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S.C. SUPREME COURT

**THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

**CERTIORARI-PCR
APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
Honorable J. Cordell Maddox, Jr., Circuit Court Judge**

**Case № 2025- 000871
Lower Case 2021CP3203337**

APPENDIX

James Curtis Cobbert, III Petitioner,

vs.

The State of South Carolina, ... Respondent.

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SC Bar No. 6188**

Attorney for Petitioner

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FORM 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

County of Lexington

James Curtis Cobbett III

Full name and prison number (if any) of Applicant

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2021CP3203337

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

Kershaw CI

2. Name and location of Court which imposed sentence

Lexington Co

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

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

(a) 2006-GS-32-1445

(b) 2006-GS-32-1447

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

2021 OCT 14 AM 9:50

FILED

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 2008 Oct 16, 10y
- (b) 2008 Oct 16, 25y
- (c) _____
6. Check whether a finding of guilty was made:
- (a) ☒ after a plea of guilty
- (b) ☐ after a plea of not guilty
- (c) ☐ after a plea of nolo contendere
7. Did you appeal from the judgment of conviction or the imposition of sentence? YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. PCR
- ii. South Carolina Supreme
- iii. District Court of South Carolina
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. Denied
- iii. Denied
- (c) the date of each such result:
- i. Nov 29, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Unconstitutional Statute
- (b) Ex post Facto
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Sentencing and characterization is in conflict with Federal Law
- (b) Applied law to case that wasn't law at the time of committed
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? 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? No
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. PCR
- ii. South Carolina supreme court
- iii. South Carolina district court
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

No

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

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

(a) _____
(b) _____
(c) _____

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

(a) your arraignment and plea? Yes
(b) your trial, if any? _____
(c) your sentencing? Yes
(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

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. Elizabeth Fullwood Lexington Public Defender
ii. _____
iii. _____
(b) the proceedings at which each such attorney represented you:
i. Plea arraignment
ii. _____
iii. _____

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

Sentence vacated

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

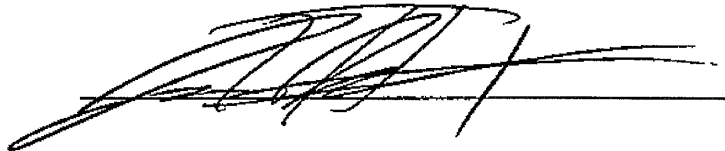
No

STATE OF SOUTH CAROLINA)

County of Lexington)

VERIFICATION

I, James Curtis Cobbett III, 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.



SWORN to and subscribed before me this 7th
day of October, 2021.

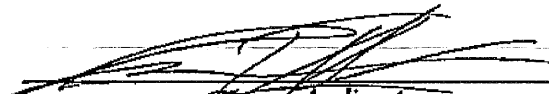
Cathrine A. Amos (L.S.)
Notary Public

My Commission Expires: 1-22-2029

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

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

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.


Applicant

SWORN or affirmed to and subscribed before me this
7th day of October, 2021.

Caroline A. Amos
Notary Public

My Commission Expires: 1-22-2029

FILED
FORM 5

2023 AUG 16 PM 2: 54

STATE OF SOUTH CAROLINA

LISA M. COMER
CLERK OF COURT
LEXINGTON SC

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

James Cobbert, SCDC № 00293798

2021-CP-32-03337

v.

AMMENDED
APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

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: Tuberville Correctional Institution, 1578 Clarence Coker Hwy,
Tuberville, SC 29162
2. Name and location of Court which imposed sentence: Lexington County Court of
General Sessions, Lexington, SC

Revised 3/2003

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) 2006-GS-32-1445
 - (b) 2006-GS-32-1447
 - (c)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) October 16, 2008, 10 years
 - (b) October 16, 2008, 25 years, consecutive to 10 year sentence
 - (c)
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ☒ X
 - (b) after a plea of not guilty ☐ ____
 - (c) after a plea of nolo contendere ☐ ____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
No
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
 - i. N/A
 - ii. ____
 - iii. ____
 - (b) the result in each such Court to which you appealed:
 - i. N/A
 - ii. ____
 - iii. ____
 - (c) the date of each such result:
 - i. N/A
 - ii. ____
 - iii. ____
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:

Revised 3/2003

i. N/A

ii. /

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) Did not know of any benefit of appealing at that time. No objections were raised as to my sentence.

(b)

(c)

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

(a) The consecutive sentences on the two charges violated the double jeopardy provisions of the Article I, § 12 of the Constitution of the State of South Carolina and the Fifth Amendment to the Constitution of the United States of America.

(b)

(c)

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

(a) At my sentencing, Judge William P. Keesley sentenced me to 10 years in prison for reckless homicide and 25 years in prison for failure to stop for a blue light resulting in death. The 25 year sentence was consecutive to the 10 year sentence. Both charges arise out of a single act of failing to stop for a blue light. My original Post Conviction Relief Petition was denied based upon *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997). On or about February 20, 2023, I learned that *Easler* had been overturned in *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018). This case represented a change in the law as to the issue of double jeopardy. I was not aware of this decision prior to February of 2023.

(b)

(c)

(d)

Revised 3/2003

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? No
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. Post Conviction Relief Petition
 - ii. 18 USC § 2254 habeas corpus petition
 - iii. —
 - iv. —
 - (b) the name and location of the Court in which each was filed:
 - i. Lexington Court of Common Pleas, Lexington, SC
 - ii. United States District Court for the District of South Carolina, Anderson Division
 - iii. —
 - iv. —
 - (c) the disposition thereof:
 - i. Denied
 - ii. Denied
 - iii. —
 - iv. —
 - (d) the date of each such disposition:
 - i. January 18, 2012
 - ii. September 2, 2015
 - iii. —
 - iv. —
 - (e) if known, citations of any written opinions or orders entered pursuant to each such

Revised 3/2003

disposition:

- i. Court of Common Pleas opinion was not published
- ii. 2015 WL 5158976
- iii. _____
- iv. _____

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

Yes

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

(a) which grounds have been presented:

- i. The issue as to double jeopardy
- ii. The issue as to double jeopardy
- iii. _____

