilty of Two counts of Criminal Sexual Conduct, First degree; kidnapping and Grand Larceny, more than \$ 5,000. The Trial Judge J. Cordell Maddox Jr. sentenced applicant to 30 years, 30 years, 30 years and 10 years consecutive, sentences, totaling 100 years in prison.

In 2010, Applicant timely filed a Notice of Appeal. Applicant received an appellate counsel to effectuate his direct appeal. On 2012, Wanda H. Carter, Chief Deputy Appellate counsel filed a Anders Brief on applicant's behalf. On November 1, 2012. Applicant filed a Pro se response to the Anders brief. On September 11, 2013, applicant direct appeal was dismissed, including the Pro se brief.

On October 15, 2013 applicant filed a Post-Conviction Relief action in the Oconee County Courthouse. Applicant raised numerous constitutional ground on why his conviction and sentences should be overturned. On October 31, 2013 applicant filed a Motion to Amend PCR application to include a **ineffective Assistance Counsels** claim and filed other motions as well. On October 31, 2013 Hugh Welborn, Esquire was appointed to represent the applicant. On July 7, 2014 the State of South Carolina through the Attorney General, Alan Wilson office issued a Return and partial Motion to Dismiss.

On July 28, 2014 a Post-Conviction Relief hearing was held at the Oconee County Courthouse. On October 31, 2016 the PCR Court issued an order of dismissal in the case. However, the PCR Court failed to state finding of facts and conclusion of law regarding on applicant i ineffective assistance of counsels claim against Sarah Drawdy and Keith Denny and Kurt Tavernier regarding the Schmerber hearing which was raised in the PCR Application and in the PCR hearing on July 28, 2014. Applicant Post-Conviction attorney failed to file a 59(e) motion, other motion upon applicant's request, but filed a motion to be relieved as counsel before the hearing took place.

While Applicant's Post-Conviction Relief actions was still pending in state court. On August 26, 2014 applicant filed his First Habeas Corpus petition in the United States District Court. On September 9, 2014. The Magistrate Judge Jacquelyn D. Austin issued a Report and Recommendation, recommending the applicant's Federal Habeas Corpus petition to be dismissed without prejudice and without requiring respondent to file an answer or return. On September 30, 2014 the United States District Court Judge, Joseph F. Anderson, Jr. issued a order incorporating the report and recommendation and dismissing the petition without prejudice.

In 2017, Taylor Gilliam, Attorney of the South Carolina Commission of Indigent Defense was appointed as applicant's counsel on Writ of Certiorari in the South Carolina Supreme Court. On August 2, 2017 applicant's attorney, Taylor Gilliam filed a Johnson brief on his behalf with the South Carolina Supreme Court. However, the South Carolina Supreme Court transferred the Writ of Certiorari to the South Carolina Court of Appeals for review. On October 16, 2018 South Carolina Court of Appeals dismissed the applicant Writ of Certiorari Appeal. The remittitur was sent back to the lower court on November 9, 2018.

On November 29, 2018 applicant filed his second petition of Habeas Corpus in the Federal District Court raising several constitutional claims. On April 25, 2019 Respondent filed a return. On June 20, 2019 United States District Judge Jacquelyn D. Austin issued a report and recommendation that respondent's Motion for Summary Judgment be granted and Applicant's petition for Habeas Corpus be denied. On April 25, 2019 Applicant filed objections to the R & R and later filed amended objections on August 26, 2019. Respondent replies to the original objections on July 24, 2019, and again to the amended objections on September 9, 2019.

On October 31, 2019, Judge Anderson issued an order adopting and incorporating the R&R by reference; granting Respondent's Motion for Summary Judgment; dismissing the Applicant's petition with prejudice; and denying applicant a certificate of appealability.

On September 18, 2020 applicant filed a second Post-Conviction Relief in the Oconee County Courthouse where he raised the following claims: [1] " ineffective of

Assistance of counsels," [2] "Schmerber v. California" Hearing Claim and [3] Applicant moves the court for a new trial because the State of South Carolina notified him 1 year and 10 months after direct appeal that his July 16, 2010 preliminary hearing transcript does not exist. Applicant requested that the conviction and 100 years sentences to be vacated and request a new trial.

On September 21, 2021 Respondent, the States of South Carolina by and through the Attorney General Office has moved this Court in its Conditional Order of Dismissal for an order from the Chief Administration Judge McIntosh to Dismiss applicant Second Post-Conviction Relief Action. Respondent alleges that the applicant's second PCR application must be summary dismissed for : [1] failing to comply with the one year statute of limitation of the Uniform Post-Conviction Procedures Act and, [2] because it is successive to applicant's previous PCR action and barred by the doctrine of *res judicata* and [3] *because applicant's allegation of ineffective assistance of PCR counsel must be dismissed for failure to state a prima facie claim of ineffective assistance of counsel and; [4] frustration of finality of Convictions.*

The Applicant alleges that State of South Carolina has not demonstrated or shown the absence of genuine issues of material facts to bar his second PCR action and the state is not forth coming with all the relevont facts, or misleading the court and the applicant is entitled to relief as follows:

FACTUAL AND PROCEDURAL HISTORY

(2). In April 2010, Applicant, Dennis Maurice Temple a 38 year- old black male from Seneca, South Carolina began a small business buying products at low prices and reselling them at higher prices. His business began to do well and he had limited room to storage his products. Applicant decided to rent a storage unit. He researched different storage facilities. Applicant selected the All Safe Storage in Seneca, South Carolina because of its security features, surveillance and location it advertised.

(3). On May 2010, Catherine Mcgough a 19 year-old white female Clemson University Student rented a storage unit at the All Safe Storage in Seneca, South Carolina. On May 10, 2010, Catherine Mcgough alleged in her seven (7) page sworn written statement to police at

the Oconee Medical Center paraphrased as follows:

" On May 9, 2010 I arrived at my storage unit at the All Safe Storage Unit in Seneca, South Carolina at 4:30 p.m. When I noticed a black man between the age 20 to 40 walking on site without a car. I became nervous and he tried to sell me some shoes, but I did not want to buy. He then beat me up, dragged me into his storage Unit where he raped me, cleaned me with a blue cloth and left me inside his storage unit tied up. Ultimately, I freed myself and found a cell phone inside the storage unit. I then called 911 and a Oconee County Sherriff Officer rescued me from the storage unit. Afterwards, I was taken to the Oconee County Medical Center.

(APP. 789 – App. 795. see. Catherine Mcgough Statement. Exhibit # 11.

NOTE : Catherine Mcgough sworn written statement to police at the Oconee Medical Center which, (1) never mention Applicant's name Dennis Temple, (2) victim statement never alleged she identified Applicant in a six man photo lineup, (3) the alleged victim's statement never connected storage Unit # 193 to any criminal activity; (4) the victim's statement never connected Applicant to any criminal activity; (5) the alleged victim statement was the only source of Sergeant, Scott Arnold information and belief provided in the arrest warrants affidavit, which was submitted to Magistrate Judge Blake Norton on May 10, 2010. In support of the arrest warrants, (6) there was no probable cause to arrest Applicant for committing these offenses against the alleged victim Catherine Mcgough.

(4). Later that day, On May 10, 2010 a Oconee County Sherriff's Officer named Sergeant, Scott Arnold went before Magistrate Judge Blake Norton requesting the issuance of three (3) arrest warrants for complainant's arrest for committing the crimes of Grand Larceny more than \$5,000; Kidnapping and Criminal Sexual Conduct 1st degree at the All Safe Storage in Seneca, South Carolina.

GRAND LARCENY ARREST WARRANT

(5). On May 10, 2010 Sgt. Sergeant Scott Arnold swore in his arrest warrant affidavit for Grand Larceny as following :

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

"THE DEFENDANT DID, ON 05-09-10, WITH THE INTENT TO PERMANENTLY DEPRIVE THE OWNER, TAKE AND CARRY AWAY A HONDA ACCORD, WEST VIRGINIA TAG #NL3593,

VALUED AT MORE THAN \$5,000, WHICH BELONGED TO CATHERINE MCGOUGH. THIS INCIDENT OCCURRED AT 600 SHILOH RD, SENECA, SC, IN OCONEE COUNTY AND WAS INVESTIGATED BY OCSO. A WRITTEN REPORT IS ON FILE. CASE # 1012105.

(App. 797)

KIDNAPPING ARREST WARRANT

(6). On May 10, 2010 Sgt. Scott Arnold swore in his arrest warrant affidavit for Kidnapping as following:

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

THE DEFENDANT DID, ON 05-09-10, UNLAWFULLY AND WITHOUT AUTHORITY TO DO SO, ABDUCT, CONFINED AND INVEIGLED THE VICTIM, CATHERINE MCGOUGH, AGAINST HER WILL WHILE ACCOMPANIED BY AGGRAVATED CIRCUMSTANCES. THIS DEFENDANT DID FORCE THE VICTIM FROM HER STORAGE UNIT, UNIT 177, TO HIS PERSONAL STORAGE UNIT, UNIT 193, WHERE HE COMMITTED THE CRIME OF CRIMINAL SEXUAL CONDUCT AGAINST THE VICTIM. THE VICTIM WAS TIED UP AND LEFT INSIDE THE DEFENDANT'S STORAGE UNIT. THIS INCIDENT OCCURRED AT 600 SHILOH RD, SENECA, SC IN OCONEE COUNTY AND WAS INVESTIGATED BY OCSO. A WRITTEN REPORT, PHOTOGRAPHS AND STATEMENTS ARE ON FILE. CASE # 1012105.

(App. 796)

CRIMINAL SEXUAL CONDUCT ARREST WARRANT

(7). On May 10, 2010 Sgt. Scott Arnold swore in his arrest warrant affidavit for Criminal Sexual Conduct, 1st degree as following:

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

"The Defendant Did, on 05-09-10, while committing the crime of Kidnapping engage in Sexual Battery upon the victim Catherine McGough, by performing sexual intercourse on the victim against her will. The Defendant Did, while at Unit 193. All Safe Storage, 600 Shiloh RD. Seneca, SC in Oconee County force sexual intercourse with the victim, victim was transported to OMC for examinations. Investigated by OCSO. (A written Report. Photograph and statement are on file. case # 1012105.

(App. 798)

(8). Sgt. Scott Arnold affidavits stated his information and belief was a written report, photographs and a statement. We searched the trial files received from Solicitor, Christina Adams and Assistance Solicitor, Lindsey Simmons the documents disclosure, pursuant to Applicant Rule 5, discovery request. The only written report, photographs and statement on file before and on the day of Complainant's arrest. On May 11, 2010 was a seven page sworn written statement by Catherine McGough, a photographs of six (6) black males. There was no supplemental oral testimony or written report on file before or on the day of Applicant's arrest by Lieutenant Greg Reed on May 11, 2010.

see. Photo lineup at. Exhibit # 12.

PRELIMINARY HEARING

In a preliminary hearing, the state must show that there was "probable cause" to arrest the defendant for the commission of some crime. Absent this showing, the charge must be dismissed. State v. McClure, 277 S.C. 432, 289 S.E.2d 158 (S.C. 1982). The defendant's right to request a preliminary hearing is provided solely by state statute. It is not required by either the state or Federal Constitution and is not necessary before a grand jury can indict a person for a crime State v. Irby, 166 S.C. 430, 1654 S.E. 912 (1932). South Carolina statutory law specifically provides that an accused may be brought to trial under indictment by a grand jury without a preliminary hearing in some cases. State v. Nesmith, 213 S.C. 60, 48 S.E.2d 595 (1948). The indictment itself constitutes a finding of probable cause and thus avoids the need for a preliminary hearing. U.S. V. Werbrouck, 589 F.2d 273 (7th Cir. 1978) cert den. 400 U.S. 962, 99 S.Ct. 1507, 59 L.Ed. 2d 776.

FOURTEENTH AMENDMENT OF THE U.S. CONSTITUTION

Section 1. All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the State are wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CONSTITUTION, 4TH AMENDMENT SEARCH AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

S.C. CONSTITUTION ARTICLE 1, SECTION 10, SEARCHES AND SEIZURES; INVASIONS PRIVACY

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place or thing to be searched, the person or to be seized, and the information to be obtained.

THE SEARCH

The Constitutions of the United States and the State of South Carolina require that Search warrants be "supported by Oath or affirmation." U.S. Const. Amend. IV; S.C. Const. Art. Section 10. This is minimum standard and State legislatures are free to enact stricter requirements for the issuance of search warrants. **State v. York**, 250 S.C. 30, 156 S.E.2d 326 (1967).

The South Carolina General Assembly has enacted a requirement that search warrants may be issued "only upon affidavit Sworn to before the magistrate... establishing the grounds for the warrants," S.C. Code Ann. section 17-13-140 (1985). A search warrant may still be defective under statute. **State v. McKnight**, 289 S.C. 167, 337 S.E.2d 208 (1987).

In addition, the statutory requirement that all proceeding before magistrate in criminal cases shall be commenced on information under Oath plainly and substantially setting forth the offense charged, upon which and only which, shall a warrant of arrest issue," cannot be waived. **Town of Honea Path v. Wright**, 194 S.C. 461, 9 S.E.2d 924 (S.C. 1940); S.C. Code Ann § 22-3-710 (1976); **Gist v. Berkeley County Sherriff's Department**, 336 S.C. 611, 521 S.E.2d 163 (1999). The purpose of the statute requiring that a warrant be issued only upon affidavit is to provide for timely recording of facts presented to a judicial officer. **State v. Sachs**, 264 S.C. 541, 216 S.E.2d 501 (S.C. 1975). A warrant affidavit is "insufficient in itself to establish probable cause may be supplement before a magistrate by Sworn oral testimony" **State v. Crane**, 296 S.C. 336, 372 S.E.2d 587 (1988). However, a warrant issued upon a statement of facts not Sworn to is unconstitutional. **State v. Wimbush**, 9 S.C. 309 (1878).

An affidavit is a voluntary ex parte statement reduced to writing and Sworn to or affirmed before some person legally authorized to administer an oath in that an affidavit consists of a statement of fact which is Sworn to as the truth. While an Oath is a pledge. While a Sworn,

oral statement may be sufficient to satisfy the Constitutional requirement for Oath or affirmation, it does not satisfy the statutory requirement of an affidavit. State v. Knight, 289 S.C. 167, 337 S.E.2d 208 (1987).

South Carolina is one of the Jurisdictions allowing affidavit set out on information and belief. When the facts are set out on information and belief, the affiant is required to show the source of his knowledge. S.C. Code of Laws § 61-2-220 et seq. (1976); State v. York, 250 S.C. 30, 156 S.E. 2d 326 (1967); State v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964); Illinois v. Gates, 402 U.S. 213, 238, 103 S.Ct. 2317, 76 L. Ed. 2D 527 (1983).

STANDARD OF REVIEW BY MAGISTRATE JUDGE

In determining the existence of probable cause "the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him... , including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that... evidence of a crime will be found in a particular place." State v. Herring, 387 S.C. 201, 212, 692 S.E.2d 490, 495-96 (2009). (quoting Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983) for a magistrate to properly perform this function, the affidavit must contain adequate supporting facts about the underlying circumstances to show that probable cause exists. United States v. Weaver, 99 f.3d 1372, 1377 (6th Cir. 1996). A magistrate's findings are entitled to great deference and 'the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed." Gates, 462 U.S. at 238, 103 S.Ct. 2317. Yet, "the court must... insist that the magistrate perform his neutral and detached function and not serve merely as a rubber stamp for police." Aguilar v. Texas, 378 U.S. 108, 111, 84 S.Ct. 1504, 12 L.Ed. 2d 723 (1964). A such "deference to the issuing magistrate... is not boundless." United States v. Leon, 468 U.S. 897, 914, 104 S.Ct. 3405, 82 L. Ed 677 (1984).

In this present case, the three arrest warrants affidavit by Sgt. Scott Arnold set forth know facts as to why police believed Applicant committed the crimes. State v. Smith, 301 S.C. 371, 373, 392 S.E.2d 182, 183 (1990); State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (S.C. 2006); State v. Jenkins, 398 S.C. 215, 727 S.E. 2d 761 (S.C. App. Ct. 2012). The magistrate's action cannot be a mere ratification of the bare conclusions of other," Illinois v. Gates, 462 U.S. at 239, 103 S.Ct. 2317 (1983); State v. Viard, 276 S.C. 147, 276 S.E.2d 531 (1981), the affidavits in this case lacks specificity and contains nothing more than conclusory statements. The

affidavit must set forth particular facts and circumstances underlying the existence of probable cause to allow the magistrate to make an independent evaluation of the matter.” 367 S.C. at 50-51, 625 S.E.2d at 221 (citing Franks v. Delaware, 438 U.S. 154, 165, 98 S.Ct. 2674, 57 L.Ed. 667 (1978)). The affidavit in this case fails to meet the requirement of showing why police believed Applicant committed the crimes.

Sgt. Scott Arnold affidavits are not based on personal knowledge, but on information and belief. There is a statutory requirement that an affidavit on information and belief must set forth the source of affidavits information is to the end that the magistrate may judicially weigh not only information, but the source thereof, in determining whether or not there is probable cause for the issuance of the warrant. see. S.C. Code of Laws § 61-2-220 et seq. (1976). State v. York, 250 S.C. 30, 156 S.E.2d 326 (1967). State v. Sachs, 264 S.C. 541, 216 S.E.2d 501 (S.C. 1975); States v. Hill, 245 S.C. 76, 138 S.E.2d 829 (1964. Illinois v. Gates, 462 U.S. at 230, 103 S.Ct. 2317 (1983).

In this case, Sgt. Scott Arnold stated his source of his information and belief (or basis of knowledge) at the end of his affidavit statements in all three arrest warrants stating... “ a written Report, Photographs and statements are on file.” This may satisfy the source of information and belief requirement; however, the affidavit does not contain even a conclusory assertion that the information is reliable and that its source is credible. Illinois v. Gates, 462 U.S. at 238, 103 S.Ct. 2317 (1983). (stating the circumstances a magistrate must consider include the “ veracity ” of the persons supplying the information on which the warrant is based), without any information concerning the credibility of the informant and the reliability of his information, the inferences from the facts which lead to the complaint will be drawn not by a neutral and detached, but instead, by a police officer engaged in the often competitive enterprise of ferreting out crime...” State v. Johnson, 302 S.C. 243, 248, 395 S.E.2d 167 (1990). citation and quotation marks omitted).

Moreover, when these arrest warrants were issued by the Magistrate Judge Blake Norton on May 10, 2010. The only “ **Written Report, Photographs and Statement** on file was the alleged victim’s seven (7) page statement and a photo lineup of six black males; however, this Sworn written statement by the alleged victim or the source of Sgt. Scott Arnold information and belief: (1) the victim statement never mention Applicant name Dennis Temple, (2)

victim statement never alleged she identified Applicant as the assailant in a six man photo lineup, (3) the victim's statement never connected storage Unit # 193 to any criminal activity); (4) the victim's statement never connected Applicant to any criminal activity; (5) the alleged victim statement was the only source of Sergeant, Scott Arnold information and belief provided in the arrest warrants affidavit. That was submitted to Magistrate Judge Blake Norton on May 10, 2010. (6) there was no probable cause to arrest applicant for the offenses.

Therefore, the information that was included in Sgt. Scott Arnold's affidavit that was never mentioned in the statement by the alleged victim (or source of information) was misleading and false. In Young, the court stated that, " A facially valid search warrant will be found to violate the fourth Amendment if it contains false or misleading statements that are necessary to the finding of probable cause." see. Wilkes v. Young, 28 f.3d 1362, 1365 (4th cir. 1994), cert. denied, 513 U.S. 1151 (1995)(quoting Franks v. Delaware, 438 U.S. 154, 156 (1978).

Viewing these deficiencies, the conclusionary and false statements, the failure of magistrate Judge Blake Norton to state facts ascertaining the alleged victims Catherine McGough's credibility and reliability together and considering the totality of the circumstances. We find that Sgt. Scott Arnold did not provide the Magistrate Judge Blake Norton a substantial basis on which to find probable cause to believe applicant committed these crimes. That Sgt. Scott Arnold committed perjury and fraud upon the court and illegally arrested the complainant. Magistrate Judge Blake Norton served as a rubber stamp for the police, by neglected his duties, and assisted the police in illegal arrest, which show partiality and unfairness in this case.

MAGISTRATE JUDGE BLAKE NORTON

(9). On May 10, 2010 Magistrate Judge Blake Norton issued the three (3) arrest warrants for applicant's arrest for committing the crimes of Grand Larceny, more than \$5,000; Kidnapping and Criminal Sexual Conduct 1st degree, arrest warrants numbers: N- 136668, N-136669 & N-136670 at the All Safe Storage in Seneca, South Carolina.

(10). On May 11, 2010 Applicant was arrested by the Oconee County Sherriff's officer Lieutenant Greg Reed for allegedly committing the crimes of Grand Larceny, more than \$ 5,000; Kidnapping; and Criminal Sexual Conduct, 1st degree at the All Safe Storage in Seneca, South Carolina. Where he was detained in the Oconee County Detention Center.

FOX CAROLINA NEWS REPORT

(11). On May 11, 2010. Fox Carolina News stated the following on television quote: Greenville S.C.-- Oconee Sherriff's Office investigators have arrested a man sought in the abduction and sexual assault of a 19- year-old Clemson University student who said the man tied her up and locked her inside his storage unit.

Sherriff's officials said Dennis Maurice Temple, 37 turned himself in to authorities on Tuesday. He was in custody Tues night and scheduled for a Bond hearing on Wednesday.

Warrants had been issued for his arrest on charges of Kidnapping , first-degree criminal sexual conduct and grand larceny of a motor vehicle.

Sherriff's official were called to All- Safe Storage at 600 Shiloh Road in Seneca at about 1 a.m. Monday, they said. They forced their way into one of the storage units and found the woman. She told deputies that she had been delivering items to a unit on Sunday night when she was abducted, sexually assaulted, bound and locked up in his unit. She was able to free herself and called 911, sheriff's officials said.