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

- i. In the application for Post Conviction Relief
- ii. In the 18 USC § 2254 petition
- iii. _____

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

(a) N/A

(b)

(c)

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? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or

applications with respect to this conviction, which you filed? Yes

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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. Elizabeth Fullwood and Wallis Alves, of the Lexington County Public Defender's Office, 204 East Main St., Lexington, SC 29072
 - ii. Ronald Hall, 791 Greenlawn Dr., Suite 4, Columbia, SC 29209
 - iii. C. Rauch Wise
305 Main Street
Greenwood, SC 29646
 - (b) the proceedings at which each such attorney represented you:
 - i. Initial plea, pretrial motions and sentencing
 - ii. The Post Conviction Relief Hearing
 - iii. Preparation of this application for Post Conviction Relief
19. State clearly the relief you seek in filing this application:
Dismissal of the reckless homicide or the failure to stop for a blue light charges
20. Are you now under sentence from any other court that you have not challenged?
No

STATE OF SOUTH CAROLINA

VERIFICATION

County of Clarendon

I, James Cobbert, 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.

James Cobbert

SWORN to and subscribed before me this 07
day of August, 2023.

Bridget Julian Durno (L.S.)
Notary Public for South Carolina

My Commission Expires: March 15, 2031

Revised 3/2003

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2024 MAR -7 AM 9:08 FOR THE ELEVENTH JUDICIAL CIRCUIT

LISA M. COMER
CLERK OF COURT
JAMES CURTIS COBBERT, III, SCDC #293728-01 SC Case No. 2021-CP-32-3337

Applicant,

v.

RETURN AND MOTION TO DISMISS
(Retained Counsel)

State of South Carolina,

Respondent.

The Respondent State of South Carolina makes a Return to the original and amend application for post-conviction relief filed by James Curtis Cobbert, III (Applicant) on October 14, 2021 and amended on August 16, 2023. The Applicant is represented in these proceeding by C. Rauch Wise of the South Carolina Bar.

The Respondent makes a Motion to Dismiss because the Application untimely and successive to the initial PCR action Cobbert v. State, 2009-CP-32-0127 and the earlier federal habeas corpus action Cobbert v. Stevenson, No. 8:14-3331-TMC (D.S.C. Aug. 4, 2015) which both addressed on the merits the underlying federal constitutional claim of double jeopardy related to the convictions and sentences for reckless homicide (2006-GS-32-1445) and failure to stop for law enforcement vehicle, blue light resulting in death (2006-GS-32-1447). AS shown below, the Applicant contends that he is entitled to a second PCR application because the Supreme Court decision in State v. Greene, 423 S.C. 263, 814 S.E;2d 496 (2018). However, Greene has no impact on the Applicants' conviction or sentences and does not have retroactive effect, further, his filing is still untimely since Greene was decided over one year before his application was filed on October 14, 2021. Respondent would show this Court the following:

ALLEGATIONS

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) "Unconstitutional Statute"

- a. "Sentencing and characterization is in conflict with federal law."

2) "Ex Post Facto"

- a. "Applied law to case that wasn't law at the time of [sic] committed.

In the August 16, 2023 amended application, through counsel, the applicant alleges:

I. The consecutive sentences on the two charges violated the double jeopardy clause of Article I, §12 of the Constitution of the State of South Carolina and the Fifth Amendment of the Constitution of the United States of America.

- a. At my sentencing, Judge William P. Keesley sentenced me to 10 years in prison for reckless homicide and 25 years in prison for failure to stop for a blue light resulting in death. The 25 year sentence was consecutive to the 10 year sentence. Both charges arise out of a single act of failing to stop for a blue light. My original Post Conviction Relief Petition was denied based upon State v. Easier, 327 S.C. 121, 489 S.E.2d 617 (1997). On or about February 20, 2023, I learned that Easier had been overturned in State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). This case represented a change in the law as to the issue of double jeopardy. I was not aware of this decision prior to February of 2023.

The Respondent would show this Court the following:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on February 17, 2006, following an investigation into a traffic stop and subsequent high speed vehicle chase that ended in a fatal crash. During its May 2006 term, the Lexington County Grand Jury indicted Applicant for reckless homicide (2006-GS-32-1445) and failure to stop for law enforcement vehicle, blue light resulting in death (2006-GS-32-1447).

On October 16, 2008, Applicant appeared before the Honorable William P. Keesley and pleaded guilty to as indicted.¹ The State withdrew the Aiken County common law robbery warrant and allowed Applicant to plea to shoplifting in exchange for Applicant's plea. Elizabeth Fullwood and Wallis Alves, Esquires (collectively Counsel) represented Applicant. Assistant Solicitor Shawn Graham, prosecuted the case.

Without negotiations or recommendations, Judge Keesley sentenced Applicant to ten years' imprisonment for reckless homicide, a concurrent term of five years' imprisonment for shoplifting, and a consecutive term of twenty-five years' imprisonment for failure to stop for blue light resulting in death. No direct appeal was filed.²

A. Initial PCR Action and Subsequent Appeal: 2009-CP-32-0127

On January 9, 2009, Applicant filed his first PCR action, raising the following grounds for relief (excerpted verbatim):

1. "Double Jeopardy"
 - a. "Sentenced twice for same offense (crime)!"
2. "Cruel and unusually [*sic*] punishment"
 - a. "Harsh lengthy sentence which is uncommon for crime!"
3. "Involuntary Guilty Plea"
 - a. "Plea was entered under false pretense!"

Applicant subsequently amended his application. The State requested an evidentiary hearing through its return filed on December 16, 2009. On November 29, 2011, the PCR court convened an evidentiary hearing before the Honorable Edward W. Miller. Applicant was present

¹ Thereafter, Applicant waived presentment to the grand jury on an Aiken County indictment for shoplifting (2008-GS-02-1678); waived jurisdiction and venues issues related to Aiken County; and pled guilty to shoplifting.