The man took off in her 1998 Honda Accord, they said. Anderson County deputies found the car on wellborn Drive near Pendleton on Tuesday. Temple was being held on \$200,000 Bond.

see. Exhibit # 13.

MAGISTRATE JUDGE BLAKE NORTON

(12). On May 12, 2010 applicant was taken before Magistrate Judge Blake Norton. Judge Norton issued a \$200,000 bond against applicant to gain his freedom on the Grand Larceny, more than \$5,000; Kidnapping and Criminal Sexual Conduct, 1st degree charges.

(App. 803-804)

(13). Applicant was unable to post bail on the \$200,00 bond and remained detained in the Oconee County Detention Center. However, applicant made arraignment for a friend named, Millie Forrester to pay over \$1,000 to Robert Mills Arial Jr. to get him a Bond Reduction on the \$200,000 Bond.

JUDGE R. LAWTON MCINTOSH

(14). On May 20, 2010, a hearing was held before Judge R. Lawton McIntosh. (App. 1) Lindsey Simmons represented the State, and applicant appeared pro se. [Upon personal knowledge, the transcript contains a scrivener's error: this hearing was held May 20, 2010, not May 20, 2012]. The purpose of the hearing was to test applicant for Sexual transmitted diseases under S.C. Code Ann. § 16-3-740. Applicant indicated that he chose to represent himself based upon "[p]rior experience with attorneys from Oconee County." (App. 2, ll. 17-20) Judge McIntosh found that applicant freely, voluntarily, and knowingly waived his right to an attorney in the limited context of the hearing. (App. 3 . ll. 13-19) Pursuant to the statute, a finding of probable cause was necessary before testing could be completed. Therefore, the State offered the testimony of Sergeant, Scott Arnold, who claimed that the alleged victim, C.M., identified applicant out of a six- picture photo lineup. (App. 6 l. 6.) Judge McIntosh's finding were as follows:

First, I'm going to find that the victim did make a request for these tests under statute, there's probable cause to believe that [applicant] committed this offense, and further, there's probable cause to find that there were body fluids transmitted and that [applicant] received proper notice of this petition as well as waived his right to have an attorney represent him in this matter. I am going to grant the motion and sign the order as we speak. (App. 7 ll. 2 -10).

ATTORNEY ROBERT MILLS ARIAIL JR.

(15). In May 2010, applicant was called out of the cell at the Oconee County Detention Center to talk with attorney, Robert Mills Ariail Jr. That's when Ariail Jr. told Applicant that he had scheduled for a bond reduction hearing that month, but due to the media coverage of the case on the news. Ariail Jr. rescheduled the hearing for June 2010.

(16). On or about June 7, 2010 Applicant filed a Motion for Discovery and Inspection as well as Brady Material under Rule 6 with the Oconee County Clerk of Court regarding State v. Dennis Temple , arrest warrants # N-136668, Grand Larceny, more than \$5,000; N-136669 Kidnapping ; and N-136670, Criminal Sexual Conduct 1st degree.

(17). On June 30, 2010 applicant appeared before General Session Court in Oconee County for the Bond Reduction Hearing regarding the Grand Larceny, more than \$ 5,000; Kidnapping and Criminal Sexual Conduct, 1st degree charges before Judge Alexander Macaulay. App. 9. Solicitor, Christina Adams and Assistance Solicitor, Lindsey Simmons appeared on behalf of the State, and Robert Mills Ariail Jr. represented applicant. At that hearing, applicant was brought into the court room. Robert Mills Ariail Jr. took Applicant into a jointing room in the court and told applicant that the judge was going to take his current \$ 200,000 bond. That Applicant must to go before the judge and say he withdraw his bond reconsideration. App. 12 ll. 2 -3. However, Robert Mills Ariail Jr. reviewed the alleged victims Catherine McGough's statement that never stated she identified applicant in a photo lineup, (1) never stated Applicant's storage Unit # 193 was involved in any criminal activity; (2) never stated that Applicant (Dennis Temple) was identified as the assailant in a six man photograph lineup, (3) the victim's statement never connected Applicant to any of the criminal activity related to the offenses. (4) but applicant was arrested and detained and received a \$200,000 bond to gain his freedom for allegedly committing the crimes. Robert Mills Ariail Jr. did not inform his client(applicant) about Catherine McGoughs statement to police and mislead him. Solicitor, Christina Adam and Assistance Solicitor Lindsey S. Simmons had not disclosed the alleged victims statement to the applicant pursuant discovery yet. Judge Macaulay waived the application for the Public Defender's office and ordered Wilson Burr meet with Applicant to start his representation. That same day, applicant wrote Robert Mills Ariail Jr. a letter requesting his Bond Reduction money back for failing to get him a Bond Reduction. Later, Respondent Ariail Jr. wrote Applicant back, stating that he for filled his agreement with Millie Forrester regarding applicant's bond reduction.

ATTORNEYS, SARAH DRAWDY AND KEITH DENNY

(18). In July, 2010, Wilson Burr and Sarah Drawdy came to the Oconee County Detention Center to visit the Applicant. Wilson Burr informed applicant that he was appointing Sarah Drawdy as attorney to represent him on the charges and including another attorney since this was a high profile case. see. Exhibit # 6.

(19). Sometime, In July 2010 applicant received from the Solicitor, Christine Adams many documents regarding his discovery request, which included, but not limited to a seven page sworn written statement by the alleged victim Catherine McGough, a photo lineup of six black males and a Fox Carolina News report. see. Exhibits # 11, 12, & 13.

(20). That next week, in July 2010, applicant's attorney Sarah Drawdy came back to the Oconee County Detention Center with attorney, Keith Denny to discuss the case with him. applicant told Respondent Drawdy and Denny that this case is receiving a lot of media attention in the newspapers and on television. As a result, applicant would like for them to file a Motion for a Change in Venue with the court in the case. Applicant made it clear to Respondent Drawdy and Denny, " that if any motion is filed on his behalf and regarding the state case against him. Then they must inform him first and provide him with a copy of the motion as well. Respondent Drawdy informed the applicant that his case was schedule for a Preliminary Hearing on July 16, 2010. Applicant told Respondent Drawdy and Denny that on May 10, 2010. That the alleged victim Catherine McGough wrote a seven (7) page Sworn written statement to police at the Oconee Medical Center, detailing the incident that happen to her and that she did not alleged he was involved in the crimes against her. Applicant showed his attorneys Sarah Drawdy and Keith Denny the alleged victims statement and told them that the victims statement did not ever mention his name and; did not state she identified him in a photo lineup and did not even involve him or his storage unit in any criminal activity. Respondents Drawdy and Denny did not say nothing. see. Exhibit # 7.

MAGISTRATE COURT JUDGE WILLIAM DERRICK

(21). On July 16, 2010 a Preliminary hearing was held at the Magistrate Court House in Oconee before Magistrate Judge, William Derrick regarding the arrest warrants that was issued by Magistrate Judge Blake Norton. Solicitor, Christine Adams, and Assistance Solicitor, Lindsey S. Simmons represented the State. Attorney, Sarah Drawdy and Keith Denny appeared on Complainant behalf. The Applicant was present as well. The Respondents Adam and Lindsey called Sergeant Scott Arnold to the stand, which he testified that the alleged victim identified Applicant in a six- man photo lineup on May 10, 2010. Moreover, Applicant attorney, Sarah Drawdy and Keith Denny did not raise a fourth Amendment claim regarding

the Criminal Sexual Conduct, 1st degree, Kidnapping and Grand Larceny charges that were lodged against their clients, nor did they put up any argument regarding a lack of probable cause for the arrest warrants and seize of his DNA pursuant to a search warrant. see. Exhibit # 8.

JUDGE J. CORDELL MADDOX JR.

(22). On July 29, 2010 another hearing was held before the Judge J. Cordell Maddox, Jr. Roc. 19. Lindsey Simmons appeared on the behalf of the State, and Sarah Drawdy represented Applicant. Applicant had moved to relieve his counsel, Sarah Drawdy and Keith Denny because 1) he previously asked them a question and they told complainant a lie and; 2) they failed to raise a fourth Amendment claim based on a lack of probable cause to arrest him on the arrest warrants in the preliminary hearing :

The State also had a Motion that Applicant obtain counsel within thirty days of the date of the hearing. According to the State, Wilson " sent the case out of his office to Ms. Drawdy and Mr. Denny." App. 22 ll. 3 – 8. applicant indicated that he had not authorized the court to appoint an attorney. App. 22 ll. 11 -13. Judge Maddox advised applicant against proceeding pro se. App. 23 ll. 18 – 23. Judge Maddox granted both parties' motions. App. 24 l. 21 – App. 25 l. 21.

INDICTMENTS

(23). On September 7, 2010 Applicant was indicted by the Grand Jury on, Count One- Criminal Sexual Conduct 1st degree, Count Two – Criminal Sexual Conduct 1st degree, Kidnapping and Grand Larceny charges. App. 894 – 901.

(24). On September 14, 2010, another hearing was held before the Judge J. Cordell Maddox, Jr. App. 30. Lindsey Simmons appeared on behalf of the State, and Dennis Temple appeared pro se. At the start of the hearing, the following occurred:

The Court : All right. Yes, ma'am?

Ms. Simmons : Thank you, Your Honor. We are here today in state of South Carolina vs. Dennis Temple. It's an Oconee County case. He has four indictments on 2010- GS-37-00886 through 889. Its two counts of criminal Sexual Conduct

in the first degree, kidnapping and Grand Larceny.

On May the 14th of 2010 we filed a motion pursuant to 16-3-740 and served notice on Mr. Temple. That is under the S -T-D testing statute. Judge McIntosh subsequently granted that order and ordered testing on May the 20th of 2010. Mr. Temple has appealed that order and asked that Judge McIntosh reconsider that.

Subsequently to that, Mr. Temple was appointed counsel and had a Preliminary hearing. He was represented by Ms. Drawdy in that matter, and that was on July 16th of 2010.

We filed a Schmerber motion out of an abundance of caution on July 19th, 2010 and served that on his attorneys at the time. The Defendant appeared before Your Honor on July 29, of 2010 for the scheduled Schmerber hearing and to address the issue of representation.

At this time Your Honor relieved Ms. Drawdy and Mr. Denny as his Counsel and gave the defendant 30 days to appear your Honor with an attorney. And the Schmerber issue is still out- standing. App. 32 I. 1 -25 – App. 33 I. 1-3.

In addition, the State claimed that it received a fax from Applicant requesting a speedy trial and indicating that he was going to proceed pro se. (App. 33 II. 6 -11). Judge Maddox told Applicant that he had a right to represent himself. (App. 33 I. 20 – App. 34 I. 7).

At this hearing, applicant contested the validity of the indictments under the South Carolina Rules of Criminal Procedure. (App. 35 -37). Regarding applicant's representation status, Judge Maddox stated:

Well, see, the option I got is I can let you go forward and sit at the table an represent yourself or I can appoint what's basically in my mind a shadow counsel. In other words, I'll appoint a lawyer to sit there with you. He doesn't represent you. If you are dead set on going and representing yourself then I'm going to appoint somebody to sit with you so that you can answer questions - - you can ask questions ,they can answer questions. That's only - - that's what I'm comfortable with. App. 39 II. 10 -19.

Applicant agreed that it would be unwise to represent himself but claimed that past hardship with attorneys who did not act as zealous advocates on his behalf prevented him from proceeding with their representation. App. 39 I. 4 – App. 41 I. 5. Judge Maddox

appointed Applicant another attorney:

Well, let me just tell you generic, generic. I'm not talking about your case. If I appointed you Johnny Cochran and he was still alive and he sat down with you and told you that, take this road, and you were going to [take] the other road, that's something you got to work out with your attorney. So every time you got to work out with your attorney. So every time you have a dispute with an attorney you can't come back and ask for another one.

In fact, what I'm going to do is I'm going to appoint you a lawyer. There's a list of lawyers who have agreed to be appointed. They are outside the public defender's office. I don't know who is next on that list but I'm going to appoint them with the caveat that this case is going to be tried December 13th.

Judge Maddox appointed Kurt Tavernier to represent applicant. App. 46 ll. 14 –15.

(25). On September 22, 2010, a Schmerber hearing was held before the Honorable Alexander S. Macaulay.² Chrissy Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier represented Applicant. (App. 49) Counsel for Applicant stated that blood, buccal swabs, and hair samples were requested. App. 54 ll. 13 -20. Counsel indicated that Applicant refused to consent and would not consent to the issuance of the Schmerber order. App. 54 l. 22- App. 55 ll. 9 – 12. However, counsel for Applicant also sought to suppress any and all DNA which was taken in accordance with a May 13, 2010 search warrant. App. 55 ll. 14 – 22. Based on the premise that those were taken illegally, counsel requested that all of those samples be suppressed and that the search warrant be quashed. App. 56 ll. 2 – 18; App. 57 ll. 9 -14. The State claimed that those samples were never taken to SLED and would not be used. App. 56 ll. 23 – 24.

Judge Macaulay granted applicant's Motion, quashed the search warrant, and suppressed anything obtained. App. 58 ll. 4 -15; App. 59 ll. 2 -6. Counsel renewed applicant's motion that the indictments be quashed, based upon Rule 3(c), SCRCrimP. App. 62 l. 12 – App. 66 l. 24. Judge Macaulay denied the motion. App. 66 ll. 11-24. applicant's attorney, Kurt Tavernier failed to raise a fourth Amendment claim on a lack of probable cause on the arrest warrants, which (probable cause) was a requirement for the issuance and seizer of applicant's DNA pursuant to a Schmerber order.

(26). Another Hearing was held on October 21, 2010 before the Judge J. Cordell Maddox, Jr. with Christine Adams appearing on behalf of the State and Tavernier representing applicant, to "deal with [applicant's] representations concerns and issues." App. 75; App. 77 ll. 10 – 16. Applicant indicated that when Mr. Tavernier was appointed by the court, the court did not "have [Applicant's] best interest[s] at stake." App. 78 ll. 1 – 20. Applicant alleged that Mr. Tavernier threatened his family if he did not plead guilty and also refused to file a motion on his behalf. App. 78 ll. 5 -13. The following conversation took place between Judge Maddox and Applicant:

The Court : Well, what job have you done that was your best? Where did you work that you thought you were most able to do well?

Applicant : I have done welding. I have done plumbing. I've done structures.

The Court : Okay. Let me tell you a problem I've got. I don't know anything about welding . And if you were out working welding and I came out and showed you - - and had no idea how to weld and started telling you how to weld, you'd think I was an idiot. And I would be an idiot. What I'm telling you is that, you know, this would be-

Applicant: Are you saying, Your Honor, that I don't have experience in the law? I have fifteen years' experience in the law.

App. 79 l. 15 – App. 80 l. 4.

Counsel indicated that Applicant filed a grievance which claimed that he threatened to kill him and his family. App. 81 ll. 13 -24. When asked whether he wanted to represent himself or hire an attorney, Applicant stated:

Well, Your Honor, according to the Constitution, the United States Constitution, I am entitled to a defense attorney. Just because the Court, appoint[ed] me an attorney and he has skills in the law, that doesn't mean he's using those skills to defend me. So I still to this day have not been able to defend myself because you refuse to give me a lawyer to defend me, myself. Refuse. I have had no lawyer to defend me yet to this day.

I want Mr. Tavernier off my case because he has no interest, no best interest- - there's no best - - he don't have my best interest at stake. I am furious with his defense. I cannot work with somebody who's not - - have the best interest of my defense.

App. 84 ll. 6 – 14; App. 85 ll. 15 -20.

Judge Maddox order Mr. Tavernier to stay on the case as standby counsel, applicant's objections notwithstanding. App. 90 II. 8 -21; App. 96 II. 1 – 9. Judge Maddox told applicant "the biggest mistake you can make is to show up on December 13th representing yourself."

App. 103 II. 1 -2.

(27). On December 7, 2010, a pretrial hearing was held before Judge J. Cordell Maddox, Jr. (App. 107). Christina Adams and Lindsey Simmons appeared on behalf of the State, and Kurt Tavernier appeared as standby counsel for applicant. At this hearing, State moved for an order to prohibit complainant from offering any evidence of the victims prior sexual conduct and third- party guilt. App. 110- App. 122, I. 9. In addition, complainant moved to suppress the photographic lineup, search warrant , arrest warrants, D.N.A testing conducted pursuant to Schmerber order for lack of probable cause Motion to Dismiss the indictments, Motion to Compel Discovery and request an injunction and declaration judgment against the jail. (App. 122. I.12- App. 181. I. 1. App. 136 I. 7 – App. 137 I. 7.

The State offered the testimony of Lieutenant Greg Reed, and applicant questioned him on cross examination. (App 138 – App. 148). Catherine McGough also testified and was questioned by applicant. (App. 148 – 156). At the conclusion of the hearing, Judge Maddox discussed with applicant his right to counsel:

The second to last thing before I talk about what we're going to do on Monday, Mr. Temple, I've gone over exhaustively your right to counsel. I know you and I don't agree on some of these issues. And that's fine. Unfortunately, the law does basically say that we may not agree, but what I say is final. Mr. Tavernier, who has sat here very quietly all day, deserves to know for his preparation if you have changed your mind about whether or not he's going to represent you or whether you intend on Monday of next week to represent yourself. For my sake, I just need you to tell me, have you changed your mind? You still want to represent yourself?

(App. 182 I. 20 – App. 183 I.7).

Applicant spoke with Mr. Tavernier, and the latter spoke to the court regarding his representation. (App. 186 I. 9 – App. 192 I. 5). Judge Maddox ruled that Applicant was to proceed pro se with Mr. Tavernier to serve as advisory counsel. (App. 192 I. 11 – 17.

(28). On December 13, 2010 J. Cordell Maddox Jr. coerced Applicant to proceed pro se in a Jury trial. App. 191. Chrissy Adams and Lindsey Simmons represented the State, and with Kurt Tavernier serving as standby counsel. App. 191. At trial, Catherine McGough testified that around 4:30 p.m. on the afternoon on May 9, 2010, she was putting her dormitory items in her storage unit at All Safe Storage located in Seneca, South Carolina, and then began walking to her car when she encountered a black male (whom she identified as appellant at trial and after viewing a photograph layout after the incident) who wanted her to purchase shoes he was selling at that time. App. 84, 1. 5-p. 124, 1. 7. The State presented over fourteen witnesses in its case against Applicant. Then the State rested its case against Applicant. App. 200- Roc. 600. Applicant requested to present two witnesses in his defense. Judge Maddox, denied complainant to present his witness and sent the case out to the Jury for deliberation. A juror pool of 11 white and 1 black found Applicant guilty on all counts. Judge Maddox, sentenced Applicant to consecutive 30 years, 30 years, 30 years, and 10 years - totaling 100 years in prison.

(29). On December 15, 2010 Applicant called upon the court to present two witnesses in his defense Catherine McGough and Nurse Chapman. After the state rested its case. Judge Maddox denied Applicant to call his witnesses in his defense and sent the Jury in for deliberation on the case. The Jury found Applicant guilty as indicted. (App. 646 ll. 17 – 25). Judge Maddox sentenced Applicant to thirty years' imprisonment on Count One – Criminal Sexual Conduct 1st degree; thirty years' imprisonment on Count Two – Criminal Sexual Conduct 1st degree; thirty years' imprisonment on the Kidnapping charge, and ten years' imprisonment on the grand Larceny, more than \$ 5,000 charges, with the sentences to run consecutive in violation of South Carolina offense Code §§§ 16-13-30; 16-3-652 and 16-3-910. App. 655 l. 23 – App. 656 l. 5.

THE DIRECT APPEAL

(30). In December of 2010, Applicant timely filed a Notice of Appeal of his conviction and sentences with all parties including the South Carolina Court of Appeals. On September 28, 2012 Wanda Carter, Deputy Chief of Appellate Defense of the South Carolina Commission on Indigent Defense filed an Anders Brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967) of behalf Applicant. (App. 658- App 669). In the Anders brief, Applicant

raised the following issue to the South Carolina Court of Appeals:

The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial; ultimately, he rescinded the waiver after the jury was selected and re-asserted his right to counsel by requesting representation of appointed counsel for his trial. (Anders brief, p.3)

By way of unpublished opinion dated September 11, 2013, the Court of Appeals dismissed Applicant's appeal. App. 704 – App. 705. Unpublished Opinion and granted appellate counsel's request to withdraw. State v. Dennis Temple Unpublished No. 2013-UP-350 (Ct. App. filed September 11, 2013). (App. 658). The Opinion reads as follows:

PER CURIAM: Dismissed after consideration of Appellant's pro se brief and review pursuant to Anders v. California, 386 U.S. 738 (1967). Counsel's motion to be relieved is granted. [We decide this case without oral argument pursuant to Rule 215, 5CACR.]

APPEAL DISMISSED.

SHORT, WILLIAMS, and THOMAS, JJ., concur.

(31). On November 1, 2012 the Applicant filed a Pro Se Response to the Anders brief and where he raised the two (2) following issues:

1. "Did the judge err when he failed to suppress the evidence obtained from the obtained from the arrest warrants that was issued upon a supporting affidavit that did not link Appellant to the criminal activity or storage Unit # 193 to Appellant." (Pro Se Response pp. 1-12).
2. "Did the State commit perjury upon the court when it contended that this case was fast-tracked due to appellant's speedy trial motion." (Pro Se Response pp. 13-16).

(App. 671 – App. 690).

The remittitur was issued on September 27, 2013. (App. 706).