² Applicant contended in an earlier proceeding that he sent a letter to his lawyer to file an appeal; however, the State has no record that a direct appeal was ever filed in this matter. It was the subject of the earlier PCR appeal in Cobbett v. State, 2009-CP-32-0127.

at the hearing and represented by Ronald R. Hall, Esquire. Assistant Attorney General Kaelon E. May appeared on behalf of the State. Applicant testified on his own behalf. The State presented testimony from Applicant's plea counsel, Elizabeth Fullwood. By order signed January 18, 2012, and filed January 23, 2012, Judge Miller denied the application on all grounds and dismissed the action with prejudice.

Pertinent to this proceeding, Judge Miller ordered and dismissed the following ground:

c. Failure to Object to Sentence Based on Double Jeopardy

Applicant asserts that plea counsel was ineffective for failing to object to Applicant's sentence because Applicant's plea to Reckless Homicide and Failure to Stop for a Blue Light resulted in Double Jeopardy. This Court finds that this allegation is without merit. Counsel testified that in her review of the Applicant's indictments and the elements of offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. This Court agrees with plea counsel. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses. State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996). This Court has reviewed the entire record and does not find that Applicant's plea to the charges placed Applicant in double jeopardy. This Court finds Applicant has failed to show plea counsel's performance was deficient or any resulting prejudice; therefore counsel was not ineffective for failing to object to Applicant's sentence based on double jeopardy. This Court finds that this allegation is denied and dismissed.

Cobbett v. State, 2009-CP-32-0127, Order of Dismissal, (Hon. Edward Miller, January 18, 2021.(p. 10-11).

Applicant filed a timely notice of appeal. Appellate Defender Robert M. Pachak perfected Applicant's appeal by filing a petition for writ of certiorari with the Supreme Court, raising the following issue:

Whether plea counsel was ineffective for failing to file an appeal on the issue of whether Petitioner's guilty plea complied with the mandates set forth in *Boykin v. Alabama*?

On September 26, 2012 our Supreme Court, in response to a letter from Applicant, relieved appellate counsel and allowed Applicant to proceed *pro se*. Further, our Supreme Court informed Applicant that the petition for writ of certiorari was being treated as withdrawn and he had thirty days to submit a *pro se* petition for writ of certiorari.

On October 16, 2012, Applicant filed a *pro se* petition for writ of certiorari with our Supreme Court, raising the following issue:

Whether plea counsel was ineffective for failing to object to the failure to stop for blue lights result/death charge, after Petitioner had already plead to reckless homicide?

The case was subsequently transferred to the Court of Appeals.

The Respondent, through Assistant Attorney General Walt Whitmire made a Return to the petition. In the Return, the State asserted:

Petitioner failed to prove he would have refrained from pleading guilty if counsel was not ineffective in advising him of the alleged double jeopardy violation or objecting to an alleged double jeopardy violation. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932). Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses. State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996).

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) is instructive to the present case. Easler was convicted for Felony DUI and Reckless Homicide [S.C. Code Ann. Section 56-5-2910] and appealed alleging the convictions constituted a double jeopardy violation. Id. at 132, 489 S.E.2d at 623. The South Carolina Supreme Court employed the Blockburger test and found Easler's allegation lacked merit. The Easler Court stated, "This Court has held that reckless homicide is not a lesser included offense of felony DUI causing death, as felony DUI does not require proof of recklessness. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). *See also State v. Carter*, 291 S.C. 385, 353 S.E.2d 875 (1987) (recognizing that a defendant may be convicted of both offenses in one trial). Id. at 132-33, 489 S.E. at 623-24 (1997).

Applying Easler, Petitioner's argument similarly fails a Blockburger analysis. Simply, "recklessness" is not an element of the Failure to Stop for a Blue Light Resulting in Death or Serious Bodily Injury offense. *See* S.C. Code Ann. § 56-5-750(C)(2). Therefore, Petitioner failed to prove his guilty plea was entered involuntarily pursuant to ineffective assistance of counsel.

Cobbett v. State, Return to Petition for Writ of Certiorari, p. 7-8.

On June 24, 2014, the Court of Appeal issued an order summarily denying Applicant's petition. The case was remitted back to the circuit court on July 11, 2014.

B. Initial Federal Habeas Corpus Action: 8:14-3331-TMC-JDA

On August 13, 2014, Applicant filed a *pro se* 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 Cobbett v. Stevenson*, No. 8:14-3331-TMC-JDA. Applicant raised the following allegations in his *pro se* petition (verbatim):

1. "Ineffective assistance of counsel/Double Jeopardy. Plea counsel was ineffective for allowing Petitioner to plea to a double Jeopardy violation. Which violates Petitioner's 5th Amendment and 6th Amendment of the United States Constitution"
 - a. "Under the Blockburger Test, state cannot prosecute for both offenses of reckless homicide and failure to stop for blue lights resulting in death; Double Jeopardy."

Subsequently, on February 27, 2015, Applicant filed an amended petition

clarifying his issue as follows:

1. "Ineffective assistance of counsel. Based on the double jeopardy clause, plea counsel was ineffective for allowing Petitioner to plea to a double jeopardy violation. Which violates Petitioner's 5th and 6th Amendment of the United States Constitution."
 - a. "Under the Blockburger Test, State cannot prosecute for both offenses of Reckless Homicide and Failure to stop for blue lights resulting in death, therefore resulting in double jeopardy."

Respondent filed a return and motion for summary judgment on December 3, 2014.³ In response to Applicant's amended petition, Respondent filed an amended return and motion for summary judgment on March 6, 2015.

On July 13, 2015, the Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued a report and recommendation that Respondent's motion for summary judgment be granted. Applicant filed objections to the R&R on July 30, 2015.

On August 4, 2015, the Honorable Timothy M. Cain, United States District Judge, 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. *Cobbett v. Stevenson*, No. 8:14-3331-TMC (D.S.C. Aug. 4, 2015).

In particular, Judge Cain addressed the double jeopardy claim in the following manner:

The magistrate judge discussed the two offenses to which Petitioner pled—reckless homicide and failure to stop for a blue light resulting in death—and concluded that each offense has a unique element of proof. Therefore, the magistrate judge found that the PCR court's denial of PCR was neither contrary to, nor an unreasonable application of, Supreme Court precedent. (Report at 19).

In his objections, Petitioner sets out three separate objections. However, in his first two objections, Petitioner raises basically the same issue—that the PCR

³ In the Return to the District Court the Respondent made a similar argument to what was raised in the PCR Appeal Certiorari Return. However, the State added the following language.

court impermissible relied on trial counsel's testimony that, in her opinion, there was not a double jeopardy violation rather than conducting his own *Blockburger* analysis. In his third objection, Petitioner contends that the offenses have the same elements under *Blockburger*. The court notes that Petitioner raises numerous other claims regarding trial counsel's representation. (Objections at 15–18). However, in his petition, he raises only that trial counsel was ineffective for allowing him to plead guilty to two offenses in violation of the double jeopardy clause, and therefore this is the only ground properly before the court. See *United States v. Humphreys*, 194 F.3d 1306, 1306 (4th Cir.1999) (rejecting the appellant's argument “that the district court abused its discretion when it refused to consider an ineffective assistance of counsel claim [the petitioner] raised for the first time in his objections to the magistrate judge's recommendation”); *Kelley v. Bollinger*, C/A No. 8:12–CV–03008–JMC, 2013 WL 4460155, at *2 (D.S.C.Aug.15, 2013) (declining to address a new ground upon which the petitioner sought habeas relief because the ground—an ineffective assistance claim—was raised for the first time in the petitioner's objections to the magistrate's report).⁴

As to Petitioner's objection that the PCR court impermissibly relied on trial counsel's opinion in finding no double jeopardy violation, the court finds this objection to be without merit. The PCR court did not rely on trial court's opinion. The PCR court set out trial counsel's opinion and then stated that he agreed with her—not because she opined there was no violation, but because he also found none. In his third objection, Petitioner contends that the elements of the two offenses to which he plead guilty are the same. The court disagrees.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections. “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 715 (1969) (footnotes omitted). Only the third guarantee—prohibiting multiple punishments for the same offense—is implicated here.

It is well-established that “a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.” *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); see also *United States v. Shavers*, 820 F.2d 1375 (4th Cir.1987). Applying the *Blockburger* test to a claim of double jeopardy involving multiple conspiracies, the Supreme Court concluded that conspiracy to import marijuana and conspiracy to distribute marijuana did not proscribe the same offense because each crime “‘require[d] proof of a fact [that] the other does not.’” *Albernaz v. United States*, 450 U.S. 333, 339, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (quoting *Blockburger*, 284 U.S. at 304). Further, the Supreme Court has concluded that “cumulative punishments can presumptively be

assessed after conviction for two offenses that are not the 'same' under Blockburger." *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)).

Here, Petitioner pled guilty to reckless homicide and failure to stop for a blue light resulting in death. In South Carolina, "[w]hen the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless homicide...." S.C.Code Ann. § 56-5-2910(A). Reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim; and (4) within three years, the victim died as a result of these injuries. *State v. Horton*, 359 S.C. 555, 598 S.E.2d 279 (S.C.2004) (citing ¹ *State v. Watson*, 349 S.C. 372, 563 S.E.2d 336 (S.C.2002)).

The offense of failure to stop a motor vehicle when signaled by law enforcement vehicle is codified in S.C.Code Ann. § 56-5-750. This section provides

(A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

...

(C) A person who violates the provisions of subsection (A) and when driving performs an act forbidden by law or neglects a duty imposed by law in the driving of the vehicle:

(1) where great bodily injury resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years; or

(2) where death resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty-five years.

S.C.Code Ann. § 56-5-750.

Failure to stop for a blue light resulting in death requires proof of the following elements: (1) that the defendant was driving a motor vehicle; (2) that he was driving it on a road, street, or highway of the State; (3) that he was signaled to stop by a law enforcement vehicle by means of a siren or flashing light; and (4) that he did not stop. See *United States v. James*, 337 F.3d 387 (4th Cir.2003) (citing

State v. Hoffman, 257 S.C. 461, 186 S.E.2d 421 (S.C.1972). Petitioner argues that a person cannot commit the offense of failure to stop for a blue light without operating his vehicle in a reckless manner. (Objections at 20). Further, he argues that to act recklessly, one must be aware of his conduct and consciously disregard a risk. *Id.* However, the failure to stop for a blue light statute is a strict liability statute and it “explicitly criminalizes a broad swath of unintentional conduct.” *United States v. Rivers*, 595 F.3d 558, 565 (4th Cir.2010). And as Petitioner recognizes, reckless homicide requires a conscious disregard of a risk. As the magistrate judge found, these two offenses are distinct and clearly require the establishment of different elements.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the court finds Petitioner's objections are without merit. Accordingly, Respondent's Summary Judgment Motions (ECF Nos. 31 and 56) are **GRANTED**; and the Petition is **DISMISSED with prejudice**.

Cobbett v. Stevenson, No. CA 9:14-3331-TMC, 2015 WL 5158976, at *2-4 (D.S.C. Sept. 2, 2015), dismissed, 654 F. App'x 632 (4th Cir. 2016).

The Applicant made a pro se petition to appeal to the Fourth Circuit. The Court dismissed the appeal. Cobbett v. Stevenson, 654 F. App'x 632, 633 (4th Cir. 2016). On October 18, 2016, Applicant filed an untimely petition for rehearing *en banc*. The Court determined that Applicant's failure to file a timely petition was a result of an extraordinary circumstance wholly beyond his control and granted his motion to extend the filing time. After review of the petition for rehearing, the Court denied the petition by order issued December 2, 2016. An attempt to seek certiorari in the United States Supreme Court was denied as being out of time. Cobbett v. Stevenson, 582 U.S. 928, 137 S. Ct. 2319, 198 L. Ed. 2d 722 (2017).