FIRST POST- CONVICTION RELIEF ACTION

(32). On October 15, 2013 Applicant then filed his First Application for Post-Conviction Relief (PCR) in the Oconee County Courthouse (*Dennis Temple v. State* , Civil Action # 2013-CP-37-729). App. 707. Applicant PCR application contained allegations of various Constitutional defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714 – App. 735. Applicant filed a Motion to Amend Application for Post-Conviction Relief on October 31, 2013. App. 738 – App. 739. Applicant also filed a “Motion to Amend and Supplement ” on January 14, 2014. App. 743- App. 746. He also filed a Memorandum in Support of Summary Judgment on March 5, 2014. App. 748 -761. Applicant filed an affidavit on February 27, 2014, presumably in support of his application for Post- Conviction Relief. App. 762 – App. 765. On March 5, 2014, Applicant filed an Motion for Summary Judgment. App. 783 – App. 784. On March 19, 2014, Affidavit, also presumably in support of his motions and application. App. 785 – App. 788. He also filed a Notice of Motion and Motion for Default Judgment on May 12, 2014. App. 805 – App. 806. He filed a Memorandum in Support of Default Judgment at the same time. App. 807 – App. – 818. He likewise filed an Affidavit on May 12, 2014. App. 819- App. 823.

MOTION TO AMEND APPLICATION POST- CONVICTION RELIEF

(33). On October 31, 2013 Applicant filed a Motion to Amend Application for Post-Conviction Relief as follows:

STATEMENT OF THE CASE

Upon the filing of my [sic] application for Post- Conviction Relief against the state of South Carolina at which time. I was ignorant of the true facts as correctly stated below, I now do state for the purpose of amending my application that:

- C. (1). Applicant was coerced [sic] to represent himself during trial, and (2) ineffective assistance of appellate counsel. See. (Exhibit 18 & 19).

was incorrect, and should be stated as below:

- C. (1). Ineffective Assistance of Counsels and (2) coerced to represent himself [sic] during

trial and (3) ineffective assistance of appellate counsel. See. (Exhibit 18 & 19).

(34). Also, On October 31, 2013 Hugh Welborn, Esquire was Appointed as Applicant's counsel in his First Post-Conviction Relief action by the Attorney General Office. The Oconee County Courthouse, Clerk of Court filed the order. (App. 742).

(35). On July 8, 2014 State filed its responsive pleading. An evidentiary hearing into was convened on July 28, 2014, at the Oconee County Courthouse before the Honorable Edger W. Dickson, Circuit Court Judge(" the PCR Court"). Applicant was Represent at the hearing by Hugh Welborn, Esquire. The State was represented by Walt Whitmire, Esquire, of the South Carolina Attorney General's Office. Applicant raised the following issues:

1. " In violation of S.C. Code Ann. Section 22-3-710, and 4th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 10 &3; abuse of discretion, or error of law and breach of duty."
 - a. " Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest warrants that was issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to Criminal activity, (2) There was no facts connecting applicant to the storage unit # 193, (3) There was no facts connecting storage unit# 193 to any criminal activity, (4) There was no facts under by the alleged victim stating the applicant was identified as the accused, (5) There was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7) There was no probable cause to arrest." **APCR P. 11**; further more redundantly repeated in allegations (b), (f), (g), (h), & (m) on **APCR p.12; pp. 14-15; p.17.**
2. "In violation of the 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3; abuse of discretion, or error of law and breach of duty."
 - a. "Judge in suppression hearing on arrest warrants failed to correct the record and failed to make specific findings of facts [sic] to mixed questions of law before its ruling in the suppression hearing on the arrest warrants."

3. " In violation of the 6th and 15th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 14 & 3; abuse of discretion, or error of law and breach of duty."
 - a. "(1) Applicant was coerced to represent himself during trial, and (2) ineffective assistance of appellate counsel." **APCR p. 12**
4. " In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 11 & 3; abuse of discretion, or error of law; and breach of duty."
 - a. " indictments were not issued within 90 days." **APCR p. 12.**
5. " In violation of the 14th Amendments of the U.S. Constitution and S.C. Constitution, Article, Section 3.'
 - a. " (1) The six man photo lineup of the applicant and five other black was assemble and shaded in a unduly and suggestive way, that gave way to irreparable misidentification and (2) the trial court judge failed to make specific findings of facts to mixed question of law before its ruling in suppression hearing on the photo lineup. **APCR PP. 13-14.**
6. " In violation of the S.C. Code Ann. Section 16-3-740, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
 - a. " Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was [sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statue to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial."
7. " In violation of the S.C. Code Ann. Section 17-13-140, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10."
 - a. " Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was [sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statue to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during

trial.”

8. “ In violation of Schmerber v. California, 384 U.S. 757 (1966) and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution Article 1, Section 3, 12, 14, & 10 .”
 - a. “ Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was [sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
9. “ In violation of the 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3.”
 - a. “ The State failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the State further failed to disclose other materials [sic] in its possession or control to the applicant which would have contradicted the state’s claims or cleared the defendant of blame. **APCR pp. 15-16.**
10. “ In violation of the 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law.”
 - a. “once the state presented its case against the applicant during trial, the applicant was denied by judge to present witnesses for his defense.” **APCR P. 16.**
11. “In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 3 & 14”
 - a. “Once the initial juror[sic] started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrences [sic].”
12. “In violation of the 5th, 6th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 3 & 14” abuse of discretion, or error of law.”
 - a. “Threw out the trial the solicitors consistently [sic] claimed that the applicant

used cleaning solution to clean out the alleged victim after he raped her. These allegation [sic] was [sic] unfounded by the evidence and cause inflammation, confusion and prejudice among the jurors."

13. "In violation of the 4th, 5th, 6th, 14th Amendments of the U.S. Constitution; S.C. Constitution, and S.C. Code Ann. §22-3-710 (1976) and S.C. Constitutions, Article 1, Section 3, 10 & 14; abuse of discretion, or error of law and breach of duty."
 - a. "Arrest warrants affidavit briefly stated facts unfounded and not true at the time of the arrest of applicant and not sworn too [sic]."
14. " In violation of the 4th, 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution and S.C. Constitutions, Article 1, Section 3, 14; abuse of discretion, or error of law."
 - a. " Trial judge and solicitor leading the state witness on what to testify to or say on cross examination." **APCR p. 17.**

POST- CONVICTION RELIEF HEARING

(36). As stated above an evidentiary was conducted on July 28, 2014 regarding the First Post-Conviction Relief Application before the Honorable Edgar Dickson. App. 835. Hugh Welborn represented the State. Applicant testified during the hearing to pertinent parts as follows:

Mr. Welborn :

Q. Thank you. We talked about the search. We talked about those allegations. We talked about the jurors that you wanted to come. Tell the court what else that you wanted to complain about that you feel was ineffective assistance of counsel where you should get a new trial.

Mr. Temple :

A. Based on the fact that there was no probable cause to arrest me -- I was arrested on these arrest warrants. detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence. What the law applies to the situation, they was ineffective.

App. 858 l-17.

FIRST FEDERAL HABEAS CORPUS

(37). On August 26, 2014, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. Temple v. McFadden, 8:14-3499-JFA-JDA. The Honorable Jacquelyn D. Austin, United States Magistrate Judge, subsequently issued a report a recommendation that Applicant's petition be dismissed without prejudice for failure to exhaust states remedies on September 9, 2014. Applicant did not file timely objections to the R&R. On September 30, 2014, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order dismissing the petition without prejudice in accordance with the R&R and denying a certificate of appealability. Temple v. McFadden, No. 8:14-3499-JFA (D.S.C. Sept.30, 2014). Applicant did not appeal.

ORDER OF DISMISSAL OF PCR

(38). On October 24, 2016, the PCR Court, Judge Edgar W. Dickson issued an Order of Dismissal Denying and dismissing Applicant's PCR application with prejudice. App. 707 – 884. The Order was filed with the Oconee County Clerk of Court's Office on October 31, 2016 stating as follows in pertinent parts:

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This court has reviewed the testimony and evidence presented at the evidentiary hearing, observed the witness presented at the hearing, passed upon their credibility, and weighed the testimony accordingly. Further, this Court reviewed the Clerk of Court records regarding the prior PCR proceedings, the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, and the legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2016), this Court makes the following findings of fact and conclusions of law based upon all of the probative evidence presented.

Ineffective Assistance of Appellate Counsel

Applicant alleged that his appellate counsel was ineffective for failing to submit the preliminary hearing transcript as part of the record on appeal; failing to argue that there was no probable cause to issue an arrest warrant; and failing to argue he did not freely and

voluntarily waive the right to counsel. The State moved for summary dismissal on this allegation. This Court finds summary judgment is appropriate and grants the State's motion.

App. 888.

Under Rule 56, SCRPC, a party is entitled to a Judgment as a matter of law if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. Law v. South Carolina Dept. of Corrections, 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006). In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences which can be reasonably drawn from the evidence must be viewed in light most favorable to the nonmoving party. Fleming v. Rose, 350 S.C. 488, 493-94, 567 S.C.2d 857, 860 (2002).

This Court first notes that in spite of Applicant's belief concerning the strength of the omitted arguments, his appeal was submitted pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396 (1967). Where appellate counsel submits an Anders brief, the role of the appellate court is to review the brief submitted by counsel, any pro se response submitted by the appellant, and the record on appeal to determine whether the appeal contains any issues of arguable merit. Stote v. Lyles, 381 S.C. 442, 444, 673 S.E.2d 811, 813 (2009) (citing Stote v. Williams, 305 S.C.116, 406 S.E.2d 357 (1991)). If an issue is found which has arguable merit, the appellate court will direct the parties to file merit briefs, and the case will proceed under the normal appellate process. Id. On the other hand, if no issues of arguable merit are found by the appellate court, the appeal is dismissed, and the appellant's counsel is relieved. Id. Applicant's appeal was dismissed after review pursuant to Anders, reflecting that "the appellate court was unable to ascertain a non-frivolous issue which would require counsel to file a merits brief." Id.

In this case, Applicant alleged his appellate counsel was ineffective for failing to argue that his arrest warrant was not supported by probable cause. This issue was raised in Applicant's pro se brief on direct appeal, and therefore considered and determined to be without merit by the appellate court pursuant to Anders. Applicant's allegation that appellate counsel was ineffective for failing to include the transcript from his preliminary hearing in the record is an extension of this argument. Applicant has failed to raise or argue any conceivable prejudice from the fact that this transcript was omitted, particularly in light of the lower court record.

Applicant has also alleged that his appellate counsel was ineffective for failing to argue that he was forced to represent himself. There is no factual basis for this claim-the issue was raised by appellate counsel in its Anders brief. Had the issue been meritorious, then the appellate court would have ordered a brief on the merits. As discussed above, the record is replete with discussions concerning the dangers of self-representation. This Court is of firm opinion that the Applicant waived his right to counsel with his eyes wide open and in compliance with Faretta. Because Applicant has failed to raise any meritorious arguments that his appellate counsel omitted, this allegation is summarily denied and dismissed.

Res Judicata

Applicant has also raised the following allegations:

1. "Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest warrant that was issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting applicant to criminal activity, (2). There was no facts connecting applicant to storage unit # 193, (3). There was no facts connecting storage unit # 193 to any criminal activity, (4) There was no facts under by the alleged victim stating the applicant was identified as the accused, (5). There was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too. (7). There was no probable cause to arrest." **APCR p.11; further more redundantly repeated in allegations (b), (f), (g), (h), & (m) on APCR p. 12; pp.14-15; p.17.**
2. "Applicant was coerced to represent himself during trial." **APCR p.12**

App. 890.

Direct Appeal Issues

The remainder of Applicant's allegations are direct appeal issues that are procedurally barred direct by S.C. Code Ann. § 17-27-20(b) (2003).

1. "indictments were not issued within 90 days." **APCR p.12.**
2. "The six man photo lineup of the applicant and five other black was assemble and shaded in a unduly and suggestive way, that gave way to irreparable misidentification and (2) the trial court judge failed to make specific findings of facts to mixed question of law before its ruling in suppression hearing on the photo lineup. **APCR pp. 13-14.**
3. "Once the state presented its case against applicant during trail, the applicant was denied by judge to present witnesses for his defense." **Application for Post-Conviction Relief ' APCR' p.16.**
4. "The State failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the state further failed to disclose other materials in it's possession or control to the applicant which would have contradicted the state's claims or cleared the defendant of blame. **APCR p.16.**
5. "one of the initial juror's started making comments about the case before the case was submitted to the jury for deliberation and was replaced by

one of the two alternates. The record is void of these transactions and occurrences." **APCR p.16.**

6. "Trial Judge and Solicitor leading the state witnesses on what to testify to or say on cross examination." **APCR p.17.**

App. 891.

Post- Conviction relief is not a substitute for an appeal." **Simmons v. State**, 264 S.C. 417, 423, 215 S.E.2d 883, 885 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on appeal. **Dravion v. Evatt**, 312 S.C. 4, 8, 430 S.E.2d 517, 520 (1993). Summary dismissal is therefore appropriate.

Applicant's Motion for Summary Judgment

The Applicant also moved for summary judgment on the ground that the Attorney General's Office did not file its Return in a timely manner, and failed to respond to his summary judgment motion. This motion is denied. Applicant has to show or allege any prejudice from Respondent's delay. See. **Kneece v. State**, 269 S.C. 177, 178, 236 S.E.2d 746 747 (1977).

All Other Allegation

As to any and all allegation that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to Present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

App. 945 – 956.

THE APPEAL FROM THE DENIAL OF PCR

(39). In 2016, applicant' attorney, Hugh Welborn, Esquire timely filed a Notice of Appeal of the order of dismissal of PCR action on applicant's behalf. In 2017, Taylor Gilliam, Esquire of the South Carolina Commission on Indigent Defense was appointed to represent applicant on appeal of denial of PCR action. Applicant appealed from the denial of PCR by way of a **Johnson** Petition for Writ of Certiorari. On August 2, 2017 applicant's filed

the Johnson Petition for Writ of Certiorari, Petition raised the following issues to the South Carolina Supreme Court:

Did the PCR Court err in granting Summary Judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing where the transcript from that hearing was not included in the Record on Appeal?

(Johnson Petition for Writ of Certiorari, p. 1). Collateral appellate counsel certified to the Supreme Court the appeal was without merit and asked to withdraw from the case.

On May 23, 2018 Applicant filed a Pro Se Response, to the Johnson Petition.

In the Pro se Response, Applicant raised the following issues(s) to the South Carolina Supreme Court:

Did the General session Court have jurisdiction to hear appellant's criminal case? When the Magistrate Court never established, it had probable cause to detain appellant on the arrest warrants.

(Pro se Response, p.2). The appeal was transferred to the South Carolina Court of Appeals by the South Carolina Supreme Court. On October 16, 2018, allegedly after careful consideration of the entire record as required by Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), the South Carolina Court of Appeals denied certiorari and granted counsel's request to be relieved. The Remittitur was issued on November 9, 2018 and filed on November 13, 2018.

SECOND FEDERAL HABEAS CORPUS

(40). On November 29, 2018, Applicant filed a Federal Habeas Corpus in the United States District Court Dennis Maurice Temple v. Warden Scott Lewis , Civil Action No: 8:18-cv-3258-JFA-JDA. The Attorney General Office, Alan Wilson was represented by J. Anthony Mabry. Applicant stated the following issues:

Ground one: The trial judge erred by what was in effect coercing appellant to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he

rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointment counsel for his trial.

Ground two: The PCR Court erred in granting summary judgment to the State on the issue of ineffective assistance of appellant counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the record on Appeal.

Ground Three: Did the General Session Court have jurisdiction to hear appellant's criminal case when the Magistrate never established it had probable cause to detain appellant on the arrest warrants. (See p.31).

On April 1, 2019 the Attorney General Office, J. Anthony J. Mabry filed a Motion for Summary Judgment and a Return and Memorandum of law in Support of Motion for Summary Judgment. On June 20, 2019 Magistrate Judge Jacquelyn D. Austin filed a Report and Recommendation, recommending to grant J. Anthony Mabry's Motion For Summary Judgment and dismissing Applicant's Federal Habeas Corpus petition.

On October 31, 2019 United States District Judge, Joseph F. Anderson issued an order adopting Magistrate Judge Report and Recommendation granting the Summary Judgment Motion and dismissing Applicant's Habeas Corpus with prejudice.

SECOND POST- CONVICTION RELIEF ACTION

(41). On September 18, 2020 Applicant filed his **Second Post-Conviction Relief Application** in the Oconee County Courthouse. see. **Dennis Maurice Temple v. State**, Civil Action No: 2020-CP-37-695. He raised three (3) issues as follows:

1. Ineffective Assistance of counsels [sic]
 - a. Applicant's counsel Sarah Drawdy and Keith Denny [sic] were ineffective assistance of Counsels for failing to object to the state's reasons establishing probable cause and failing to raise a fourth Amendment claim in the July 16, 2010 preliminary hearing.
 - b. Applicant filed an application [sic] for Post-Conviction Relief on October 15, 2013. App. 707. His application contained allegations of various constitution defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714- App.735.

Applicant filed a motion to Amend Application for Post-Conviction Relief on October 31, 2013. App. 738- App.739. Applicant also filed a " Motion to Amend and Supplement " on January 14, 2014. App. 743- App. 746. He also filed a memorandum in support of Summary Judgment on March 5, 2014. App. 748 -761. Applicant filed an affidavit on February 27, 2014. presumably in support of his application for post- conviction relief. App. 762- App. 765. On March 5, 2014, Applicant filed an affidavit, also presumably in support of his motion and application. App. 785- App. 788. He also filed a notice of motion and motion for Default Judgment on May 12, 2014. App. 805-App. 806. He likewise filed an affidavit an May 12, 2014. App. 819-823.

On May 21, 2014, Hugh Welborn, attorney for Applicant, filed a Notice of Motion [sic] and Motion to be Relieved as counsel. App. 824- App. 825. The state filed a Return and Partial Motion to Dismiss and a motion for a more Definite statement on or about July 7, 2014. App. 826- App. 833.

An evidentiary hearing [sic] was conducted on July 28, 2014 before then Judge, Edgar Dickson. App. 835. Hugh Welborn represented applicant , and John W. Whitmire represented the state. Applicant testified during the hearing to pertinent parts as follows:

Mr. Welborn:

Q. Thank you. We talked about the search. We talked [sic] about those allegations. We talked about the Jurors that you wanted to come. Tell the court what else that you wanted to complain about that you feel was ineffective assistance of counsel where you should get a new trial.

Mr. Temple:

A. Based on the fact that there [sic] was no probable cause to arrest me – I was arrested on these arrest warrants. detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the state presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

App. 858. l. 17.

In a written order filed on October 31, 2016. Judge Dickson [sic] dismissed Applicant's PCR application granted Summary Judge on the issues of ineffective appellate counsel, and found that some of Applicant's other allegations were barred by res Judicata. App. 684- App. 893. Judge Dickson did not make any findings of facts and conclusion of law regarding his ineffective assistance of counsel claim, but further ruled that some of Applicant's other allegations were direct appeal issues and summarily dismissed them. App. 891.

These failure were in violation of the applicant's 4th, 5th, 6th, & 14th Amendments of the

United States Constitution.

In addition, Applicant's PCR Counsel was ineffective [sic] for failing to subpoena counsels to the PCR hearing and for failing to file a 59(e) motion. When the court issued a order of dismissal in the case, which did not include specific findings of facts and conclusion of law on Applicant's ineffective assistance of counsel claim against Sarah Drawdy and Keith Denny.

2. In violation of Schmerber v. California, 384 U.S. 757 (1966) and 4th, 5th, 6th, 14th Amendments of the U.S. Constitution [sic] and S.C. Constitution, Article 1, section 3, 12, 14, & 10.

App. 716.

- (a). Applicant was never accused in the affidavit or sworn [sic] statement of the alleged victim of committing a crime and was never identified as the accused. As a result, the state did not have all of the elements required in the statute or case law to get authorization of the court order to get the search warrant that was used against the applicant during trial.

App. 721.

Applicant filed [sic] an application for Post-Conviction Relief on October 15, 2013. App. 707. His application contained allegations of various constitution defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714- App.735... et al.

On May 21, 2014, Hugh Welborn, attorney for Applicant, [sic] filed a Notice of Motion and Motion to be Relieved as counsel. App. 824- App. 825. The state filed a Return and Partial Motion to Dismiss and a motion for a more Definite statement on or about July 7, 2014. App. 826 - App. 833.

An evidentiary hearing [sic] was conducted on July 28, 2014 before then Judge, Edgar Dickson. App. 835. Hugh Welborn represented applicant, and John W. Whitmire represented the state. Applicant testified during the hearing to pertinent parts as follows:

In a written order filed on October 31, 2016. Judge Dickson dismissed Applicant's a PCR Application, and summary Judgment on [sic] the issues of ineffective appellate counsel and found that some of applicant's other allegations were barred by res judicata. App. 684- App. 893. Judge Dickson did not make any specific findings of facts and conclusion of law regarding his Schmerber v. California, hearing claim, but further ruled that some of Applicant's other allegations were direct appeal issues and summarily dismissed them. App. 891.

Applicant's Schmerber v. California, claim should have been grounded as a ineffective assistance of Counsel claim against Kurt Tavernier for failing to object to the state's allegation regarding applicant's identification and probable cause to arrest, and failing to raise a fourth Amendment claim in the September 22, 2010 Schmerber hearing.

These failure violated Applicant's 4th, 5th, 6th, & 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, section 3, 10, 12, & 14.

In addition, applicant's PCR Counsel was ineffective for failing to Amend the PCR Application as a ineffective assistance of counsel claim against Kurt Tavernier regarding the Schmerber hearing issues, and for failing to file a 59(e) motion. When the court issued a order of dismissal in the case, which did not include specific findings of facts and conclusion of law a on Applicant's Schmerber hearing claim.

3. Applicant moves the court for [sic] a new trial because the state notified Applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.
- c. Applicant proceeded to a jury trial on December 13, 2010 before Judge J. Cordell Maddox. App. 191. Chrissy Adams and Lindsey Simmons represented the state, and applicant represented himself with Kurt Tavernier serving as standby counsel. App. 191.