C. Second Federal Habeas Corpus Action

Applicant filed a motion for an order authorizing the district court to consider a second or successive application for relief pursuant to 28 U.S.C. § 2244 in the United States Court of Appeals on May 25, 2018. On March 23, 2018, the Fourth Circuit issued an order denying Applicant's

motion to file a successive application. In RE: James Curtis Cobbert, III, Movant, No. 18-152, Order, (4th Cir. March 23, 2018)(

II. ATTACHMENTS

Attached to this return and incorporated by reference are:

1. State v. Cobbert, Guilty Plea Transcript.
2. Cobbert v. State, PCR Appendix.
3. Cobbert v. State, 2009-CP-32-0127, Order of Dismissal, (Hon. Edward Miller, January 18, 2021.
4. Cobbert v. State, Return to Petition for Writ of Certiorari.
5. Cobbert v. State, Order denying certiorari, S.C. Court of Appeals, June 24, 2014.
6. Cobbert v. Stevenson, No. CA 9:14-3331-TMC, 2015 WL 5158976, (D.S.C. Sept. 2, 2015)(Judge Timothy Cain).
7. Lexington County Clerk of Court records regarding the subject convictions.

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). *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 return in support of the motion for summary judgment, the State would respectfully show this Court:

A. Statute of Limitations

This action should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act⁴ (Act). Specifically, the 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

⁴ S.C. Code Ann. §§ 17-27-10 to -160.

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*, 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 pleaded guilty on October 16, 2008. This application was filed on October 14, 2021—almost *twelve 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

This action should further be summarily dismissed because it is successive to Applicant's previous PCR application. 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). Section 17-27-90 of the South Carolina Code 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.

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.”). 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 failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief actions; thus, these allegations are 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))). Applicant has failed to meet the burden imposed upon him, and this Court should summarily dismiss the application as successive to Applicant’s previous PCR action.

Here, the Applicant did raise before the state court whether his convictions and sentences violated the double jeopardy clause of the federal constitution. In the order of Judge Miller in his first PCR and in the Order of Federal District Cain they fully addressed the federal constitutional claim in denying relief.

The Applicant asserts some entitlement to a belated second application because of an intervening decision in State v. Greene, 423 S.C. 263, 814 S.E.2d 496 (2018). He contends now that because Greene overruled a decision that the Respondent cited in its Return to Certiorari, State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) that he is entitled to relief. However, a closer reading of Greene does not support the Applicant assertion. In Greene, the Court held to avoid double jeopardy, one homicide is limited to one homicide punishment per defendant, overruling State v. Easler, 327 S.C. 121, 489 S.E.2d 617. Greene involved convictions for homicide by child abuse and involuntary manslaughter. In its decision, the *Greene* Court stated:

This issue is presented to us in an unusual posture. While both homicide charges were properly presented to the jury, the jury was not instructed in accordance with Appellant’s proper request—Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges. The State erroneously contends both homicide

convictions and punishments should stand.

The flaw in the State's argument on appeal is best understood by reviewing its theory of criminal liability as the trial unfolded. After indicting Appellant on varying homicide charges (which as a matter of law could not be premised on one theory of liability), the State ultimately elected to pursue a single theory of liability—Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk—and the trial court instructed the jury, "That applies to each of the separate charges." The jury could have accepted Appellant's view of the evidence and found Appellant not guilty of homicide by child abuse. Specifically, the jury could have concluded the State failed to prove Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."⁷ In that scenario, the jury may have nevertheless found Appellant guilty of involuntary manslaughter.⁸ But the jury's guilty verdict on Count One in the indictment—homicide by child abuse—precluded a guilty verdict on the charged offense of involuntary manslaughter in Count Two. Thus, under these circumstances, a conviction and sentence for each homicide charge cannot stand.⁹

The situation here should be contrasted with a homicide that would properly fall within multiple homicide statutes. In that situation, a jury may properly return a guilty verdict on more than one homicide charge.

In *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997), this Court affirmed convictions and sentences for two homicide charges—felony driving under the influence causing death and reckless homicide—arising out of a motor vehicle accident that killed one person and seriously injured another. The evidence and theory of criminal liability satisfied the elements of both homicide statutes.

Easler, however, went further and affirmed multiple punishments for the single homicide committed by one defendant, and this was error. **We overrule *Easler* to the extent it authorizes multiple homicide punishments involving only one homicide.**

It is because of this rule—one homicide, one homicide punishment—that even were we to accept the State's argument that the involuntary manslaughter guilty verdict should stand, an additional sentence for Alexis's death could not stand. The fact that Appellant received a concurrent five-year sentence for involuntary manslaughter does not change the result. The concurrent sentence likely reflects the learned trial judge's inherent understanding that a consecutive sentence could not be imposed. Yet the conviction itself is considered a punishment and that, too, must be vacated. *Ball v. United States*, 470 U.S. 856, 864–65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) ("The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. ... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.").

State v. Greene, 423 S.C. 263, 282–84, 814 S.E.2d 496, 506–07 (2018).

First, Cobbert pled guilty to failure to stop for law enforcement and reckless homicide.

Unlike Greene, the legislative intent in the failure to stop for law enforcement clearly reveals a legislative intent for separate punishment to deter individuals from evading lawful stops on the highways. Additionally, as noted above, these matters are grounded in legislative intent to punish in the passage of the act. Unlike Easler and Greene, this is distinguishable and does not create a double jeopardy violation.

The Green ruling was based on an interpretation of legislative intent involving a state statute, with the court finding “no expression of legislative intent authorizing multiple homicide punishments for a single homicide committed by a single defendant” and “[a]s a result, absent legislative intent to the contrary”, it would follow the prevailing rule - “one homicide is limited to one homicide punishment per defendant.” See Greene, 814 S.E.2d at 505. In doing so, the Court specifically noted that it was overruling Easler “to the extent it authorizes multiple homicide punishments involving only one homicide.” Id. at 507.

However, even assuming Applicant may have been sentenced differently today after Greene, Applicant has not shown that the ruling in Greene applies retroactively to his case on post-conviction relief. See State v. Belcher, 685 S.E.2d 802, 811 (S.C. 2009) [retroactive application of new precedent does not extend to matters challenged on post-conviction relief]; see also Teague v. Lane, 489 U.S. 288 (1989); McDougall v. Dixon, 921 F.3d 518, 539 (4th Cir. 1990) [Not applying new rule retroactively on habeas review where new rule involved in validating sentencing regarding mitigating circumstances]. Therefore, this issue is without merit and should be dismissed.