The jury found Applicant guilty as indicted. App. 646 II.17-25. Judge Maddox sentenced Applicant to thirty years imprisonment on Two Counts of Criminal Sexual Conduct, first degree charges, thirty years imprisonment on the Kidnapping charge, and ten years imprisonment on the Grand Larceny charges, with the sentences to run consecutive. App. 655 I. 23- App. 656 I. 5.

Wanda Carter, Deputy Chief Appellate Defense (Counsel) filed an Anders brief on behalf of Applicant with the South Carolina Court of Appeals on September 28, 2012. App. 658 – App. 669. Thereafter, Applicant filed a "Pro Se Brief" On November 1, 2012. App. 671- App. 690.

By way of unpublished opinion dated September 11, 2013, the Court of Appeals dismissed Applicant's appeal. App. 704- App.705. The remittitur was issued on September 27, 2013. App. 706. Applicant filed an application for Post-Conviction relief on October 15, 2013. App. 707. His application contained allegations of various constitutional defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. App. 714 – App. 735. Applicant filed a motion to Amend Application for Post-Conviction Relief on October 31, 2013. App. 738- App.739. Applicant also filed a "Motion to Amend and Supplement" on January 14, 2014. App. 743- App. 746. He also filed a memorandum in support of Summary

Judgment on March 5, 2014. App. 748 -761. Applicant filed an affidavit on February 27, 2014. presumably in support of his application for post- conviction relief. App. 762- App. 765. On March 5, 2014, Applicant filed an affidavit, also presumably in support of his motion and application. App. 785- App. 788. He also filed a notice of motion and motion for Default Judgment on May 12, 2014. App. 805-App. 806. He likewise filed an affidavit an May 12, 2014. App. 819-823.

On May 21, 2014, Hugh Welborn, attorney for Applicant, filed a Notice of Motion [sic] and Motion to be Relieved as counsel. App. 824- App. 825. The state filed a Return and Partial Motion to Dismiss and a motion for a more Definite statement on or about July 7, 2014. App. 826- App. 833.

An evidentiary hearing [sic] was conducted on July 28, 2014 before then Judge, Edgar Dickson. App. 835. Hugh Welborn represented applicant , and John W. Whitmire represented the state.

Applicant testified that appellate counsel was ineffective for failing to include all of the pre-trial transcripts, including the preliminary hearing transcript, including all of preliminary hearing transcript, in the record. App. 856 I.9 – App. 857 I. 15.

In particular, Applicant alleged that the court did not have jurisdiction to hear his case due to a defect with the arrest warrant, namely that there was a lack of probable cause.

Based on the fact that there was no probable cause to arrest me - - I was arrested on these arrest warrants, detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing 's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the state presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

App. 858 II. 6 -15.

A transcript from that hearing is unavailable. Applicant later testified:

A: " I think that my appellate counsel was ineffective by the very fact that she proceeded with my appeal with not receiving all the transcripts. There could have been more motions that was objected to."

App. 866 II. 10-13.

On cross – examination the following exchange took place:

Q: So your're alleging appellate counsel was ineffective for not providing the court with all of your preliminary hearing transcripts; is that correct?

A: No. I'm alleging that appellate counsel was not effective because she proceeded on my appeal and not had all the transcripts.

Q: Now, what is this transcript you're speaking of? What date is it?

A: July the 16th. 2010.

Q: What judge was it before?

A: It was before -- I'm not even sure because I don't even have the transcript.

Q: You can't remember?

A: No, I don't.

Q: Did you ever request this supposed transcript at your trial?

A: Mr. Welborn, I asked attorney --

Q: I mean at your trial.

A: Did I ever request it?

Q: Uh -- huh (affirmative). A copy of it.

A: It's a part of the record, isn't it?

Q: This July transcript you speak of doesn't exist. That's why I'm asking you. Did you. Make any efforts to locate it or track it down.

A: Well, my attorneys requested all the transcripts that was available.

App. 869 l. 15 – App. 870 l. 15.

However, prior to trial. On September 14, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. **App. 30.** Lindsey Simmons appeared on behalf of the State, and Dennis Temple appeared pro se. During the hearing Ms. Simmons stated the following:

The court: All right. Yes, ma'am?

Ms. Simmons: Thank You, Your Honor. We are here today in state of South Carolina vs. Dennis Temple. It's an Oconee County case. He has four indictments on 2010-GS-37-886 through 889. It's two counts of criminal Sexual Conduct in the first degree, kidnapping and Grand Larceny.

On May the 14th of 2010 we filed a motion pursuant to 16-3-740 and served notice on Mr. Temple. That is under the S-T-D testing statute. Judge McIntosh subsequently granted that order and ordered testing on May the 20th of 2010. Mr. Temple has appealed that order and asked that Judge McIntosh reconsider that,

Subsequent to that, Mr. Temple has appointed counsel and had a preliminary hearing. He was represented by Ms. Drawdy in that matter, and that was on July 16th of 2010.

We filed a Schmerber motion out of an abundance of caution on July 19th, 2010 and served that on his attorneys at the time. The defendant appeared before your Honor on July 29th of 2010 for the scheduled Schmerber hearing and to address the issue of representation.

At this time your Honor relieved Ms. Drawdy and Mr. Denny as his counsel and gave the defendant 30 days to appear before your Honor with an attorney. And the Schmerber issue is still outstanding. App. 32 I. 1-25 – App. 33 I. 1-3.

As a result, Applicant's 5th, 6th & 14th Amendments of the United States Constitution rights have been violated

FIRST ISSUE PRESENTED

THE STATE HAS FAILED TO SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON IT'S ONE YEAR STATUTE OF LIMITATION DEFENSE, BUT ARE REQUESTING THAT APPLICANT'S SECOND PCR APPLICATION SHOULD BE SUMMARY DISMISSED WITHOUT A HEARING FOR FAILURE TO COMPLY WITH THE ONE YEAR STATUTE OF LIMITATION S.C. CODE ANN. § 17-27-45(A-C) OF THE UNIFORM POST-CONVICTION PROCEDURE ACT.

STATUTE OF LIMITATION

S.C. Code Ann. § 17-27-45(A-C) provides:

- (A) An application for relief filed pursuant to the chapter must be filed within one year after entry of a judgment of Conviction or within one years 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.
- (B) When a court whose decision are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a Substantive standard not previously recognized or a right not in existence at the time of the State Court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.

- (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

The South Carolina Supreme Court has held that the statute of limitations shall apply to all applications filed after July 1, 1995. *Peloquin v. State*, 321 S.C. 468, 469 S.E.2d 606 (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, 445 S.E.2d 638 (1994). Additionally, 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 pleading . . . there is no genuine issue judgment as a matter of law."

All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were" *Mathews v. State*, 105 F.3d 907, 916 (1997) quoting *Gamble v. State*, 298 S.C. 176, 379 S.E.2d 118, 119 (1989).

STANDARD OF REVIEW

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's Motion for Summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in light most favorable to the applicant. Similarly, when reviewing the propriety of a dismissal, this court must view the facts in the same fashion. see. S.C. Code Ann. § 17-27-80 (2003). (PCR actions are governed by usual rules of civil procedure); *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002); *Al-Shabazz v. State*, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

ARGUMENT I

An examination of the record shows that the following to place:

- On December 13- 15, 2010 applicant proceeded in a Jury trial and found guilty on all counts and sentenced to a total of 100 years in prison.
- In 2011, Applicant received an appellate counsel to effectuate his direct appeal.
- On 2012, Wanda H. Carter, Chief Deputy Appellate counsel filed a Anders Brief on applicant's behalf on direct appeal.
- On September 11, 2013, applicant direct appeal was dismissed, including the Pro se brief.
- On October 15, 2013 applicant filed a Post-Conviction Relief action in the Oconee County Courthouse.
- On December 27, 2013 the remittitur from direct appeal was issued back to the lower Court.
- On July 28, 2014 a Post-Conviction Relief hearing was held at the Oconee County Courthouse.
- On August 26, 2014 applicant filed his First Habeas Corpus petition in the United States District Court.
- On September 9, 2014 Judge Jacquelyn D. Austin, United States Magistrate Judge, subsequently issued a report a recommendation that Applicant's petition be dismissed without prejudice for failure to exhaust states remedies.
- Applicant did not file timely objections to the report and recommendation. R&R
- On September 30, 2014, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order dismissing the petition without prejudice in accordance with the R&R and denying a certificate of appealability
- On October 31, 2016 the PCR Court issued an order of dismissal in the case.
- In 2017, Taylor Gilliam, Esquire of the South Carolina Commission of Indigent Defense was appointed as applicant's counsel on Writ of Certiorari in the South Carolina Supreme Court.
- The South Carolina Supreme Court transferred the case to the South Carolina Court of

Appeals

- On October 16, 2018, the South Carolina Court of Appeals denied Applicant's Writ of certiorari.
- The Remittitur was issued on November 9, 2018 and filed on November 13, 2018.
- On November 29, 2018, Applicant filed a Federal Habeas Corpus in the United States District Court **Dennis Maurice Temple v. Warden Scott Lewis**, Civil Action No: 8:18 cv- 3258-JFA-JDA. The State of South Carolina was represented by the Attorney General Office, Alan Wilson and by J. Anthony Mabry.
- On April 1, 2019 the Attorney General Office, J. Anthony J. Mabry filed a Motion for Summary Judgment and a Return and Memorandum of law in Support of Motion for Summary Judgment.
- On June 20, 2019 Magistrate Judge Jacquelyn D. Austin filed a Report and
- Recommendation, recommending to grant J. Anthony Mabry's Motion For Summary Judgment and dismissing Applicant's Federal Habeas Corpus petition.
- On October 31, 2019 United States District Judge, Joseph F. Anderson issued a order adopting Magistrate Judge Report and Recommendation granting the Summary Judgment Motion and dismissing Applicant's Habeas Corpus with prejudice.

In this present case, first we notice that the record shows that applicant has been on six different appeals in five different courts and one after the other with no lapse or pause in between these appeals. see. record; Statute of limitation, S.C. Code § Ann. 17-27-45(A)(C) applies in this case. Specifically applicant received a remittitur from second Federal Habeas Corpus petition.

The Second events we notice, it appears on the record that during applicant First PCR action he filed a Motion to Amendments PCR application on October 31, 2013, including adding a "Ineffective Assistance of Counsels" claim which was accepted by the PCR court. Also, Applicant filed Schmerber hearing claim. However, PCR Court never issued any **findings of facts and conclusions of law** regarding applicant ineffective assistance of counsels claim against Sarah Drawdy and Keith Denny. App. 884- 893.

The third relevant events that we notice in this case, in the PCR hearing. The applicant stated on the record that Sarah Drawdy and Keith Denny represented him in a July 16, 2010 Preliminary Hearing at the Oconee County Magistrate Court. (quoting..." If Sarah

Drawdy and Keith Denny were his lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective." App. 858. l. 17.

The fourth, event we noticed in the record was the State admitted in the PCR hearing that Applicant July 16, 2010 preliminary hearing does not exist, but the record clearly and convincingly show a preliminary hearing occurred on July 16, 2010, but was covered up or not transcribed. App. 869 l. 15 – App. 870 l. 15.

For a fifth defense , it appear on the record that prior to applicant's Jury trial on September 14, 2010, another hearing was held before the Judge J. Cordell Maddox. Jr. **App. 30.** Lindsey Simmons appeared on behalf of the State, and Applicant (Dennis Temple) appeared pro se. During the hearing Ms. Simmons (Solicitor) stated the following:

The court: All right. Yes, ma'am ?

Ms. Simmons: Thank You, Your Honor. We are here today in state of South Carolina vs. Dennis Temple. It's an Oconee County case. He has four indictments on 2010-GS-37-886 through 889. It's two counts of criminal Sexual Conduct in the first degree, kidnapping and Grand Larceny. On May the 14th of 2010 we filed a motion pursuant to 16-3-740 and served notice on Mr. Temple. That is under the S-T-D testing statute. Judge McIntosh subsequently granted that order and ordered testing on May the 20th of 2010. Mr. Temple has appealed that order and asked that Judge McIntosh reconsider that, Subsequent to that, Mr. Temple has appointed counsel and had a preliminary hearing. He was represented by Ms. Drawdy in that matter, and that was on July 16th of 2010.

We filed a Schmerber motion out of an abundance of caution on July 19th, 2010 and served that on his attorneys at the time. The defendant appeared before your Honor on July 29th of 2010 for the scheduled schmerber hearing and to address the issue of representation.

At this time your Honor relieved Ms. Drawdy and Mr. Denny as his counsel and gave the defendant 30 days to appear before your Honor with an attorney. And the Schmerber issue is still outstanding.

App. 32 l. 1-25 – App. 33 l. 1-3.

The PCR Court denied applicant a full and fair opportunity to present his claim of "Ineffective assistance of Counsels" in the first Post-Conviction Relief action by failing to issue an Order of Dismissal presenting its finding of facts and conclusion of law regarding his ineffective assistance of Counsels claims. This issue was presented in applicant's Amended PCR application. Also, applicant testified in the PCR hearing that his ineffective assistance of counsels claim against attorneys Sarah Drawdy and Keith Denny for failing to object to the state probable cause and etc.. etc.. App. 858 ll. 6 -15.

In addition, applicant's second PCR action regarding this claim: "Applicant moves the court for [sic] a new trial because the state notified Applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review." is not barred by the statute of limitation. Therefore the state motion to dismiss applicant's second PCR action regarding the one year statute of limitation should not be granted. see. This issue could not have been raised in Applicant's first PCR application because the State of South Carolina notified Applicant in the July 28, 2014 PCR hearing "that the transcript did not exist, 1 year and 10 months after direct appeal.

Our Supreme Court stated, "Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing." McCoy, 401 S.C.at 369, 737 S.E.2d at 626.

SECOND ISSUE PRESENTED

THE STATE HAS FAILED TO SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON IT'S SUCCESSIVE AND RES JUDICATA DEFENSE , BUT ARE REQUESTING THAT APPLICANT'S SECOND PCR APPLICATION SHOULD BE SUMMARY DISMISSED WITHOUT A HEARING BECAUSE IT'S BARRED BY SUCCESSIVE AND RES JUDICATA.

All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were" Mathews v. State, 105 F.3d 907, 916 (1997) quoting Gamble v. State, 298 S.C. 176, 379 S.E.2d 118, 119 (1989).

The PCR Act states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

S.C. Code Ann. § 17-27-90.

SUCCESSIVE AND RES JUDICATA

A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987); see S.C. Code Ann. § 17-27-90 (1976 & Supp. 1997). In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

STANDARD OF REVIEW

Summary dismissal of a PCR application without a hearing is appropriate only when (1) it is apparent on the face of the application that there is no need for a hearing to develop any facts and (2) the applicant is not entitled to relief. S.C. Code Ann. § 17-27-70(b) and (c) (2003). When considering the State's Motion for Summary dismissal of an application, where no evidentiary hearing has been held, the circuit court must assume facts presented by an applicant are true and view those facts in light most favorable to the applicant. Similarly, when reviewing the propriety of a dismissal, this court must view the facts in the same fashion. see. S.C. Code Ann. § 17-27-80 (2003). (PCR actions are governed by usual rules of civil procedure); Wilson v. State, 348 S.C. 215, 559 S.E.2d 581 (2002); Al-Shabazz v. State, 338 S.C. 354, 364, 527 S.E.2d 742, 747 (2000).

ARGUMENT II

In this present case, first we notice that the record shows that applicant has been on a six different appeals in five different courts and one after the other with no lapse or pause in between these appeals. see. record. Statute of limitation, S.C. Code § Ann. 17-27-45(A)(C) applies in this case. Specifically applicant received a remittitur from second Federal Habeas Corpus petition.

The Second events we notice, it appears on the record that during applicant First PCR action he filed a Motion to Amendments PCR application on October 31, 2013, including adding a "Ineffective Assistance of Counsels " claim which was accepted by the PCR court. Also, Applicant filed Schmerber hearing claim. However, PCR Court never issued any **findings of facts and conclusions of law** regarding applicant ineffective assistance of counsels claim against Sarah Drawdy and Keith Denny. App. 884- 893.

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At this time your Honor relieved Ms. Drawdy and Mr. Denny as his counsel and gave the defendant 30 days to appear before your Honor with an attorney. And the Schmerber issue is still outstanding.

App. 32 I. 1-25 – App. 33 I. 1-3.

The PCR Court denied applicant a full and fair opportunity to present his claim of “Ineffective assistance of Counsels” in the first Post-Conviction Relief action by failing to issue an Order of Dismissal presenting its finding of facts and conclusion of law regarding his ineffective assistance of Counsels claims. This issue was presented in applicant’s Amended PCR application. Also, applicant testified in the PCR hearing that his ineffective assistance of counsels claim against attorneys Sarah Drawdy and Keith Denny for failing to object to the state probable cause and etc., etc., App. 858 II. 6 -15.

In addition, applicant’s second PCR action is not successive because he presented a new claim: “Applicant moves the court for [sic] a new trial because the state notified Applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.” Therefore the state motion to summary dismiss applicant’s second PCR action successive and barred by res judicata should not be granted. see. Second PCR action p.44. This issue could not have been raised in Applicant’s first PCR application because the State of South Carolina notified Applicant in the July 28, 2014 PCR hearing “that the transcript did not exist 1, year and 10 months after direct appeal.

Our Supreme Court stated, "Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing." McCoy, 401 S.C. at 369, 737 S.E.2d at 626.

THIRD ISSUE PRESENTED

THE STATE HAS FAILED TO SHOW THAT THERE IS NO GENUINE ISSUE OF MATERIAL FACT ON IT'S FAILURE TO STATE A CLAIM DEFENSE, BUT ARE REQUESTING THAT APPLICANT'S SECOND PCR APPLICATION SHOULD BE SUMMARY DISMISSED WITHOUT A HEARING BECAUSE IT'S FAILURE TO STATE A CLAIM.

All applicants are entitled to a full and fair opportunity to present claims in one PCR application. Successive PCR applications and appeals are generally disfavored because they allow an applicant to receive more than "one bite at the apple as it were" Mathews v. State, 105 F.3d 907, 916 (1997) quoting Gamble v. State, 298 S.C. 176, 379 S.E.2d 118, 119 (1989). A successive PCR application is one that raises grounds not raised in a prior application, raises grounds previously heard and determined, or raises grounds waived in prior proceedings. Carter v. State, 293 S.C. 528, 362 S.E.2d 20 (1987); see S.C. Code Ann. § 17-27-90 (1976 & Supp. 1997). In order to be entitled to a successive PCR application, the applicant must establish that the grounds raised in the subsequent application could not have been raised in the previous application. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999).

STANDARD OF REVIEW

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ARGUMENT III

In this present case, first we notice that the record shows that applicant has been on a six different appeals in five different courts and one after the other with no lapse or pause in between these appeals. see. record. Statute of limitation, S.C. Code § Ann. 17-27-45(A)(C) applies in this case. Specifically applicant received a remittitur from second Federal Habeas Corpus petition.

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In addition, applicant's second PCR action did not fail to state a claim: "Applicant moves the court for [sic] a new trial because the state notified Applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review." Therefore the state motion to dismiss applicant's second PCR action regarding the failure to state a claim should not be granted. This issue could not have been raised in Applicant's first PCR application because the State of South Carolina notified Applicant in the July 28, 2015 PCR hearing "that the transcript does not exist, 1 year and 10 months after direct appeal.

Our Supreme Court stated, "Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR applications and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing." McCoy, 401 S.C. at 369, 737 S.E.2d at 626.

FOURTH ISSUE PRESENTED

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In addition, “Applicant moves the court for [sic] a new trial because the state notified Applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.” Therefore the state motion to Summary dismiss applicant’s second PCR action regarding Frustration of Finality of Conviction is in violation of applicant’s State and Federal statutory and Constitutional rights by deprive him of **“one bite of the apple”** and should not be granted.. This issue could not have been raised in Applicant’s first PCR application because the State of South Carolina notified Applicant in the July 28, 2014 PCR hearing “ that the transcript does not exist, 1 year and 10 months after direct appeal.

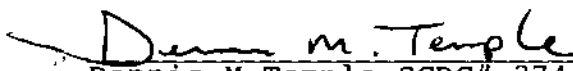
Our Supreme Court stated, "Where an applicant alleges facts that would establish an exception to either the statute of limitations or the prohibition against successive PCR application and those facts are not conclusively refuted by the record before the PCR Court, a question of fact is raised which can only be resolved by a hearing." McCoy, 401 S.C. at 369, 737 S.E.2d at 626.

CONCLUSION

In ruling on a PCR application, "the PCR Court shall make specific findings of fact and state expressly its conclusions of law, relating to each issue presented." S.C. Code Ann. section 17-27-80 (2014). The South Carolina Rules of Civil procedure apply to PCR matters. See *id*; Rule 71.1(a), SCRPC. Rule 52(a) provides in pertinent part, "In all actions tried upon the facts without a jury... the court shall find the facts specially and state separately its conclusions of law thereon." Rule 52(a). SCRPC. "The PCR Court's general denial of all claims not specifically addressed in the PCR Court's order does not constitute a sufficient ruling on any issues since it does not set forth specific finding of facts and conclusions of law." Simmon v. State, 416 S.C. 584, 592, 788 S.E.2d 220, 225 (2016). Fishburne v. State, 427 S.C. 505, 832 S.E.2d 584 (2019).

Pursuant to section 17-27-70(b), of the Uniform Post-Conviction Relief Act. This court has an affirmative duty to deny the State's Motion for Summary Dismissal of applicant's Second PCR application, because its facts are refuted by the record. However, the PCR Court has a duty to grant the applicant a hearing on his Second PCR application because he has shown the court on the face of the application, record, and arguments that there are genuine issues of material facts present in this case, which can only be resolved by appointment of counsel and a hearing.

October 25, 2021


Dennis M. Temple, SCDC# 274802
applicant

1330

Judge R. Lawton McIntosh
Chief Administrative Judge
Post Office Box 8002
Anderson, South Carolina 29622

FILED
CLERK OF COURT
ANDERSON, SOUTH CAROLINA
2021 OCT 27 A 11:36

Re: Dennis M. Temple, SCDC # 274802 v. State of South Carolina
Civil Action No. 2020-CP-37-0695

Dear Judge McIntosh:

Enclosed please find the Applicant's Response to the State of South Carolina Conditional Order of Dismissal, including our Certificate of Service in the above regarding case.

U.S. Department of Justice
Attorney General Office
Melissa C. Burton

October 25, 2021

Sincerely Yours.



Dennis M. Temple, SCDC # 274802
Lee Correctional Institution F6A-2154
990 Wisacky Highway
Bishopville, South Carolina 29010

1331

Melissa C. Burton
Oconee County, Clerk of Court
Post Office Box 678
Walhalla, South Carolina 29691

OCEAN COUNTY, SC
MELISSA C. BURTON
CLERK OF COURT

2021 OCT 27 A 11:36

Re: Dennis M. Temple, SCDC # 274802 v. State of South Carolina
Civil Action No. 2020-CP-37-0695

Dear Ms. Burton:

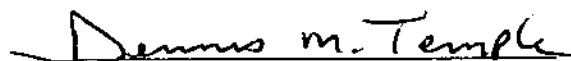
Congratulation to you as the new Oconee County, Clerk of Court !!! We have been working on getting [REDACTED] her duties and responsibilities. We the people are depending on you.

As of now, please find enclosed the Applicant's Response to the State of South Carolina Conditional Order of Dismissal, including our certificate of service in the above regarding case.

Please clock-in this copy and return a copy to me as soon as possible.

U.S. Department of Justice
Attorney General Office
Judge R. Lawton McIntosh

Sincerely Yours,



Dennis M. Temple, SCDC # 274802
Lee Correctional Institution F6A-2154
990 Wisacky Highway
Bishopville, South Carolina 29010

October 25, 2021

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

FILED OCONEE COUNTY SC
JAN 15 2021
CLERK OF COURT
IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Dennis Maurice Temple, SCDC #274802,

Case No. 2020-CP-37-0695

Applicant,

v.

CONDITIONAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Dennis Maurice Temple (Applicant) on January 18, 2020. The State made its return on September 14, 2021, requesting the action be summarily dismissed.¹

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. On March 9, 2010, over the course of approximately nine hours, Applicant violently attacked and sexually assaulted a Clemson student, Catherine McGough, after dragging her across the gravel yard of a storage facility by a belt around her neck and holding her hostage in his storage unit. He was arrested two days later.

¹ The State's return was originally due on April 17, 2020. *See* Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, this Court grants the State's request to accept its return 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).

Copies to:

3119 (P) Temple (D) Meadows

other

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COMPUTER

During its September 2010 term, the Oconee County Grand Jury indicted Applicant for two counts of first-degree criminal sexual conduct (CSC) (2010-GS-37-887, -889); kidnapping (2010-GS-37-888); and grand larceny, valued five-thousand dollars or more (2010-GS-37-886).

A. Pre-Trial

On May 20, 2010, a hearing convened before this Court on the State's motion to require Applicant to submit to HIV and other STD testing pursuant to S.C. Code Ann. § 16-3-740(B). Applicant knowingly and voluntarily waived his right to assistance of counsel with this matter. This Court granted the State's motion, finding probable cause to believe Applicant committed the offense and transmitted bodily fluids. (App'x 1–8).

Applicant initially retained R. Mills Ariail, Jr., Esquire to represent him for purposes of requesting a bond reduction. On June 30, 2010, a hearing convened before the Honorable Alexander S. Macaulay. At that time, Applicant insisted on representing himself in all future matters. Out of an abundance of caution, Judge Macaulay appointed Wilson Burr, Esquire, to represent Applicant and informed Applicant he was no longer entitled to *pro se* filings. Mr. Burr subsequently assigned the case to Sarah Drawdy, Esquire, and Keith Denny, Esquire, to represent Applicant at trial. (App'x 10–18).

On July 29, 2010, a hearing convened before the Honorable J. Cordell Maddox, Jr., on Applicant's *pro se* motion to have his attorneys relieved. Applicant argued the motion was based on a breach of trust with his attorneys. Judge Maddox granted Applicant's motion and gave him thirty days to retain private counsel. (App'x 19–29).

On September 14, 2010, a hearing convened before Judge Maddox on several pretrial matters, including lingering issues concerning counsel. Judge Maddox ultimately appointed Kurt Tavernier, Esquire, as Applicant's fourth and final attorney on the case. (App'x 31–48).

On September 22, 2010, a *Schmerber*² hearing convened before Judge Macaulay regarding Judge McIntosh's order requiring Applicant to submit to HIV and other STD testing. Applicant was present and was represented by Mr. Tavernier. Samples were subsequently taken from Applicant in the presence of Mr. Tavernier. Judge Macaulay issued rulings on several additional pretrial matters. (App'x 49–74).

On October 21, 2010, another hearing convened before Judge Maddox on Applicant's *pro se* motion to relieve Mr. Tavernier. Applicant told Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." (App'x 78). Mr. Tavernier apprised Judge Maddox the allegation was entirely false and based upon Applicant's ulterior disappointment in Tavernier's decision not to raise frivolous arguments and objections. (App'x 81–82). Applicant then stated to Judge Maddox, "I have fifteen [15] years' experience in the law." (App'x 80). Judge Maddox ruled that he would not appoint a fifth attorney to represent Applicant. Judge Maddox warned him, "You're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." (App'x 85).

At Mr. Tavernier's request, Judge Maddox subsequently issued an amended order on November 15, 2010, clarifying Mr. Tavernier's role in Applicant's case. (R. 111–18). Specifically, Judge Maddox ordered that Mr. Tavernier serve only as an advisor with legal training to "assist [Applicant] in preparation for and at trial." (R. 111).

On December 7, 2010, a final pre-trial hearing convened before Judge Maddox to conclude all substantive preliminary matters. Applicant was present and proceeded *pro se* with Mr. Tavernier as "advisory counsel." Judge Maddox warned Applicant that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation.

² *Schmerber v. California*, 384 U.S. 757 (1966).

During the course of the hearing, Judge Maddox commented, “I’ve gone over exhaustively your right to counsel.” Based on exhaustive inquiries regarding Applicant’s Sixth Amendment rights, Applicant made the final determination to proceed to trial *pro se* with the assistance of Mr. Tavernier as advisory counsel. Applicant apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial *pro se*. (App’x 107–198).

On December 13, 2010, Applicant proceeded *pro se* to a jury trial before Judge Maddox with Mr. Tavernier serving as advisory counsel. After jury selection, Applicant attempted to rescind his waiver of right to counsel and moved for a continuance so that Mr. Tavernier could represent him at trial. Judge Maddox denied the motion.

B. Summary of Evidence Adduced at Trial

Catherine McGough, a Clemson University student, was preparing to leave South Carolina for the summer and travel to Ireland. Around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit, Unit 177, at All Safe Storage located in Seneca, South Carolina. She then began walking to her car when she encountered a male (whom she identified as Applicant at trial and after viewing a photograph line-up after the incident)¹ who wanted her to purchase shoes he was selling at that time. McGough showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough went back to close the door. Applicant pushed her down in the unit and managed to place a belt around her neck. Applicant then dragged her against her will to another storage unit, Unit 193, where he bound her and raped her and later placed a bottle of solution into her vagina after ejaculating in her. He then kept her tied up inside the storage room and locked in the storage bin while he fled in her vehicle, stealing it. McGough remained in the storage room for hours until

she was able to free herself from her bindings. McGouch then eventually managed to call 911 from a cell phone, reported the kidnapping and rape, and waited for police to arrive. (App'x 282–322).

Oconee Officer Neill Burkett was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. (App'x 356–60). Oconee police had to break into Storage Unit 193 where they discovered the victim. Officer Brian Danielson transported McGough from the incident location to the local hospital. (App'x 412–13). At the hospital, a SANE kit was performed.

The victim was treated at the hospital for injuries she sustained in the kidnapping and sexual assault. The victim had a swollen nose and a contusion over her eye. She also had a bruise on her arm consistent with having been tied up. She had a similar bruise to her forearm and wrist. She also had multiple bruises or abrasions to her left shoulder. She also had abrasions on the lower part of her abdomen and back consistent with being dragged by her assailant as she described at trial. Her left thigh and left knee and lower leg had multiple scrapes and abrasions on it also consistent with being dragged. The victim also had a ligature mark around her neck consistent with her report of being strangled or dragged with a belt tied around her neck. (App'x 386–93).

Officer Greg Reed created a photographic lineup, which he showed to McGough. She identified the picture of Applicant as the perpetrator of her kidnapping and rape. (App'x 457).

Police executed a search warrant on Applicant's storage unit, Unit 193. Applicant had rented this storage unit in his own name, Dennis Temple. The owner of the storage facility identified Applicant from a photo line-up as the person who rented Unit 193. Records produced by the storage facility also showed Applicant recently rented Unit 193, and Applicant entered the storage facility approximately two (2) to three (3) minutes after the victim entered the facility on the day of the crimes. The owner of the storage facility also testified Applicant operated a tennis

shoe business and stored tennis shoes in his storage bin in the storage facility and had attempted to sell her tennis shoes in the past as well. Inside Applicant's storage unit, police found strips of clothing consistent with those described by the victim as used by Applicant to bind the victim. Police also found a bottle as described by the victim. Police also found socks, similar to those described by the victim as used to gag her during the sexual assault and kidnapping, and police found a leather belt, similar to that described by the victim as that placed around her neck during the kidnapping and sexual assault. Forensic testing determined the victim's DNA was on the socks and on the belt recovered by police. Applicant's DNA was also found on several of the items as well. Applicant's DNA was found in the rape victim's stolen car after it was recovered by police. The car was valued at \$19,000. It was recovered abandoned in Anderson County. Applicant's DNA was also found in a rectal swab from the victim's rape protocol kit taken at the hospital after the rape and kidnapping. (App'x 282–347; 356–432; 441–99; 501–31; 539–70; 571–601).

C. Verdict & Direct Appeal

On December 15, 2010, after fifteen minutes of deliberations, the jury convicted Applicant as indicted. Judge Maddox sentenced Applicant to consecutive terms of thirty years' imprisonment for first-degree CSC, thirty years for kidnapping, and ten years for larceny—an aggregate term of one-hundred years imprisonment.³

Applicant filed a timely notice of appeal. Deputy Chief Appellate Defender Wanda H.

³ Petitioner had an extensive criminal record which was provided to the court at sentencing. Petitioner was convicted in 1993 of possession of cocaine and possession with intent to distribute. Petitioner was convicted in 1995 of possession with intent to distribute or distribution of drugs within proximity of a school, simple assault, DUS 2nd, and malicious injury to personal property. Petitioner was convicted in 2001 of strong armed robbery and received a sentence of ten (10) years. Petitioner was convicted in 2007 of fraudulent check and in 2009 of petit larceny. And, Petitioner was convicted in 1992 in Rome, Georgia of providing false information to police. (App. 652-53).

Carter perfected Applicant's appeal by filing an *Anders*⁴ brief with the Court of Appeals on the following issue:

The trial judge erred by what was in effect coercing [Applicant] to appear *pro se* at trial because although he waived his right to counsel prior to trial; ultimately, he rescinded that waive rafter the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

Applicant filed a *pro se* brief in response. On September 11, 2013, the Court issued an unpublished *per curiam* opinion affirming Applicant's convictions and granting appellate counsel's request to be relieved. *State v. Temple*, No. 2013-UP-350 (S.C. Ct. App. filed Sept. 11, 2013). The case was remitted back to the circuit court on September 27, 2013.

D. First Federal Habeas Corpus Action: 8:14-3499-JFA-JDA

On August 26, 2014, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *Temple v. McFadden*, 8:14-3499-JFA-JDA.⁵ The Honorable Jacquelyn D. Austin, United States Magistrate Judge, subsequently issued a report and recommendation that Applicant's petition be dismissed without prejudice for failure to exhaust state remedies on September 9, 2014. Applicant did not file timely objections to the R&R. On September 30, 2014, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order dismissing the petition without prejudice in accordance with the R&R and denying a certificate of appealability. *Temple v. McFadden*, No. 8:14-3499-JFA (D.S.C. Sept. 30, 2014). Applicant did not appeal.

⁴ *Anders v. California*, 386 U.S. 738 (1967).

⁵ In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a United States Magistrate Judge.

E. Initial Post-Conviction Relief Action and Subsequent Appeal: 2013-CP-37-0729

On October 15, 2013, Applicant filed his first PCR action, raising the following grounds for relief (verbatim):

1. "In violation of S.C. Code Ann. Section 22-3-710, and 4th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 10 & 3; abuse of discretion, or error of law and breach of duty."
 - a. "Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest arrests that was[sic] issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to criminal activity, (2) there was[sic] no facts connecting applicant to the storage unit #193, (3) there was[sic] no facts connecting storage unit #193 to any criminal activity, (4) there was[sic] no facts under by the alleged victim stating the applicant was identified as the accused, (5) there was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7). There was no probable cause to arrest."
2. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3; abuse of discretion, or error of law and breach of duty."
 - a. "Judge in suppression hearing on arrest warrants failed to correct the record and failed to make specific findings of facts[sic] to mixed questions of law before its ruling in the suppression hearing on the arrest warrants."
3. "In violation of the 6th and 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 14 & 3; abuse of discretion, or error of law and breach of duty."
 - a. "(1) Applicant was coerced to represent himself during trial, and (2) ineffective assistance of appellate counsel."
4. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 11 & 3; abuse of discretion, or error of law; and breach of duty."
 - a. "Indictments were not issued within 90 days."
5. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3."
 - a. "(1) The six man photo lineup of the applicant and five other black[sic] was assemble[sic] and shaded in a[sic] unduly and suggestive way, that gave way to irreparable

- misidentification and (2) trial court judge failed to make specific findings of facts[sic] to mixed questions of law before its ruling in suppression hearing on the photo lineup.”
6. “In violation of S.C. Code Ann. Section 16-3-740, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 7. “In violation of S.C. Code Ann. Section 17-13-140, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 8. “In violation of Schmerber v. California, 384 U.S. 757 (1966) and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused. As a result, the state did not have all of the elements required in the statute or case law to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 9. “In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3.”
 - a. “The state failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the state further failed to disclose other material[sic] in its possession or control to the applicant which would have

- contradicted the state's claims or cleared defendant of blame."
10. "In violation of 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Once the state presented its case against the applicant during trial, the applicant was denied by judge to present witnesses for his defense."
 11. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 3 & 14"
 - a. "One of the initial juror[sic] started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrences[sic]."
 12. "In violation of 5th, 6th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Threw out the trial the solicitors consistly[scf] claimed that the applicant used clearning solution to clean out the alleged victim after he raped her. These allegation[sic] was[sic] unfounded by the evidence and cause inflammation, confusion and prejudice among the jurors."
 13. "In violation of the 4th, 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution and S.C. Code Ann. § 22-3-710 (1976) and S.C. Constitutions, Article 1, Section 3, 10 & 14; abuse of discretion, or error of law, and breach of duty."
 - a. "Arrest warrants affidavit briefly stated facts unfounded and not true at the time of the arrest of applicant and not sworn too[sic]."
 14. "In violation of 5th, 6th, and 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Trial judge and solicitor leading the state witness on what to testify to or say on cross examination."

Hugh Welborn, Esquire, was appointed to represent Applicant on October 31, 2013. The State requested an evidentiary hearing through its return on July 7, 2014. On July 28, 2014, the PCR court convened an evidentiary hearing before the Honorable Edgar W. Dickson. Applicant was present at the hearing and represented by Mr. Welborn. Assistant Attorney General John W. Whitmire appeared on behalf of the State. Applicant testified at the hearing. By order signed

October 24, 2016, and filed October 31, 2016, Judge Dickson denied the application on all grounds and dismissed the action with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant's appeal by filing a *Johnson*⁶ petition for writ of certiorari with the Supreme Court, raising the following issue:

Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

Applicant filed a *pro se* petition in response. The case was subsequently transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On October 16, 2018, the Court issued an order denying Applicant's petition and granting appellate counsel's request to be relieved. The case was remitted back to the circuit court on November 9, 2018.

F. Second Federal Habeas Corpus Action (8:18-03258-JFA-JDA)

On November 29, 2018, Applicant filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *See Temple v. Lewis*, 8:18-03258-JFA-JDA. Applicant raised the following allegations in his *pro se* petition (verbatim):

1. "The trial judge erred by what was in effect coercing [Applicant] to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial."
2. "The PCR Court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether

⁶ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.”

3. “Did the General Sessions Court have jurisdiction to hear appellant’s criminal case when the magistrate never established it had probable cause to detain appellant on the arrest warrants.”

Respondent filed a return and motion for summary judgment on April 1, 2019. On June 20, 2019, Judge Austin issued a report and recommendation that Respondent’s motion for summary judgment be granted and the petition dismissed with prejudice because (1) grounds one and two of the petition fail to state a claim for relief; and (2) ground three is not a cognizable issue in a federal habeas action.

Applicant filed objections to the R&R on April 25, 2019, and later filed amended objections on August 26, 2019. Respondent replied to the original objections on July 24, 2019, and again to the amended objections on September 9, 2019. On October 31, 2019, Judge Anderson issued an order adopting and incorporating the R&R by reference; granting Respondent’s motion for summary judgment; dismissing the petition with prejudice; and denying a certificate of appealability. *Temple v. Lewis*, No. CA 8:18-03258-JFA (D.S.C. Oct. 31, 2019).

II. CURRENT APPLICATION

In his **second and current** application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. “Ineffective assistance of counsels”
 - a. “Applicant’s counsel Sarah Drawdy and Keith Denny were ineffective for failing to object to the state’s reasons establishing probable cause and failing to raise a fourth amendment claim in the July 16, 2010 preliminary hearing.”
 - b. “These failure[sic] were in violation of the applicant’s 4th, 5th, 6th, & 14th Amendments of the United States Constitution.”

- c. “In addition, Applicant’s PCR counsel was ineffective for failing to subpoena counsels to the PCR hearing and for failing to file a 59(e) motion when the court issued a[sic] order of dismissal in the case, which did not include specific findings of facts[sic] and conclusion[sic] of law and applicant’s ineffective assistance of counsel claim against Sarah Drawdy and Keith Denny.”
- 2. “In violation of Schmerber v. California, 384 U.S. 757 (1966) and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant’s Schmerber v. California claim should have been grounded[sic] as a[sic] ineffective assistance of counsel against Kurt Tavernier for failing to object to the state’s allegations regarding applicant’s identification and probable cause to arrest, and for failing to raise a fourth amendment claim in the September 22, 2010 Schmerber hearing.”
 - b. “These failure[sic] violated Applicant’s 4th, 5th, 6th, & 14th Amendments of the United States Constitution, Article 1, section 3, 10, 12, & 14.”
 - c. “In addition, Applicant’s PCR counsel was ineffective for failing to amend the PCR application as a[sic] ineffective assistance of counsel claim against Kurt Tavernier regarding the Schmerber hearing issues, and for failing to file a 59(e) motion when the court issued a[sic] order of dismissal in the case, which did not include specific findings of facts[sic] and conclusion[sic] of law on Applicant’s Schmerber hearing claim.”
- 3. “Applicant moves the court for a new trial because the state notified applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.”
 - a. “As a result, Applicant’s 5th, 6th, & 14th Amendments of the United States Constitution Rights have been violated.”

Applicant requests relief as follows:

“vacate the conviction, a new trial, or overturn the conviction and sentences”

Before this Court are the Oconee County Clerk of Court records regarding the subject

convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; Applicant's federal habeas records; and the records of the current PCR action.

III. FINDINGS OF FACT & CONCLUSIONS OF LAW

Because there is no genuine issue of material fact which would necessitate an evidentiary hearing, this Court hereby informs the parties of its intent to dismiss the application as procedurally barred. *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); *see also Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a prima facie showing he is entitled to relief before the court will hold an evidentiary hearing). Pursuant to section 17-27-70 and -80 of the South Carolina Code, this Court makes the following findings of facts and conclusions of law based upon the pleadings, records submitted by both parties, and the applicable law:

A. Statute of Limitations

As an initial matter, this Court finds this action must be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act⁷ (PCR Act). Specifically, the PCR Act requires as follows:

- (A) 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.

⁷ S.C. Code Ann. § 17-27-10 to -160

- (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
- (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(A)–(C).

Our 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). 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, 445 S.E.2d 638 (1994). Additionally, 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 . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” See *Leamon*, 363 S.C. at 435, 611 S.E.2d at 49 (“Ignorance of the statute of limitations is not an excuse for late filing . . .”); *Sutton v. State*, 361 S.C. 644, 648, 606 S.E.2d 779, 781 (2004) (declining “to impose a duty on trial or appellate counsel to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application”), *abrogated on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005).

Applicant was convicted on December 15, 2010, and the remittitur from the direct appeal

was issued on December 27, 2013. This application was filed on September 18, 2020—almost *six years* after the requisite filing period expired. Accordingly, this action must be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619–20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive and *Res Judicata*

This Court finds this action must further be summarily dismissed because it is successive to Applicant’s previous PCR action and barred by the doctrine of *res judicata*. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). The PCR Act states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

S.C. Code Ann. § 17-27-90.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). Thus, any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant has previously litigated the probable cause claim in his first PCR application and habeas corpus petition; thus, this allegation is successive and barred under section 17-27-90. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were” (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989))). As Judge Dickson stated in the order of dismissal, Applicant’s allegation that the arrest warrant was not supported by probable cause was raised in his *pro se* brief on direct appeal and rejected pursuant to *Anders*. Judge Dickson further noted that the record clearly established Applicant’s arrest was supported by probable cause. Additionally, Judge Anderson pointed out in the order dismissing Applicant’s federal habeas petition that Applicant’s subsequent indictment by the grand jury cured any purported deficiencies in the arrest warrants. *See, e.g., Thompson v. State*, 251 S.C. 593, 596, 164 S.E.2d

760, 761 (1968); *Whitner v. Duke Power Co.*, 277 S.C. 397, 288 S.E.2d 389, 390 (1982) (a grand jury indictment overrides any potential probable-case-based challenge to a warrantless arrest).