IV. ALL OTHER CLAIMS

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

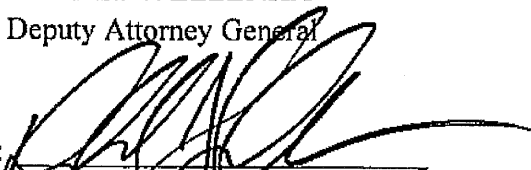
V. CONCLUSION

WHEREFORE, having made its return, the State moves to summarily dismiss the application because it was filed after the statute of limitations had expired and it is successive to Applicant's prior PCR actions.

Respectfully submitted,

ALAN WILSON
Attorney General

DONALD J. ZELENKA
Deputy Attorney General

By: 

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March 5, 2024

IN THE COURT OF COMMON PLEAS

2021-CP-32-3337

TRANSCRIPT OF RECORD

BEFORE:

APPEARANCES:

Donald Zelenka, Senior Assistant Deputy Attorney General

C. Rauch Wise, Esquire

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(NO EXHIBITS INTRODUCED DURING THIS HEARING)

1 THE COURT: The first matter we have is the case of
2 James Cobbert. Yes, sir.

3 MR. ZELENKA: Thank you, Your Honor. This is James
4 Curtis Cobbert v State of South Carolina, 2021-CP-32-3337.
5 This was an application filed on October 14, 2021 and
6 amended on August 16, 2023. The Applicant is represented by
7 Rauch Wise of the South Carolina Bar.

8 This matter concerns an incident on February 17, 2006,
9 which involved an investigation into a traffic stop and a
10 high speed vehicle chase that ended in a fatal crash.
11 During the May 2006 term, the Grand Jury indicted the
12 Applicant for reckless homicide and failure to stop for a
13 law enforcement vehicle blue light resulting in death. On
14 October 16, 2008, he appeared before Judge Keesley and plead
15 guilty as indicted. The State withdrew an Aiken Common Law
16 robbery warrant and allowed the Applicant to plea to
17 shoplifting also in exchange for his entry of the guilty
18 plea. Without negotiations or recommendations, Judge
19 Keesley sentenced the Applicant to 10 years imprisonment for
20 reckless homicide, a concurrent term of five years
21 imprisonment for shoplifting, and a consecutive term of 25
22 years imprisonment for failure to stop for blue light
23 resulting in death.

24 No direct appeal was filed. He had an initial
25 application for post-conviction relief in January 2009. At

1 that time, he raised an issue of double jeopardy that he
2 claimed he was sentenced twice for the same offense, cruel
3 and unusual punishment, and involuntary guilty plea. A
4 hearing was held in that matter in 2011 before Judge Miller.
5 And at that time, he was represented by Ronald Hall and the
6 AG's office was represented by Kaelon May. The Applicant
7 testified on his own behalf at that time. And the State
8 presented testimony from plea counsel, Elizabeth Fullwood.

9 In an order signed January 18, 2012 and filed January
10 23, 2012, Judge Miller denied the application on all
11 grounds. As I noted in our Return, pertinent to the issue
12 we're here before is Judge Miller addressed on the merits of
13 the failure to object to a sentence based upon double
14 jeopardy. And he found relying essentially on Blockburger
15 that the charge of failure to stop for a blue light
16 resulting in death and reckless homicide essentially
17 contained separate elements under the Blockburger test. And
18 therefore, there wasn't ineffective assistance of counsel in
19 failing to object to the convictions or sentencing at that
20 time.

21 The Applicant filed a timely notice of appeal from the
22 denial of post-conviction relief. Robert Pachak with the
23 Office of Appellate Defense filed a cert petition, at that
24 time, only asserting whether plea counsel was ineffective
25 for failing to file an appeal on the issue of the guilty

1 plea. The Applicant, based upon the manner that it was
2 filed, he filed a petition for writ of cert with the Supreme
3 Court in October 2012 asserting whether plea counsel was
4 ineffective for failing to object to the failure to stop for
5 blue light with death charge after he had already pled to
6 reckless homicide. It went to the Court of Appeals, and the
7 government made a return to that petition. And as we
8 asserted in our pleading, the State's position was, under
9 State v. Easler, it was instructive that the Blockburger
10 standard still apply. And applying to Easler, the argument
11 similarly failed a Blockburger test where recklessness is
12 not an element of failure to stop for a blue light resulting
13 in death. So therefore, they contained different elements
14 at that particular time.

15 The Court of Appeals summarily denied that petition for
16 writ of cert and it went before the Circuit Court. The
17 litigation history continues. The Applicant filed a federal
18 habeas corpus action on August 13, 2014 in a pro se petition
19 before the United States District Court for the District of
20 South Carolina, a copy of that. The relevant materials are
21 before you. That was Cobbert v. Stevenson,
22 8:14-3331-TMC-JDA. In that federal habeas petition, he again
23 raised ineffective assistance related to the double jeopardy
24 claim, claiming plea counsel was ineffective in failing to
25 assert that claim, and then he also clarified that issue.

1 The government filed a return motion for summary judgment
2 on December 3, 2014. And in response to the amended
3 petition that he filed, we filed an amended return motion
4 for summary judgment on March 6, 2015. Magistrate Judge
5 Austin made a report and recommendation that the State's
6 motion for summary judgment be granted. The Applicant filed
7 objections in 2015. And on August 4, 2015, United States
8 District Judge Timothy Cain issued his order adopting and
9 incorporating the report and recommendation of Judge Austin
10 by reference, granting the Respondent's motion for summary
11 judgment, dismissed the petition with prejudice, and denied
12 a certificate of appealability to the U.S. Court of Appeals
13 for the Fourth Circuit. And again, that was entered on
14 August 4, 2015.

15 Judge Cain addressed the double jeopardy issue before
16 the Court as set forth fully in our return, at page 7, 8, 9,
17 and 10, related directly to the double jeopardy claim,
18 finding essentially that the elements were different and
19 that therefore there was not a violation of the United
20 States Constitution double jeopardy claim, and therefore
21 supported the denial of relief and dismissed it with
22 prejudice. An appeal was attempted of that to the Fourth
23 Circuit Court of Appeals, and they dismissed the matter
24 summarily in the opinion cited at 654 Federal Appendix 632
25 in that pro se petition. And he attempted to seek cert to

1 the United States Supreme Court from the denial of that, and
2 the cert petition was denied as being done out of time.