Applicant also raised the *Schmerber* claim in his first PCR action, although he admits that he “should have” raised the claim in the context of ineffective assistance of counsel against Mr. Tavernier. Because this claim *could have* been raised in Applicant’s previous state and federal proceedings, it is barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; see also *Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their convictions, which were affirmed and their appeals dismissed. 275 S.C. at 616; 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the merits.” *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616–17, 274 S.E.2d at 415–16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief

might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State, supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant had a full opportunity to litigate all of his allegations in his prior actions. The finality of the previous courts' rulings should be respected, and this Court must summarily dismiss this action as barred by the principles of *res judicata*.

C. Failure to State a Claim

Finally, this Court finds Applicant's allegations of ineffective assistance of PCR counsel must be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant's contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief 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 post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

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* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* "is limited to its particular factual situation" and is only

applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action. After the application was dismissed, he timely appealed to the South Carolina Court of Appeals. Following the filing Applicant’s *pro se Johnson* petition, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—“one full bite at the apple.” Applicant’s allegations of ineffective assistance of post-

conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court must dismiss these allegations for failing to state a cognizable claim upon which relief can be based.

D. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C. 1990). . . [Here], *Aice* seeks to have more than one procedural "bite" at the apple. *Aice* has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.

305 S.C. at 451–52, 409 S.E.2d at 394–95.

The United States Supreme Court has explained that "the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague v. Lane*, 489 U.S. 288, 309 (1989). "Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of 'becoming a constructive citizen.' " *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring)); *see McMann v. Richardson*, 397 U.S. 759, 773–74 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). In his concurring and dissenting opinion in *Mackey v. United States*, Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan's Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978).

Applicant's attempt to relitigate his convictions and sentences through this successive and time-barred application is contrary to the recognized need for finality of litigation.

IV. CONCLUSION

Pursuant to section 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 with the Oconee County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Lillian L. Meadows
Post-Conviction Relief Division – 10th Circuit
Post Office Box 11549
Columbia, South Carolina 29211

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

AND IT IS SO ORDERED this 21st day of Sept, 2021.


R. LAWTON MCINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson, South Carolina

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CLERK OF COURT
OCONEE COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Dennis Maurice Temple, SCDC #274802,

Case No. 2020-CP-37-0695

Applicant,

v.

RETURN AND MOTION TO DISMISS
(Appointment of Counsel NOT Requested)

State of South Carolina,

Respondent.

In response to the post-conviction relief (PCR) action commenced by Dennis Maurice Temple (Applicant) on January 18, 2020, the State makes this return:¹

I. FACTS & PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Oconee County Clerk of Court. On March 9, 2010, over the course of approximately nine hours, Applicant violently attacked and sexually assaulted a Clemson student, Catherine McGough, after dragging her across the gravel yard of a storage facility by a belt around her neck and holding her hostage in his storage unit. He was arrested two days later.

During its September 2010 term, the Oconee County Grand Jury indicted Applicant for

¹ The State's return was originally due on April 17, 2020. *See* Rule 12(a), SCRCP ("[T]he State of South Carolina shall answer or otherwise respond to an application for post-conviction relief within . . . 90 days if it arises out of a trial."). However, having completed the return required in this matter, and in light of no demonstrable prejudice to Applicant as a consequence of the delay, the State respectfully asks this Court to accept this return 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).

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two counts of first-degree criminal sexual conduct (CSC) (2010-GS-37-887, -889); kidnapping (2010-GS-37-888); and grand larceny, valued five-thousand dollars or more (2010-GS-37-886).

A. Pre-Trial

On May 20, 2010, a hearing convened before the Honorable R. Lawton McIntosh on the State's motion to require Applicant to submit to HIV and other STD testing pursuant to S.C. Code Ann. § 16-3-740(B). Applicant knowingly and voluntarily waived his right to assistance of counsel with this matter. Judge McIntosh granted the State's motion, finding probable cause to believe Applicant committed the offense and transmitted bodily fluids. (App'x 1–8).

Applicant initially retained R. Mills Ariail, Jr., Esquire to represent him for purposes of requesting a bond reduction. On June 30, 2010, a hearing convened before the Honorable Alexander S. Macaulay. At that time, Applicant insisted on representing himself in all future matters. Out of an abundance of caution, Judge Macaulay appointed Wilson Burr, Esquire, to represent Applicant and informed Applicant he was no longer entitled to *pro se* filings. Mr. Burr subsequently assigned the case to Sarah Drawdy, Esquire, and Keith Denny, Esquire, to represent Applicant at trial. (App'x 10–18).

On July 29, 2010, a hearing convened before the Honorable J. Cordell Maddox, Jr., on Applicant's *pro se* motion to have his attorneys relieved. Applicant argued the motion was based on a breach of trust with his attorneys. Judge Maddox granted Applicant's motion and gave him thirty days to retain private counsel. (App'x 19–29).

On September 14, 2010, a hearing convened before Judge Maddox on several pretrial matters, including lingering issues concerning counsel. Judge Maddox ultimately appointed Kurt Tavernier, Esquire, as Applicant's fourth and final attorney on the case. (App'x 31–48).

On September 22, 2010, a *Schmerber*² hearing convened before Judge Macaulay regarding Judge McIntosh's order requiring Applicant to submit to HIV and other STD testing. Applicant was present and was represented by Mr. Tavernier. Samples were subsequently taken from Applicant in the presence of Mr. Tavernier. Judge Macaulay issued rulings on several additional pretrial matters. (App'x 49–74).

On October 21, 2010, another hearing convened before Judge Maddox on Applicant's *pro se* motion to relieve Mr. Tavernier. Applicant told Judge Maddox that, "Mr. Tavernier has made threats against his people killing my people if I don't plead guilty." (App'x 78). Mr. Tavernier apprised Judge Maddox the allegation was entirely false and based upon Applicant's ulterior disappointment in Tavernier's decision not to raise frivolous arguments and objections. (App'x 81–82). Applicant then stated to Judge Maddox, "I have fifteen [15] years' experience in the law." (App'x 80). Judge Maddox ruled that he would not appoint a fifth attorney to represent Applicant. Judge Maddox warned him, "You're welcome to hire a lawyer or you're welcome to represent yourself, or you could have Mr. Tavernier who I've appointed for you." (App'x 85).

At Mr. Tavernier's request, Judge Maddox subsequently issued an amended order on November 15, 2010, clarifying Mr. Tavernier's role in Applicant's case. (R. 111–18). Specifically, Judge Maddox ordered that Mr. Tavernier serve only as an advisor with legal training to "assist [Applicant] in preparation for and at trial." (R. 111).

On December 7, 2010, a final pre-trial hearing convened before Judge Maddox to conclude all substantive preliminary matters. Applicant was present and proceeded *pro se* with Mr. Tavernier as "advisory counsel." Judge Maddox warned Applicant that he would be responsible for understanding to the Rules of Evidence, required court-room decorum, and error preservation.

² *Schmerber v. California*, 384 U.S. 757 (1966).

During the course of the hearing, Judge Maddox commented, “I’ve gone over exhaustively your right to counsel.” Based on exhaustive inquiries regarding Applicant’s Sixth Amendment rights, Applicant made the final determination to proceed to trial *pro se* with the assistance of Mr. Tavernier as advisory counsel. Applicant apprised Judge Maddox that he had been representing himself from the beginning of his case that he was comfortable proceeding to trial *pro se*. (App’x 107–198).

On December 13, 2010, Applicant proceeded *pro se* to a jury trial before Judge Maddox with Mr. Tavernier serving as advisory counsel. After jury selection, Applicant attempted to rescind his waiver of right to counsel and moved for a continuance so that Mr. Tavernier could represent him at trial. Judge Maddox denied the motion.

B. Summary of Evidence Adduced at Trial

Catherine McGough, a Clemson University student, was preparing to leave South Carolina for the summer and travel to Ireland. Around 4:30 pm on the afternoon of May 9, 2010, she was putting her dormitory items in her storage unit, Unit 177, at All Safe Storage located in Seneca, South Carolina. She then began walking to her car when she encountered a male (whom she identified as Applicant at trial and after viewing a photograph line-up after the incident)¹ who wanted her to purchase shoes he was selling at that time. McGough showed no interest, and entered her car and began to leave until she realized that she left open the door to her storage unit. McGough went back to close the door. Applicant pushed her down in the unit and managed to place a belt around her neck. Applicant then dragged her against her will to another storage unit, Unit 193, where he bound her and raped her and later placed a bottle of solution into her vagina after ejaculating in her. He then kept her tied up inside the storage room and locked in the storage bin while he fled in her vehicle, stealing it. McGough remained in the storage room for hours until

she was able to free herself from her bindings. McGouch then eventually managed to call 911 from a cell phone, reported the kidnapping and rape, and waited for police to arrive. (App'x 282–322).

Oconee Officer Neill Burkett was dispatched to the crime scene soon after the 911 call came in at 1:04 a.m. on May 10, 2010. (App'x 356–60). Oconee police had to break into Storage Unit 193 where they discovered the victim. Officer Brian Danielson transported McGough from the incident location to the local hospital. (App'x 412–13). At the hospital, a SANE kit was performed.

The victim was treated at the hospital for injuries she sustained in the kidnapping and sexual assault. The victim had a swollen nose and a contusion over her eye. She also had a bruise on her arm consistent with having been tied up. She had a similar bruise to her forearm and wrist. She also had multiple bruises or abrasions to her left shoulder. She also had abrasions on the lower part of her abdomen and back consistent with being dragged by her assailant as she described at trial. Her left thigh and left knee and lower leg had multiple scrapes and abrasions on it also consistent with being dragged. The victim also had a ligature mark around her neck consistent with her report of being strangled or dragged with a belt tied around her neck. (App'x 386–93).

Officer Greg Reed created a photographic lineup, which he showed to McGough. She identified the picture of Applicant as the perpetrator of her kidnapping and rape. (App'x 457).

Police executed a search warrant on Applicant's storage unit, Unit 193. Applicant had rented this storage unit in his own name, Dennis Temple. The owner of the storage facility identified Applicant from a photo line-up as the person who rented Unit 193. Records produced by the storage facility also showed Applicant recently rented Unit 193, and Applicant entered the storage facility approximately two (2) to three (3) minutes after the victim entered the facility on the day of the crimes. The owner of the storage facility also testified Applicant operated a tennis

shoe business and stored tennis shoes in his storage bin in the storage facility and had attempted to sell her tennis shoes in the past as well. Inside Applicant's storage unit, police found strips of clothing consistent with those described by the victim as used by Applicant to bind the victim. Police also found a bottle as described by the victim. Police also found socks, similar to those described by the victim as used to gag her during the sexual assault and kidnapping, and police found a leather belt, similar to that described by the victim as that placed around her neck during the kidnapping and sexual assault. Forensic testing determined the victim's DNA was on the socks and on the belt recovered by police. Applicant's DNA was also found on several of the items as well. Applicant's DNA was found in the rape victim's stolen car after it was recovered by police. The car was valued at \$19,000. It was recovered abandoned in Anderson County. Applicant's DNA was also found in a rectal swab from the victim's rape protocol kit taken at the hospital after the rape and kidnapping. (App'x 282–347; 356–432; 441–99; 501–31; 539–70; 571–601).

C. Verdict & Direct Appeal

On December 15, 2010, after fifteen minutes of deliberations, the jury convicted Applicant as indicted. Judge Maddox sentenced Applicant to consecutive terms of thirty years' imprisonment for first-degree CSC, thirty years for kidnapping, and ten years for larceny—an aggregate term of one-hundred years imprisonment.³

Applicant filed a timely notice of appeal. Deputy Chief Appellate Defender Wanda H.

³ Petitioner had an extensive criminal record which was provided to the court at sentencing. Petitioner was convicted in 1993 of possession of cocaine and possession with intent to distribute. Petitioner was convicted in 1995 of possession with intent to distribute or distribution of drugs within proximity of a school, simple assault, DUS 2nd, and malicious injury to personal property. Petitioner was convicted in 2001 of strong armed robbery and received a sentence of ten (10) years. Petitioner was convicted in 2007 of fraudulent check and in 2009 of petit larceny. And, Petitioner was convicted in 1992 in Rome, Georgia of providing false information to police. (App. 652-53).

Carter perfected Applicant's appeal by filing an *Anders*⁴ brief with the Court of Appeals on the following issue:

The trial judge erred by what was in effect coercing [Applicant] to appear *pro se* at trial because although he waived his right to counsel prior to trial; ultimately, he rescinded that waive rafter the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial.

Applicant filed a *pro se* brief in response. On September 11, 2013, the Court issued an unpublished *per curiam* opinion affirming Applicant's convictions and granting appellate counsel's request to be relieved. *State v. Temple*, No. 2013-UP-350 (S.C. Ct. App. filed Sept. 11, 2013). The case was remitted back to the circuit court on September 27, 2013.

D. First Federal Habeas Corpus Action: 8:14-3499-JFA-JDA

On August 26, 2014, Applicant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *Temple v. McFadden*, 8:14-3499-JFA-JDA.⁵ The Honorable Jacquelyn D. Austin, United States Magistrate Judge, subsequently issued a report and recommendation that Applicant's petition be dismissed without prejudice for failure to exhaust state remedies on September 9, 2014. Applicant did not file timely objections to the R&R. On September 30, 2014, the Honorable Joseph F. Anderson, Jr., United States District Judge, issued an order dismissing the petition without prejudice in accordance with the R&R and denying a certificate of appealability. *Temple v. McFadden*, No. 8:14-3499-JFA (D.S.C. Sept. 30, 2014). Applicant did not appeal.

⁴ *Anders v. California*, 386 U.S. 738 (1967).

⁵ In accordance with 28 U.S.C. § 636(b) and Local Rule 73.02(B)(2), D.S.C., all pre-trial proceedings were referred to a United States Magistrate Judge.

E. Initial Post-Conviction Relief Action and Subsequent Appeal: 2013-CP-37-0729

On October 15, 2013, Applicant filed his first PCR action, raising the following grounds for relief (verbatim):

1. "In violation of S.C. Code Ann. Section 22-3-710, and 4th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 10 & 3; abuse of discretion, or error of law and breach of duty."
 - a. "Applicant, Dennis Maurice Temple was arrested and detained at the Oconee County Detention Center on arrest arrests that was[sic] issued upon a supporting affidavit or sworn written statement of the alleged victim that (1) was completely void of facts connecting Applicant to criminal activity, (2) there was[sic] no facts connecting applicant to the storage unit #193, (3) there was[sic] no facts connecting storage unit #193 to any criminal activity, (4) there was[sic] no facts under by the alleged victim stating the applicant was identified as the accused, (5) there was no mentioning of the applicant in the affidavit or sworn written statement of the alleged victim, (6) arrest warrants were issued upon facts never sworn too, (7). There was no probable cause to arrest."
2. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3; abuse of discretion, or error of law and breach of duty."
 - a. "Judge in suppression hearing on arrest warrants failed to correct the record and failed to make specific findings of facts[sic] to mixed questions of law before its ruling in the suppression hearing on the arrest warrants."
3. "In violation of the 6th and 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 14 & 3; abuse of discretion, or error of law and breach of duty."
 - a. "(1) Applicant was coerced to represent himself during trial, and (2) ineffective assistance of appellate counsel."
4. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 11 & 3; abuse of discretion, or error of law; and breach of duty."
 - a. "Indictments were not issued within 90 days."
5. "In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3."
 - a. "(1) The six man photo lineup of the applicant and five other black[sic] was assemble[sic] and shaded in a[sic] unduly and suggestive way, that gave way to irreparable

- misidentification and (2) trial court judge failed to make specific findings of facts[sic] to mixed questions of law before its ruling in suppression hearing on the photo lineup.”
6. “In violation of S.C. Code Ann. Section 16-3-740, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 7. “In violation of S.C. Code Ann. Section 17-13-140, and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused, there was[sic] no facts in the search warrants affidavit to support the search and seizure applicant. As a result, the state did not have all of the elements required in the statute to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 8. “In violation of Schmerber v. California, 384 U.S. 757 (1966) and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant was never accused in the affidavit or sworn statement of the alleged victim of committing a crime and was never identified as the accused. As a result, the state did not have all of the elements required in the statute or case law to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.”
 9. “In violation of the 14th Amendment of the U.S. Constitution and S.C. Constitution, Article 1, Section 3.”
 - a. “The state failed to disclose photos of the alleged victim, her car, state witnesses names who testified during trial and a photo of the applicant which was used during trial to convict the applicant. In addition, the state further failed to disclose other material[sic] in its possession or control to the applicant which would have

- contradicted the state's claims or cleared defendant of blame."
10. "In violation of 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Once the state presented its case against the applicant during trial, the applicant was denied by judge to present witnesses for his defense."
 11. "In violation of the 5th, 14th Amendments of the U.S. Constitution; S.C. Constitution, Article 1, Section 3 & 14"
 - a. "One of the initial juror[sic] started making comments about the case before the case was submitted to the jury for deliberation and was replaced by one of the two alternates, The record is void of these transactions and occurrences[sic]."
 12. "In violation of 5th, 6th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Threw out the trial the solicitors consistly[sci] claimed that the applicant used clearing solution to clean out the alleged victim after he raped her. These allegation[sic] was[sic] unfounded by the evidence and cause inflammation, confusion and prejudice among the jurors."
 13. "In violation of the 4th, 5th, 6th, 14th Amendments of the U.S. Constitution and S.C. Constitution and S.C. Code Ann. § 22-3-710 (1976) and S.C. Constitutions, Article 1, Section 3, 10 & 14; abuse of discretion, or error of law, and breach of duty."
 - a. "Arrest warrants affidavit briefly stated facts unfounded and not true at the time of the arrest of applicant and not sworn too[sic]."
 14. "In violation of 5th, 6th, and 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3 & 14; abuse of discretion, or error of law."
 - a. "Trial judge and solicitor leading the state witness on what to testify to or say on cross examination."

Hugh Welborn, Esquire, was appointed to represent Applicant on October 31, 2013. The State requested an evidentiary hearing through its return on July 7, 2014. On July 28, 2014, the PCR court convened an evidentiary hearing before the Honorable Edgar W. Dickson. Applicant was present at the hearing and represented by Mr. Welborn. Assistant Attorney General John W. Whitmire appeared on behalf of the State. Applicant testified at the hearing. By order signed

October 24, 2016, and filed October 31, 2016, Judge Dickson denied the application on all grounds and dismissed the action with prejudice.

Applicant filed a timely notice of appeal. Appellate Defender Taylor Gilliam perfected Applicant's appeal by filing a *Johnson*⁶ petition for writ of certiorari with the Supreme Court, raising the following issue:

Did the PCR Court err in granting summary judgment to the State on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal?

Applicant filed a *pro se* petition in response. The case was subsequently transferred to the Court of Appeals pursuant to Rule 243(l), SCACR. On October 16, 2018, the Court issued an order denying Applicant's petition and granting appellate counsel's request to be relieved. The case was remitted back to the circuit court on November 9, 2018.

F. Second Federal Habeas Corpus Action (8:18-03258-JFA-JDA)

On November 29, 2018, Applicant filed a second petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of South Carolina. *See Temple v. Lewis*, 8:18-03258-JFA-JDA. Applicant raised the following allegations in his *pro se* petition (verbatim):

1. "The trial judge erred by what was in effect coercing [Applicant] to appear pro se at trial because although appellant waived his right to counsel prior to trial, ultimately, he rescinded that waiver after the jury was selected and re-asserted his right to counsel by requesting the representation of appointed counsel for his trial."
2. "The PCR Court erred in granting summary judgment to the state on the issue of ineffective assistance of appellate counsel, where there was a genuine issue of material fact as to whether

⁶ *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988).

probable cause was established at a pre-trial hearing and where the transcript from that hearing was not included in the Record on Appeal.”

3. “Did the General Sessions Court have jurisdiction to hear appellant’s criminal case when the magistrate never established it had probable cause to detain appellant on the arrest warrants.”

Respondent filed a return and motion for summary judgment on April 1, 2019. On June 20, 2019, Judge Austin issued a report and recommendation that Respondent’s motion for summary judgment be granted and the petition dismissed with prejudice because (1) grounds one and two of the petition fail to state a claim for relief; and (2) ground three is not a cognizable issue in a federal habeas action.

Applicant filed objections to the R&R on April 25, 2019, and later filed amended objections on August 26, 2019. Respondent replied to the original objections on July 24, 2019, and again to the amended objections on September 9, 2019. On October 31, 2019, Judge Anderson issued an order adopting and incorporating the R&R by reference; granting Respondent’s motion for summary judgment; dismissing the petition with prejudice; and denying a certificate of appealability. *Temple v. Lewis*, No. CA 8:18-03258-JFA (D.S.C. Oct. 31, 2019).

II. CURRENT APPLICATION

In his **second and current** application for post-conviction relief, Applicant alleges he is being held in custody unlawfully based on the following (excerpted verbatim):

1. “Ineffective assistance of counsels”
 - a. “Applicant’s counsel Sarah Drawdy and Keith Denny were ineffective for failing to object to the state’s reasons establishing probable cause and failing to raise a fourth amendment claim in the July 16, 2010 preliminary hearing.”
 - b. “These failure[sic] were in violation of the applicant’s 4th, 5th, 6th, & 14th Amendments of the United States Constitution.”