3 It didn't stop there. He filed a second federal habeas
4 petition seeking an order in the Fourth Circuit Court of
5 Appeals authorizing the district court to consider a second
6 or successive application. In that matter, he did that on
7 May 25, 2018. And let me give a little explanation about
8 that, because that may be a little confusing to the Court.
9 Under 28 U.S.C. 2254, for an individual to file a second or
10 successive application, there is no jurisdictional authority
11 for that matter to be presented to the United States
12 District Court. They are required, as essentially a
13 gatekeeper, to file it in the U.S. Court of Appeals for the
14 Fourth Circuit, and the Fourth Circuit will then decide
15 whether they're going to grant the authority to the
16 Applicant to file a second or subsequent federal habeas
17 corpus petition raising claims. And there's a very high
18 burden on an applicant, be it pro se or otherwise, to file
19 that particular matter.

20 Nevertheless, on March 23, 2018, in *In re James Curtis*
21 *Colbert, III.*, at docket number 18-152, the Fourth Circuit
22 denied the authority to file a second or subsequent
23 application on these matters. And we've listed in the
24 return the matters that are before you, including
25 particularly the PCR appendix, which necessarily includes

1 the state court matters.

2 We've got a motion to dismiss that's before the court,
3 and I've raised in that motion in our return earlier this
4 month a number of claims. The first one is that the filing
5 of this second or subsequent application in this Court is a
6 violation of the statute of limitations. It's more than a
7 year after his application became final, and that's under
8 South Carolina Code Section 17-27-70 of the court, that
9 there is no genuine material of fact that would authorize
10 this. And again, I would also cite to you Rule 71.1(d) of
11 the federal rule -- excuse me, the South Carolina Rules of
12 Civil Procedure, in making our particular return. The
13 statute of limitations is 17-27-45 (a) through (c), and we
14 would submit he's failed to make those time concerns.

15 Now, my assumption is the Applicant will try to claim
16 that, in fact, that he fits under 17-27-45(b). And (b) of
17 that statute sets up -- which is set out at page 12 of our
18 return, "When a court whose decisions are binding upon the
19 Supreme Court of this state, or the Supreme Court of this
20 state holds that the Constitution of the United States, or
21 the Constitution of South Carolina, or both, impose upon the
22 state criminal proceedings a subsequent standard not
23 previously recognized, or a right not in existence at the
24 time of the state court trial. And if that standard or
25 right is intended to be applied retroactively, an

1 application under the chapter may be filed not later than
2 one year after the date upon which that standard or right
3 was determined to exist." Now, we would assert that they
4 failed to do that.

5 He pleaded guilty on October 16, 2008, and therefore
6 more than a year had passed before he filed his application
7 on October 14, 2021. We would also assert that the matter
8 is successive. But before we go to that, I would point out
9 that in their pleadings, they're essentially relying upon
10 State v Stephanie Green, which I provided you a copy of.
11 The Green decision was May 23, 2018. This application was
12 filed on October 14, 2021, which is more than a year after
13 the Green case was decided, if that even is applicable to
14 this particular proceeding, which I'll have a further
15 argument on that.

16 Second, I'll assert that the matter must be dismissed
17 because it is a successive application. And upon that, I'll
18 rely upon Foxworth v State, a 1981 decision, and Arnold v
19 State, a 1992 decision, as well as Section 17-27-90 of the
20 Uniform Post-Conviction Relief Act, which requires all
21 matters to be presented in an initial application and any
22 ground finally adjudicated cannot be raised or presented in
23 a subsequent application unless there is sufficient reason
24 for not having asserted it or inadequately asserting it
25 previously. And I would submit that they failed in their

1 burden upon that.

2 The Applicant, in the Foxworth case, is particularly
3 important because in Foxworth, the individual had not even
4 raised the matter in a State post-conviction relief
5 petition, but he raised it in a federal habeas corpus
6 action. And the Supreme Court said basically the issue was
7 finally decided or firmly decided on the merits in a federal
8 habeas petition cannot be asserted or reasserted for the
9 first time in a State PCR action. And as I noted
10 previously, the double jeopardy claim was finally
11 adjudicated in the federal habeas corpus proceedings in
12 2014.

13 By reading the Applicant's petition as well as -- and I
14 will assert clearly, Judge Miller's order addressed the
15 merits of the federal constitutional claim. He claims he's
16 entitled to a second application because of State v Green.
17 And in State v Green, the South Carolina Supreme Court, in a
18 case involving homicide by child abuse, made a determination
19 essentially that it was overruling State v Easler. Easler
20 was a case that it wasn't cited by Judge Miller in his
21 order, but it was cited by the government in their return to
22 the petition for writ of habeas corpus. In the return that
23 was made at that time, the petition, which was summarily
24 dismissed, it wasn't granted, it didn't go to an opinion by
25 a particular court at that time. It was simply a denial of

1 cert, which respectively, as we are all aware, is not
2 necessarily a conclusion on the merits of the law of the
3 case. It was actually Judge Miller's order in the case.

4 Green involved homicide by child abuse and involuntary
5 manslaughter, and the court acknowledged the process, and at
6 page 16 of our return, put in bold, "We overrule Easler to
7 the extent that authorizes homicide punishment involving
8 only one homicide." We submit that here, unlike Easler,
9 it's distinguishable under the facts, because here we submit
10 that there was clear legislative intent. The way the failure
11 to stop a law enforcement officer, and the punishment was to
12 deter individuals from evading lawful stops on highways.
13 They're grounded in legislative intent to punish in the
14 passage of that particular act.

15 Instead, the Green ruling was based upon interpretation
16 of legislative intent involving a different state statute
17 where they found no expression of legislative intent in
18 authorizing multiple homicide punishments for a single
19 homicide committed by a single defendant. As a result,
20 absent legislative intent to the contrary, it would follow
21 the prevailing rule that one homicide is limited to one
22 punishment per defendant. And even assuming that the
23 Applicant may have been sentenced differently today, the
24 Applicant is not shown that the ruling in Green applies
25 retroactively to his case.