- c. “In addition, Applicant’s PCR counsel was ineffective for failing to subpoena counsels to the PCR hearing and for failing to file a 59(e) motion when the court issued a[sic] order of dismissal in the case, which did not include specific findings of facts[sic] and conclusion[sic] of law and applicant’s ineffective assistance of counsel claim against Sarah Drawdy and Keith Denny.”
- 2. “In violation of Schmerber v. California, 384 U.S. 757 (1966) and 14th, 5th, 6th, 4th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, Section 3, 12, 14, & 10.”
 - a. “Applicant’s Schmerber v. California claim should have been grounded[sic] as a[sic] ineffective assistance of counsel against Kurt Tavernier for failing to object to the state’s allegations regarding applicant’s identification and probable cause to arrest, and for failing to raise a fourth amendment claim in the September 22, 2010 Schmerber hearing.”
 - b. “These failure[sic] violated Applicant’s 4th, 5th, 6th, & 14th Amendments of the United States Constitution, Article 1, section 3, 10, 12, & 14.”
 - c. “In addition, Applicant’s PCR counsel was ineffective for failing to amend the PCR application as a[sic] ineffective assistance of counsel claim against Kurt Tavernier regarding the Schmerber hearing issues, and for failing to file a 59(e) motion when the court issued a[sic] order of dismissal in the case, which did not include specific findings of facts[sic] and conclusion[sic] of law on Applicant’s Schmerber hearing claim.”
- 3. “Applicant moves the court for a new trial because the state notified applicant 1 year, 10 months after direct appeal that his preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.”
 - a. “As a result, Applicant’s 5th, 6th, & 14th Amendments of the United States Constitution Rights have been violated.”

Applicant requests relief as follows:

“vacate the conviction, a new trial, or overturn the conviction and sentences”

Attached to this return and incorporated by reference are the Oconee County Clerk of Court

records regarding the subject convictions; Applicant's records from the South Carolina Department of Corrections; a full and complete record of Applicant's direct appeal, including the trial transcript; Applicant's prior post-conviction relief records challenging these convictions and the appeal therefrom; Applicant's federal habeas records; and the records of the current PCR action. The State reserves the right to amend this return upon receipt of any relevant materials.

III. MOTION TO DISMISS

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. *See Welch v. MacDougall*, 246 S.C. 258, 260, 143 S.E.2d 455, 456 (1965) (requiring a PCR applicant to make a *prima facie* showing he is entitled to relief before the court will hold an evidentiary hearing). Because this application is procedurally barred, the State requests this Court issue a conditional order of dismissal indicating the Court's intent to dismiss the application and its reasons for so doing.⁷ *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); *Sutton v. State*, 361 S.C. 644, 647, 606 S.E.2d 779, 780 (2004) ("A PCR action is a civil action generally subject to rules and statutes that apply in civil proceedings"), *abrogated on other grounds by Bray v. State*, 366 S.C. 137, 620 S.E.2d 743 (2005); *see also Re: Appointment of Counsel in Post-Conviction Relief Cases before the Circuit Court*, (S.C. Sup. Ct. Order filed Oct. 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). In making its

⁷ A proposed conditional order of dismissal consistent with this return and motion to dismiss is concurrently submitted for the Court's consideration.

return in support of the motion for summary judgment, the State would respectfully show this court:

A. Statute of Limitations

As an initial matter, this action should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act⁸ (PCR Act). Specifically, the PCR Act requires as follows:

- (A) 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.
- (B) When a court whose decisions are binding upon the Supreme Court of this State or the Supreme Court of this State holds that the Constitution of the United States or the Constitution of South Carolina, or both, impose upon state criminal proceedings a substantive standard not previously recognized or a right not in existence at the time of the state court trial, and if the standard or right is intended to be applied retroactively, an application under this chapter may be filed not later than one year after the date on which the standard or right was determined to exist.
- (C) If the applicant contends that there is evidence of material facts not previously presented and heard that requires vacation of the conviction or sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence.

S.C. Code Ann. § 17-27-45(A)–(C).

Our 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). A motion for

⁸ S.C. Code Ann. § 17-27-10 to -160

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, 445 S.E.2d 638 (1994). Additionally, 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 . . . there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *See Leamon*, 363 S.C. at 435, 611 S.E.2d at 49 (“Ignorance of the statute of limitations is not an excuse for late filing . . .”); *Sutton*, 361 S.C. at 648, 606 S.E.2d at 781 (declining “to impose a duty on trial or appellate counsel to inform a convicted defendant of the availability of PCR or the one-year deadline to file an application”).

Applicant was convicted on December 15, 2010, and the remittitur from the direct appeal was issued on December 27, 2013. This application was filed on September 18, 2020—almost *six years* after the requisite filing period expired. Accordingly, this action should be summarily dismissed as untimely, particularly in light of the fact that Applicant has failed to allege any known ground entitling him to equitable tolling. *See Pelzer v. State*, 378 S.C. 516, 521, 662 S.E.2d 618, 619–20 (Ct. App. 2008) (equitable tolling has been deemed available where (1) extraordinary circumstances prevented the plaintiff from filing despite his due diligence; (2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant’s misconduct into allowing the filing deadline to pass; and (3) the plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim).

B. Successive and *Res Judicata*

Because the allegations in the current application were or could have been raised in Applicant’s previous state and federal proceedings, this action is successive and barred by the

doctrine of *res judicata*. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). The PCR Act states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

S.C. Code Ann. § 17-27-90.

Section 17-27-90 is clear—successive post-conviction relief applications are forbidden unless an applicant can indicate a “sufficient reason” why new grounds for relief were not raised or were not properly raised in previous applications or actions challenging these convictions. *See Aice v. State*, 305 S.C. 448, 452, 409 S.E.2d 392, 395 (1991) (“[Applicant] has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and again we do so in order to effectuate the purposes of the Act and rules.”). Thus, any new ground raised in a subsequent application is limited to those grounds that “could not have been raised . . . in the previous application.” *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant has previously litigated the probable cause claim in his first PCR

application and habeas corpus petition; thus, this allegation is successive and barred under section 17-27-90. *See Aice*, 305 S.C. at 452, 409 S.E.2d at 395 (explaining that the PCR rules “contemplate an adjudication on the merits of the original petition, one bite at the apple as it were” (citing *Gamble v. State*, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989))). As Judge Dickson stated in the order of dismissal, Applicant’s allegation that the arrest warrant was not supported by probable cause was raised in his *pro se* brief on direct appeal and rejected pursuant to *Anders*. Judge Dickson further noted that the record clearly established Applicant’s arrest was supported by probable cause. Additionally, Judge Anderson pointed out in the order dismissing Applicant’s federal habeas petition that Applicant’s subsequent indictment by the grand jury cured any purported deficiencies in the arrest warrants. *See, e.g., Thompson v. State*, 251 S.C. 593, 596, 164 S.E.2d 760, 761 (1968); *Whitner v. Duke Power Co.*, 277 S.C. 397, 288 S.E.2d 389, 390 (1982) (a grand jury indictment overrides any potential probable-case-based challenge to a warrantless arrest).

Applicant also raised the *Schmerber* claim in his first PCR action, although he admits that he “should have” raised the claim in the context of ineffective assistance of counsel against Mr. Tavernier. Because this claim *could have* been raised in Applicant’s previous state and federal proceedings, it is barred by the doctrine of *res judicata*. *Res judicata* prohibits subsequent actions by the same parties on the same issues. *Bell v. Bennett*, 307 S.C. 286, 414 S.E.2d 786 (Ct. App. 1992). A final judgment on the merits in a prior action bars subsequent consideration of those issues in a new action. *Foran v. USAA Cas. Ins. Co.*, 311 S.C. 189, 427 S.E.2d 918 (Ct. App. 1993). *Res judicata* also bars any issues that could have been raised in the former action. *Id.*; *see also Foxworth*, 275 S.C. 615, 274 S.E.2d 415.

In *Foxworth v. State*, the appellants—Myron Foxworth and Gary Wilson—were convicted of armed robbery and sentenced to twenty-two years imprisonment. Both men appealed their

convictions, which were affirmed and their appeals dismissed. 275 S.C. at 616; 274 S.E.2d at 415. They then filed *pro se* petitions for writs of habeas corpus relief in the South Carolina Federal District Court, without exhausting their state PCR remedies. The District Court considered “the trial record and the numerous allegations raised in the petitions . . . and [it] dismissed [the petitions] on the merits.” *Id.* Both men then filed *pro se* PCR applications, but the PCR judge found their applications were without merit. He further found that *res judicata* barred claims raised in the applications, as well as those that *could have* been raised. *Id.* at 616–17, 274 S.E.2d at 415–16 (emphasis added). Our Supreme Court agreed. Relying upon section 17-27-90 and its prior decisions construing that statute, the Court held:

The language of Section 17-27-90 is not restricted to State proceedings but rather refers to “any other proceeding” where relief might be sought prior to the submission of a subsequent application. We, therefore, extend the reasoning espoused in *Land v. State*, *supra*, to the situation where, as here, an application in the State court follows a federal habeas corpus adjudication. The burden is on the applicant to prove that the alleged grounds for relief could not have been raised in federal court.

Id. at 618, 274 S.E.2d at 416.

Applicant had a full opportunity to litigate all of his allegations in his prior actions. The finality of the previous courts’ rulings should be respected, and this Court should summarily dismiss this action as barred by the principles of *res judicata*.

C. Failure to State a Claim

Finally, Applicant’s allegations of ineffective assistance of PCR counsel should be summarily dismissed for failure to state a *prima facie* claim of ineffective assistance of counsel. Applicant’s contention he received ineffective assistance of PCR counsel in his prior PCR action is not a cognizable claim for proceeding on the merits of a successive application.

As an initial matter, there is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *see also Coleman v. Thompson*, 501 U.S. 722 (1991) (finding that the Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions). Once a post-conviction relief 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 post-conviction relief counsel. *Aice*, 305 S.C. 448, 409 S.E.2d 392.

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* recognizes a general exception to this rule where prior post-conviction relief counsel fails to appeal the denial of the application. *Id.* *Austin* “is limited to its particular factual situation” and is only applicable in limited circumstances to correct procedural defects where an applicant is denied his “one full bite at the apple.” *Id.*; *Aice*, 305 S.C. at 452, 409 S.E.2d at 394.

Moreover, the United States Supreme Court’s opinion in *Martinez v. Ryan*, 566 U.S. 1 (2012), held that “[w]here, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a *federal habeas court* from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.” Our Supreme Court has held that “*Martinez* is limited to federal habeas corpus review and is not applicable to state post-conviction relief actions.” *Kelly v. State*, 404 S.C. 365, 365, 745 S.E.2d 377, 377 (2013). Nor does *Martinez* “afford [PCR applicants] the right to file a successive PCR application by merely alleging ineffective assistance of prior PCR counsel.” *Robertson v. State*, 418 S.C. 505, 516, 795 S.E.2d 29, 34 (2016) (allowing a successive PCR application in the narrow

situation where initial PCR counsel was not qualified to represent a capital PCR applicant in violation of S.C. Code Ann. § 17-27-160(B)).

Here, Applicant received a hearing in his first post-conviction relief action. After the application was dismissed, he timely appealed to the South Carolina Court of Appeals. Following the filing Applicant's *pro se Johnson* petition, the Court carefully considered the record as required by law. The Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016).

It is clear Applicant enjoyed a complete adjudication on the merits of his original application—"one full bite at the apple." Applicant's allegations of ineffective assistance of post-conviction relief counsel do not fall within any exception to the rule barring such claims, and this Court should dismiss these allegations for failing to state a cognizable claim upon which relief can be based.

D. Frustration of Finality of Convictions

As a final matter, both the United States Supreme Court and the South Carolina Supreme Court have emphasized the necessity for finality of litigation in criminal cases. The Court in *Aice* explained that:

Finality must be realized at some point in order to achieve a semblance of effectiveness in dispensing justice. At some juncture judicial review must stop, with only the very rarest of exceptions, when the system has simply failed a defendant and where to continue the defendant's imprisonment without review would amount to a gross miscarriage of justice. *See Butler v. State*, 397 S.E.2d 87 (S.C. 1990). . . [Here], Aice seeks to have more than one procedural "bite" at the apple. Aice has filed an original PCR application, and has been allowed to seek review of the ruling against him. We refuse to grant his request for a second chance, and

again we do so in order to effectuate the purposes of the Act and rules.

305 S.C. at 451–52, 409 S.E.2d at 394–95.

The United States Supreme Court has explained that “the principle of finality . . . is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.” *Teague v. Lane*, 489 U.S. 288, 309 (1989). “Relitigation of a conviction is a rear-view mirror, while a respect for finality encourages those in custody to contemplate the future prospect of ‘becoming a constructive citizen.’ ” *United States v. Fugit*, 703 F.3d 248, 252 (4th Cir. 2012) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring)); see *McMann v. Richardson*, 397 U.S. 759, 773–74 (1970) (noting the compelling interests in maintaining the finality of guilty-plea convictions validly obtained). In his concurring and dissenting opinion in *Mackey v. United States*, Justice Harlan wrote:

Finality in the criminal law is an end which must always be kept in plain view. . . . At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing that a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation.

401 U.S. 667, 691 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). Seven years after *Mackey*, the South Carolina Supreme Court quoted Justice Harlan’s Opinion with approval in *Anderson v. Leeke*, 271 S.C. 435, 441–42, 248 S.E.2d 120, 123 (1978).

Applicant’s attempt to relitigate his convictions and sentences through this successive and

time-barred application is contrary to the recognized need for finality of litigation.

IV. ALL OTHER CLAIMS

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

V. CONCLUSION

WHEREFORE, having made its return, the State moves to summarily dismiss the application because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; for failing to state a cognizable claim under the PCR Act, and because continued litigation by Applicant frustrates the need for finality of litigation.

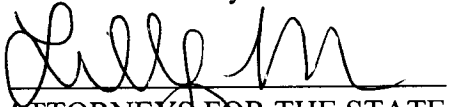
Respectfully submitted,

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By: 
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September 14, 2021

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS

2021 SEP 22 A 10:09

2020-CP-37-0695

DENNIS M. TEMPLE, #274802

Applicant,

vs

CERTIFICATE OF SERVICE BY MAIL

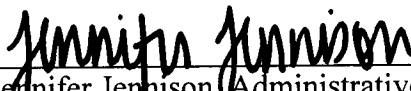
STATE OF SOUTH CAROLINA,

Respondent,

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion to Dismiss** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Dennis M. Temple, #274802 (F6A-2154-B)
Lee Correctional Institution
990 Wisacky Highway
Bishopville, SC 29010

DATED this 14th day of September, 2021


 Jennifer Jernison, Administrative Coordinator
 For Respondent

ENTERED

 COMPUTER

FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of _____

2020 SEP 18 PM 4:47

Full name and prison number (if any) of Applicant _____

v. _____

State of South Carolina

APPLICATION FOR
POST-CONVICTION RELIEF

2020 CP 37.695

INSTRUCTIONS - 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 Lee Correctional Institution
2. Name and location of Court which imposed sentence Oconee County Courthouse
415 South Pine Street, Walhalla, South Carolina 29691
3. Name(s) of co-defendant(s) (if any) NONE
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) see attachment A
 - (b) see attachment A

See, attachment A

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

(a) See, attachment A

(b) See, attachment A

(c) See, attachment A

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty yes

(c) after a plea of nolo contendere _____

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

yes

8. If you answered "yes" to (7), list:

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

i. South Carolina Court of Appeals

ii. See, attachment B

iii. See, attachment B

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

i. See, attachment B

ii. See, attachment B

iii. See, attachment B

(c) the date of each such result:

i. See, attachment B

ii. See, attachment B

iii. See, attachment B

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

i. See, attachment C

ii. See, attachment C

iii. See, attachment C

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) See, attachment C

(b) See, attachment C

- (c) see. attachment C
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) see. attachment E
- (b) see. attachment I
- (c) see. attachment M
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) see. attachment E, F, G, & H
- (b) see. attachment I, J, K, & L
- (c) see. attachment M, N, O, P, R, S & T
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? yes
- (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? yes
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. Direct appeal - Anders Brief
- ii. PCR / Federal Habeas Corpus
- iii. No
- iv. Johnson petition for writ of certiorari
- (b) the name and location of the Court in which each was filed:
- i. South Carolina Court of Appeals
- ii. Oconee County Court of Common Pleas, U.S. District Court
- iii. NONE
- iv. South Carolina Supreme Court

(c) the disposition thereof:

- i. appeal dismissed
- ii. denied and dismissed with prejudice; dismissed
- iii. NONE
- iv. denied

(d) the date of each such disposition:

- i. September 11, 2013
- ii. October 24, 2016; October 31, 2019
- iii. NONE
- iv. October 16, 2018

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

- i. see attachment C
- ii. See attachment C
- iii. See attachment C
- iv. see attachment C

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?

yes

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

(a) which grounds have been presented:

- i. ineffective assistance of counsels
- ii. Schmerber v. California hearing claims
- iii. NO

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

- i. Post-Conviction Relief
- ii. Post-Conviction Relief
- iii. NONE

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) ineffective assistance of counsel - has been presented
 (b) Schmerber v. California claim - has been presented
 (c) applicant move the Court for a new trial - premature

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

- (a) your arraignment and plea? yes
 (b) your trial, if any? NO
 (c) your sentencing? NO
 (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 "yes" to one or more parts of (17), list:

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

i. see attachment D

ii. see attachment D

iii. see attachment D

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

i. preliminary hearing July 16, 2010

Direct appeal September 11, 2013

ii. Schmerber hearing September 22, 2010

Post-conviction Relief October 16, 2018

iii. writ of certiorari October 18, 2019

State clearly the relief you seek in this application:

vacate the conviction; A new trial, or overturn
the conviction and sentences

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

NO

STATE OF SOUTH CAROLINA)

County of Oconee)

VERIFICATION

2020. CP 31.695

2020 SEP 18 PM 4:47

I, Dennis Maurice Temple, 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. including attachments A - T.

Dennis Maurice Temple

SWORN to and subscribed before me this 11th
 day of September, 2020.

Debra Eastridge (L.S.)
 Notary Public

My Commission Expires: 3/3/2024

mg
 COMPLETED

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

- (a) 2010-GS-37-00886
- (b) 2010-GS-37-00887
- (c) 2010-GS-37-00888
- (d) 2010-GS-37-00889

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

- (a) December 15, 2010 - 30 years
- (b) December 15, 2010 - 30 years
- (c) December 15, 2010 - 30 years
- (d) December 15, 2010 - 10 years



8. If you answered "Yes" to (7), list:

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

- i. South Carolina Court of Appeals
- ii. Oconee court of Common Pleas
- iii. South Carolina Supreme court
- iv. South Carolina United States District Court

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

- i. Appeal dismissed
- ii. denied and dismissed with prejudice
- iii. writ of Certiorari denied
- iv. dismissed with prejudice

(c) the date of each such result:

- i. September 11, 2013
- ii. October 24, 2016
- iii. October 16, 2018
- iv. October 31, 2019

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

- i. state v. Temple, case NO. 2011-182806
- ii. Temple v. State, c/A NO. 2013-CP-37-0729
- iii. Temple v. state. case NO. 2016-002254
- iv. Temple v. Warden Lewis, 8:18-03258-JFA-JDA

9. If you answered "No" to (7). state your reasons for not so appealing:

- (a) appealed
- (b) appealed
- (c) appealed
- (d) appealed

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

- i. state v. Temple, case NO. 2011-182806
- ii. Temple v. State, c/A NO. 2013-CP-37-0729
- iii. Temple v. Warden Lewis, 8:18-03258-JFA-JDA
NONE
- iv. Temple v. State, case NO. 2016-002254

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

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

i. Sarah Drawdy, 2315 N. main st, Ste 117, Anderson
South Carolina 29621

Keith Denny P.O. Box 101 Wthalla, SC. 29691

ii Wanda H. Carter, Deputy chief Appellate Defender
South Carolina Commission on Indigent Defense
P.O. Box 11589, Columbia, SC 29211-1589

Kurt Tavernier, 110 Benson St, Anderson, SC.
29624

Hugh W. Welborn, 913 Carolina Circle, P.O. Box
173, Anderson, S.C. 29622

Taylor D. Gilliam, S.C. Commission on Indigent
Defense, P.O. Box 11589, Columbia, S.C. 29211

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

(a) Ineffective assistance of counsels

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

(a) Applicant filed an application for Post-Conviction Relief on October 15, 2013. APP. 707. His application contained allegations of various constitution defects surrounding his trial as well as allegations of ineffective assistance of Appellate Counsel. APP. 714 - APP. 735. Applicant filed a Motion to Amend Application for Post-Conviction Relief on October 31, 2013. APP. 738 - APP. 739. Applicant also filed a "Motion to Amend and Supplement" on January 14, 2014. APP. 743 - APP. 746. He also filed a memorandum in support of summary Judgment on March 5, 2014. APP. 748 - 761. Applicant filed an affidavit on February 27, 2014, presumably in support of his application for Post-Conviction relief. APP. 762 - APP. 765. On March 5, 2014, Applicant filed an Affidavit, also presumably in support of his motion and application. APP. 785 - APP. 788. He also filed a Notice of motion and

motion for Default Judgment on May 12, 2014. APP. 805 - APP. 806. He filed a memorandum in support of Default Judgment at the same time. APP. 807 - APP. 818. He likewise filed an Affidavit on May 12, 2014. APP. 819 - 823.

On May 21, 2014, Hugh Welborn, attorney for Applicant, filed a Notice of motion and motion to be Relieved as Counsel. APP. 824 - APP. 825. The state filed a Return and Partial motion to Dismiss and a motion for a more Definite statement on or about July 7, 2014. APP. 826 - APP. 833.

An evidentiary hearing was conducted on July 28, 2014 before the Honorable Edgar Dickson. APP. 835. Hugh Welborn represented applicant, and John W. Whitmire represented the state. Applicant testified during the hearing to pertinent parts as follows:

Mr. Welborn:

Q. Thank you. We talked about the search. We talked about those allegations. We talked about the jurors that you wanted to come. Tell the court what else that you wanted to complain about that you feel was ineffective assistance of counsel where you should get a new trial.

Mr. Temple

A. Based on the fact that there was no probable cause to arrest me -- I was arrested on these arrest warrants, detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the state presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

APP. 858. 1-17.

In a written order filed on October 31, 2016, Judge Dickson dismissed Applicant's PCR application granted Summary Judgment on the issues of ineffective appellate counsel, and found that some of Applicant's other allegations were barred by res judicata. APP. 684 - APP. 893. Judge Dickson did not make any findings of facts and conclusion of law regarding his ineffective assistance of counsel claim, but further ruled that some of Applicant's other allegations were direct appeal issues and summarily dismissed them. APP. 891.

CONCLUSION

Applicant's counsel Sarah Drawdy and Keith Denny were ineffective assistance of counsels for failing to object to the state's reasons establishing Probable cause and failing to raise a fourth Amendment claim in the July 16, 2010 Preliminary hearing.

These failure were in violation of the applicant's 4th, 5th, 6th & 14th Amendments of the United States Constitution.

In addition, Applicant's PCR Counsel was ineffective for failing to subpoena counsels to the PCR hearing and for failing to file a 59(c) motion. When the court issued a order of dismissal in the case, which did not include specific findings of facts and conclusion of law on applicant's ineffective assistance of counsel claim against Sarah Drawdy and Keith Denny.

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

(b) In violation of Schmerber v. California, 384 U.S. 757 (1966) and 4th, 5th, 6th & 14th Amendments of the U.S. Constitution and Sic. Constitution, Article 1, Section 3, 12, 14, & 10.

APP. 716

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

(b) Applicant was never accused in the affidavit or Sworn statement of the alleged victim of committing a crime and was never identified as the accused. As a result, the state did not have all of the elements required in the statute or case law to get authorization of the court order to get the search warrant that obtained the evidence that was used against the applicant during trial.

APP. 721.

Applicant filed an application for post-conviction relief on October 15, 2013. APP. 707. His application contained allegations of various constitution defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. APP. 714 - APP. 735, et al.

On May 21, 2014, Hush Welborn, attorney for applicant, filed a notice of motion and motion to be relieved as Counsel. APP. 824-APP. 825. The state filed a Return and partial motion to Dismiss and a motion for a more Definite statement on or about July 7, 2014. APP. 826 - APP. 833.

An evidentiary hearing was conducted on July 28, 2014, before the Honorable Edgar Dickson. APP. 835. Hush Welborn represented applicant, and John W. Whitmire represented the state. Applicant testified during the hearing.

In a written order filed on October 31, 2016, Judge Dickson dismissed Applicant's application, granted Summary Judgment on the issues of ineffective appellate counsel, and found that some of applicant's other allegations were barred by res judicata. APP. 684 - APP. 893. Judge Dickson did not make any

specific findings of facts and conclusion of law regarding his schmerber v. califor
nia hearing claim, but further ruled that some of Applicant's other allegations were direct appeal issues and summarily dismissed them. APP. 891.

CONCLUSION

Applicant's schmerber v. california, claim should have been grounded as a ineffective assistance of counsel against Kurt Tavernier for failing to object to the state's allegations regarding applicants identification and probable cause to arrest, and for failing to raise a fourth Amendment claim in the September 22, 2010 Schmerber hearing.

These failure violated Applicant's 4th, 5th, 6th & 14th Amendments of the U.S. Constitution and S.C. Constitution, Article 1, section 3, 10, 12, & 14,

In addition, applicant's PCR counsel was ineffective for failing to amend the PCR application as a ineffective assistance of counsel claim against Kurt Tavernier regarding the Schmerber hearing issues, and for failing to file a 59(e) motion. when

the court issued a order of dismissal in the case, which did not include specific findings of facts and conclusion of law on applicant's Schmerber hearing claim.

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

(c) Applicant moves the court for a new trial because the state notified applicant 1 year, 10 months after direct appeal that his Preliminary hearing transcript does not exist, which prevented the appellate court from conducting a meaningful appellate review.

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

(c) Applicant proceeded to a jury trial on December 13, 2010 before the Honorable J. Cordell Maddox. APP. 191. Chrissy Adams and Lindsey Simmons represented the state, and applicant represented himself with Kurt Tavernier serving as standby counsel. APP. 191.

The jury found Applicant guilty as indicted. APP. 646 11. 17-25. Judge Maddox sentenced Applicant to thirty years imprisonment on each of the criminal sexual conduct in the first degree charges, thirty years imprisonment on the kidnapping charge, and ten years imprisonment on the grand larceny charges, with the sentences to run consecutive. APP. 655 1. 23 - APP. 656 1. 5.

Wanda Carter, Deputy Chief of Appellate Defense, filed an Anders brief on behalf of Applicant with the South Carolina Court of Appeals on September 28, 2012. APP. 658-APP. 669. Thereafter, Applicant filed a "Pro Se Brief" on November 1, 2012. APP. 671-APP. 690.

By way of unpublished opinion dated September 11, 2013, the Court of Appeals dismissed applicant's appeal. APP. 704-APP. 705. The remittitur was issued on September 27, 2013. APP. 706.

Applicant filed an application for post-conviction relief on October 15, 2013. APP. 707. His application contained allegations of various constitutional defects surrounding his trial as well as allegations of ineffective assistance of appellate counsel. APP. 714-APP. 735. Applicant filed a Motion to Amend Application for Post-Conviction Relief on October 31, 2013. APP. 738-APP. 739. Applicant also filed a "Motion to Amend and Supplement" on January 14, 2014. APP. 743.-APP. 746. He also filed a Memorandum in Support of Summary Judgment on March 5, 2014. APP. 748-761. Applicant filed an Affidavit on February 27, 2014, presumably in support of his application for post-conviction

relief. APP. 762 - APP. 765. On March 5, 2014, Applicant filed a Motion for Summary Judgment. APP. 783. - APP. 784. On March 19, 2014, Applicant filed an Affidavit, also presumably in support of his motions and application. APP. 785 - APP. 788. He also filed a Notice of motion and Motion for Default Judgment on May 12, 2014. APP. 805 - APP. 806. He filed a memorandum in Support of Default Judgment at the same time. APP. 807 - APP. 818. He likewise filed an Affidavit on May 12, 2014. APP. 819 - APP. 823.

On May 21, 2014, Hugh Welborn, attorney for applicant, filed a Notice of Motion and Motion to be Relieved as Counsel. APP. 824 - APP. 825. The state filed a Return and Partial motion to Dismiss and a Motion for a more Definite Statement on or about July 7, 2014. APP. 826 - APP. 833.

An evidentiary hearing was conducted on July 28, 2014 before the Honorable Edgar Dickson. APP. 835. Hugh Welborn represented applicant, and John W. Whitmire represented the state.

Applicant testified that appellate counsel was ineffective for failing to include all of the pre-trial transcripts, including the preliminary hearing transcript, in the record. APP. 856 l. 9 - APP. 857 l. 15.

In particular, Applicant alleged that the court did not have jurisdiction to hear his case due to a defect with the arrest warrant, namely that there was a lack of probable cause.

Based on the fact that there was no probable cause to arrest me - - I was arrested on these arrest warrants, detained. A preliminary hearing was held on July the 16th, 2010. A preliminary hearing's purpose is to determine if there's probable cause. If Sarah Drawdy and Keith Denny are my lawyers and the state presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective.

APP. 858 ll. 6-15.

A transcript from that hearing is unavailable. Applicant later testified: "I think that my appellate counsel was ineffective by the very fact that she proceeded with my appeal with not receiving all the transcripts. There could have been more motions that was objected to." APP. 866 ll. 10-13.

On cross-examination the following exchange took place:

Q: So you're alleging appellate counsel was ineffective for not providing the court with all of your preliminary hearing transcripts; is that correct?

A: No. I'm alleging that appellate counsel was not effective because she proceeded on my appeal and not had all the transcripts.

Q: Now, what is this transcript you're speaking of? What date is it?

A: July the 16th, 2010.

Q: What judge was it before?

A: It was before -- I'm not even sure because I don't even have the transcript.

Q: You can't remember?

A: No, I don't.

Q: Did you ever request this supposed transcript at your trial?

A: Mr. Welborn, I asked my attorney --

Q: I mean at your trial.

A: Did I ever request it?

Q: Uh-huh (affirmative). A copy of it.

A: It's a part of the record, isn't it?

Q: This July transcript you speak of doesn't exist. That's why I'm asking you. Did you make any efforts to locate it or track it down.

A: Well, my attorneys requested all the transcripts that was available.

APP. 869 1. 15 - APP. 870 1. 15.

However, prior to Trial. On September 14, 2010, another hearing was held before the Honorable J. Cordell Maddox, Jr. APP. 30. Lindsey Simmons appeared on behalf of the state, and Dennis Temple appeared pro se. During the hearing Ms. Simmons stated the following:

The Court: All right. Yes, ma'am?

Ms. Simmons: Thank you, Your Honor. We are here today in state of South Carolina vs. Dennis Temple. It's an Deonee County case. He has four indictments on 2010-GS-37-886 through 889. It's two counts of criminal sexual conduct in the first degree,

Kidnapping and Grand larceny.

On May the 14th of 2010 we filed a motion pursuant to 16-3-740 and served notice on Mr. Temple. That is under the S-T-D testing statute. Judge McIntosh subsequently granted that order and ordered testing on May the 20th of 2010. Mr. Temple has appealed that order and asked that Judge McIntosh reconsider that.

Subsequent to that, Mr. Temple has appointed counsel and had a preliminary hearing. He was represented by Ms. Drawdy in that matter, and that was on July 16th of 2010.

We filed a Schmerber motion out of an abundance of caution on July 19th, 2010 and served that on his attorneys at the time. The defendant appeared before Your Honor on July 29th of 2010 for the scheduled Schmerber hearing and to address the issue of representation.

At this time Your Honor relieved Ms. Drawdy and Mr. Denny as his counsel and gave the defendant 30 days to appear before Your Honor with an attorney. And the Schmerber issue is still outstanding. APP. 32 1.1-25.- APP. 33 1.1-3.

CONCLUSION

Applicant moves the court for a new trial in this case, because the state notified the applicant 1 Year, 10 months after direct appeal that his preliminary hearing on July 16, 2010 does not exist, which prevented the appellate court from conducting a meaningful appellate review.

As a result, Applicant's 5th, 6th & 14th Amendments of the United States Constitution Rights have been violated.

Beverly H. Whitfield
Clerk of Court, Oconee County
Post Office Box 678
Walhalla, South Carolina 29691

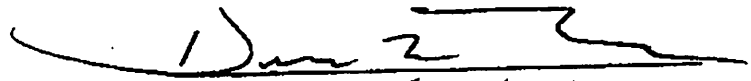
RE: Dennis M. Temple vs. State of South Carolina

Dear Clerk of Court:

Enclosed please find a copy of my Post-conviction Relief application; Attachment A-T and Appendix or Record on Appeal Pages 1-901.

Please clock-in these documents and return a copy of the PCR application and Attachments A-T back to me as soon as possible.

Thank you!


Dennis M. Temple # 274802
Lee Corr. Inst FLA-2154
990 Wisacky Highway
Bishopville, SC 29010

September 14, 2020

IN THE COURT OF COMMON PLEAS

County of OconeeDennis Maurice Temple

Plaintiff(s)

2020 SEP 18

FII 4: 47 2020

-CP- 37 - 695

vs.

State of South Carolina

Defendant(s)

Submitted By: Dennis Maurice TempleAddress: Lee Correctional Institution F6A-2154990 Wisacky HighwayBishopville, South Carolina 29010

SC Bar #:

Telephone #:

Fax #:

Other:

E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Constructions (100) ☐ Debt Collection (110) ☐ General (130) ☐ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20 -NI- ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☒ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstate Drv. License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture-Petition (840) ☐ Forfeiture-Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights Application (760) ☐ Confession of Judgment (770) ☐ Petition for Workers Compensation Settlement Approval (780) ☐ Other (799)	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970) ☐ Public Service Comm. (990) ☐ Employment Security Comm (991) ☐ Other (999)
Special/Complex/Other ☐ Environmental (600) ☐ Automobile Arb. (610) ☐ Medical (620) ☐ Other (699) ☐ Sexual Predator ☐ Permanent Restraining Order (680)	☒ Pharmaceuticals (630) ☐ Unfair Trade Practices (640) ☐ Out-of State Depositions (650) ☐ Motion to Quash Subpoena in an Out-of-County Action (660) ☐ Pre-Suit Discovery (670)		

Copies To:

Atty (P) ☒ (D) ☒

Dss Other

Mailed ☒ Boxed ☐ Handed ☐

September 18, 2020

Date:

Submitting Party Signature: Dennis M Temple

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCF, Rule 11, and the South Carolina Frivolous Civil Proceedings Statute, S.C. Code Ann. §15-36-10 et. seq.



The Supreme Court of South Carolina

PATRICIA A. HOWARD
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211

1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1080

FAX: (803) 734-1499

www.sccourts.org

January 07, 2022

The Honorable Melissa C. Burton
PO Box 678
Walhalla SC 29691-0678

REMITTITUR

Re: Dennis Temple v. State
Lower Court Case No. 2020CP3700695
Appellate Case No. 2021-001479

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

A handwritten signature in cursive script, reading "Brenda F. Shealy".

CHIEF DEPUTY CLERK

cc: Lillian Loch Meadows, Esquire
Mr. Dennis Temple, 274802

The Supreme Court of South Carolina

Dennis Temple, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2021-001479

ORDER

Petitioner has filed a notice of appeal from the circuit court's order, which dismissed Petitioner's post-conviction relief action based upon the circuit court's determination that the action is barred as being successive and untimely under the statute of limitations. In his explanation pursuant to Rule 243(c), SCACR, Petitioner has failed to show that there is an arguable basis for asserting the circuit court's determination was improper. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.



FOR THE COURT

C.J.

Columbia, South Carolina

December 22, 2021

cc:

Lillian Loch Meadows, Esquire

Dennis Temple, 274802

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS
HONORABLE R. LAWTON MCINTOSH, CHIEF ADMINISTRATIVE JUDGE

CASE NO. 2020-CP-37-0695

Dennis M. Temple, SCDC # 274802

Appellant,

V.

State of South Carolina,

Respondent,

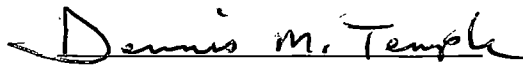
NOTICE OF APPEAL

Dennis M. Temple appeals the Final Order of Dismissal of the Chief Administrative Judge of Oconee, and Anderson County R. Lawton McIntosh dated November 17, 2021 and filed on November 22, 2021. Appellant received written Notice of entry of this Final Order of dismissal on December 1, 2021.

Lillian L. Meadows, AAG,
office of the Attorney General
Post Office Box
1549, Columbia, South Carolina

Bishopville, South Carolina

December 14, 2021


Dennis M. Temple, SCDC # 274802
Lee Correctional Institution F6A-2154
990 Wisacky Highway
Bishopville, South Carolina 29010

RECEIVED

DEC 16 2021

S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

2021 NOV 23

P 1:40

Dennis Maurice Temple, SCDC #274802,

Case No. 2020-CP-37-0695

Applicant,

v.

FINAL ORDER OF DISMISSAL

State of South Carolina,

Respondent.

This matter comes before the Court by way of a post-conviction relief (PCR) action commenced by Dennis Maurice Temple (Applicant) on January 18, 2020. The State made its return on September 14, 2021, requesting the action be summarily dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; for failing to state a cognizable claim under the PCR Act, and because continued litigation by Applicant frustrates the need for finality of litigation.

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 signed September 21, 2021, and filed September 23, 2021, 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 an affidavit of service dated October 7, 2021, serving the above-mentioned conditional order of dismissal on Applicant.

On October 4, 2021, Applicant filed a motion requesting a thirty-day extension in which to file a response to the conditional order of dismissal. He subsequently filed a response on October

Copies to:

Atty (P) Temple (D) Muddons
BGS other
Boxed handed

Page 1 of 5

2020-CP-37-0695

aw
COMPUTER

27, 2021. In his response, Applicant contends the following five claims raise a genuine issue of material fact regarding the timeliness of the action, successiveness of the action, whether it is barred by *res judicata*, and whether he raises a cognizable claim under the PCR Act (verbatim):

1. In this present case, first we notice that the record shows that applicant has been on six different appeals in five different courts and one after the other with no lapse or pause in between these appeals, see. record; Statute of limitation, S.C. Code § Ann. 17-27-45(A)(C) applies in this case. Specifically applicant received a remittitur from second Federal Habeas Corpus petition.
2. The Second events we notice, it appears on the record that during applicant First PCR action he filed a Motion to Amendments PCR application on October 31, 2013, including adding a "Ineffective Assistance of Counsels" claim which was accepted by the PCR court. Also, Applicant filed Schmerber hearing claim. However, PCR Court never issued any findings of facts and conclusions of law regarding applicant ineffective assistance of counsels claim against Sarah Drawdy and Keith Denny. App. 884- 893.
3. The third relevant events that we notice in this case, in the PCR hearing. The applicant stated on the record that Sarah Drawdy and Keith Denny represented him in a July 16, 2010 Preliminary Hearing at the Oconee County Magistrate Court, (quoting..."If Sarah Drawdy and Keith Denny were his lawyers and the State presented their probable cause for arresting me and they never objected and stated specifically the reason for the objection in presenting the evidence, what the law applies to the situation, they was ineffective." App. 858. 1. 17.
4. The fourth, event we noticed in the record was the State admitted in the PCR hearing that Applicant July 16, 2010 preliminary hearing does not exist, but the record clearly and convincingly show a preliminary hearing occurred on July 16, 2010, but was covered up or not transcribed. App. 869 1. 15 -App. 8701.15.
5. For a fifth defense, it appear on the record that prior to applicant's Jury trial on September 14, 2010, another hearing was held before the Judge J. Cordell Maddox. Jr. App. 30. Lindsey Simmons appeared on behalf of the State, and Applicant (Dennis Temple) appeared pro se.¹

Applicant then claims the first PCR court denied him a full and fair opportunity to present his claims of ineffective assistance of counsel against Sarah Drawdy and Keith Denny, which he framed in the instant PCR application as a claim of ineffective assistance of PCR counsel. He

¹ Applicant then quotes "App. 32 1. 1-25 -App. 33 1. 1-3."

further states that his motion for a new trial is not untimely because "the State of South Carolina notified Applicant in the July 28, 2014 PCR hearing that the [preliminary hearing] transcript did not exist, 1 year and 10 months after direct appeal."

This Court disagrees with Applicant's first claim that the instant action is timely. The statute of limitations for filing a PCR action begins to run "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(A) (emphasis added). Any pending litigation in federal court has no effect on the timeliness of a post-conviction relief action. To the extent Applicant contends the purportedly missing preliminary hearing transcript constitutes newly-discovered evidence, "the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." S.C. Code Ann. § 17-27-45(C). Thus, any allegation regarding the preliminary hearing transcript should have been brought on or before July 29, 2015. This Court would further note that a motion for a new trial pursuant to Rule 29, SCR CrimP, must be filed in the Court of General Sessions. The remaining claims are successive and barred by *res judicata*, as thoroughly addressed in the conditional order of dismissal.

Finally, this Court would note that Applicant's claims regarding PCR counsel's failure to file a 59(e) motion in his first PCR action are meritless. Our Supreme Court, upon review of the decision of a lower court in a post-conviction relief action, has the power to set aside procedural bars based on issue preservation and remand for further proceedings where dismissal would be fundamentally contrary to the interests of justice. *See, e.g., Simmons v. State*, 416 S.C. 584, 788 S.E.2d 220 (2016). In fact, the Court has consistently vacated and remanded PCR judgments that

do not contain sufficient findings on issues presented. *E.g.*, *Bryson v. State*, 328 S.C. 236, 493 S.E.2d 500, 500 (S.C. 1997); *McCullough v. State*, 320 S.C. 270, 464 S.E.2d 340, 340 (S.C. 1995); *Pruitt v. State*, 310 S.C. 254, 423 S.E.2d 127 (S.C. 1992); *McCray v. State*, 305 S.C. 329, 408 S.E.2d 241 (S.C. 1991); *Fishburne v. State*, 427 S.C. 505, 517, 832 S.E.2d 584, 590 (2019). The Supreme Court clearly could have done so in Applicant's case had the order been insufficient for purposes of certiorari review or inconsistent with Judge Dickson's rulings reflected in the record. The Court did not do so in Applicant's case. Thus, it is clear Applicant enjoyed a complete adjudication on the merits of her original application—"one full bite at the apple."

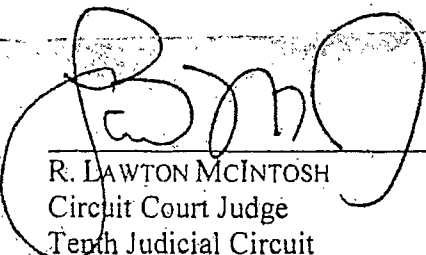
Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing that she is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such a showing based on the information set forth in his response, and therefore he is not entitled to an evidentiary hearing in this matter. Accordingly, this Court finds no reason why the conditional order of dismissal should not become final.

This Court reasserts its finding in the conditional order of dismissal that the current PCR application must be dismissed because it was filed after the statute of limitations had expired; it is successive to Applicant's prior PCR actions; it is barred by the doctrine of *res judicata*; for failing to state a cognizable claim under the PCR Act, and because continued litigation by Applicant frustrates the need for finality of litigation.

IT IS THEREFORE ORDERED that for the reasons set forth in the 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 17 day of November, 2021.


R. LAWTON MCINTOSH
Circuit Court Judge
Tenth Judicial Circuit

Anderson South Carolina

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CLERK OF COURT
OCCONEE COUNTY, SC

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