1 I've cited the case State v Belcher. In Belcher, as
2 the Court is aware, the court held in that case retroactive
3 application of new precedent does not extend the matters on
4 post-conviction relief in that particular setting.

5 So, that's our argument in these cases, that clearly
6 the law of the case is entitled to a determination. The
7 merits of this matter have been reviewed both by Judge
8 Miller in the initial post-conviction relief proceedings,
9 and by Judge Cain in the federal habeas corpus proceedings,
10 that there's no double jeopardy violation.

11 And finally, Stephanie Green, to the extent it could
12 apply to this case, he's barred under the statute of
13 limitations, because his filing in this Green occurred more
14 than a year after Green was decided. And that's our
15 argument, Your Honor.

16 MR. WISE: In the motion to dismiss, the State has to
17 accept as true the allegations in paragraph 11 of the
18 petition where Mr. Cobbert says that he was not aware of the
19 Green decision prior to February of 2023. And this was
20 filed within one year of that, and I think we then come
21 under subsection (c) of 17-27-45, which means that that's a
22 fact that Mr. Cobbert was not aware of. And he filed within
23 one year of that. And that fact is that the case that was
24 basically the heart of denying his PCR originally had been
25 overturned.

1 Now, let me suggest to the Court that when he entered a
2 guilty plea, had an objection to double jeopardy been raised
3 at that point, the Judge would have cited Easler, and that
4 would have been the end of the discussion. In the petition
5 for PCR and the appeal from that, the State, quite
6 appropriately, cited Easler, and that was the end of the
7 discussion. It isn't until 2018 that we find out that
8 Easler was improperly decided.

9 Now, first of all, I think the Court should read
10 Blockburger. Counsel talks about Blockburger being the same
11 element test. I challenge the Court to read Blockburger and
12 draw that conclusion. And the reason I say that is, in
13 Blockburger, the word "element" appears one time. One time.
14 They talk about different facts that have to be proven on
15 it, and which case, and when they talk about each case
16 required a different fact that made them different. And if
17 you read Blockburger, you'll understand it's a fact-oriented
18 case. If you then go read U.S. v Dixon, which amplifies on
19 Blockburger, and some people say it takes us back to
20 Blockburger, that's fine. It also talks about facts being
21 proven on that.

22 So, I think there's nothing in the failure to stop for
23 blue light resulting in death that remotely indicates that
24 you could also prosecute for reckless driving. It doesn't
25 say that. If the failure to stop for blue light resulting in

1 death had said any punishment in this statute shall be in
2 addition to any punishment under reckless homicide, then you
3 could argue that.

4 The problem with that argument is -- and I've never
5 understood why courts don't say this. The problem with that
6 argument is the legislature -- what, in essence, that
7 argument says is this. If the legislature intended to
8 violate double jeopardy, it's okay. But if they didn't
9 intend to violate double jeopardy, it's not okay. That
10 simply makes no sense. The double jeopardy clause bars the
11 legislature from giving successive punishments as well as
12 the court.

13 So, we contend that under (c), we clearly come under
14 within one year because of that. We think that, under
15 Easler, it would be decided differently today. And I handed
16 up to the court the U.S. Supreme Court case of Robinson v
17 Neal. And the point of that is this. Robinson v Neal held
18 that double jeopardy is to be applied retroactively unless
19 there's a real compelling reason not to.

20 Now, the South Carolina Supreme Court has recognized
21 that the retroactivity rules on decisions is governed by the
22 U.S. Supreme Court, not by any state court. So, if Robinson
23 v Neal says double jeopardy is retroactive, then it is
24 retroactive. And it would apply to Mr. Cobbert under this
25 case. And I think under the proper procedure, you would

1 actually have to vacate both sentences and remand for a new
2 sentencing proceeding. Arguably, since he pled to reckless
3 homicide first, you could just vacate the second one as
4 being the successive punishment. And then the only
5 punishment against him would be the reckless homicide. But
6 I think we've clearly come under the statute as far as
7 additional facts that Mr. Cobbert learned, and to be frank
8 with you, he learned that when he discussed it with me in
9 February of 2023. And that was the first time he knew
10 Easler had been overturned.

11 So, you know, based upon those facts, I think we are
12 timely. And as a matter of law, we're entitled to relief.

13 THE COURT: Yes, sir.

14 MR. ZELENKA: Just briefly, Your Honor. With respect
15 to the U.S. Supreme Court decision that was cited, clearly,
16 even at the time of the post-conviction relief, even at the
17 time of the trial, the decisions were not making a
18 determination that there was anything different than the
19 application of double jeopardy to these particular offenses.
20 And that's -- it's not a matter of whether double jeopardy
21 applies retroactively. Double jeopardy has always applied
22 in these particular state court decisions. And those were
23 the way the post-conviction relief court initially looked at
24 the case as to whether double jeopardy had been violated to
25 the extent that counsel should have objected, or should not

1 have pursued the guilty plea in that particular setting.
2 And the determination, clearly, by the Federal District
3 Court in its application of double jeopardy, made a
4 determination in this matter. Which, under Foxworth, should
5 be applicably reviewed, that there was no federal double
6 jeopardy violation.

7 And I would submit that the matter of Stephanie Green,
8 that wasn't a restructuring of double jeopardy. That was a
9 procedural, substantive law determination by the Supreme
10 Court in the same way that Belcher was. And within that
11 particular decision, it did not hold that Easler applied
12 retroactively to post-conviction relief matters. And I
13 would submit that it did not, and should not, under those
14 circumstances.

15 THE COURT: All right, and we talked about this off the
16 record before we started. Essentially, the State agrees
17 that I'd have to assume that the facts in the petition are
18 correct and then make a legal decision on whether or not the
19 arguments -- whether it's excessive. I mean, I think that's
20 a good way to go with this. Why don't I take the matter. I
21 mean, I've got to read this anyway. And I may be able to
22 resolve it all or just partially. And we don't have to get
23 into the facts today, as much as I know.

24 MR. WISE: And then reading 17-27-45, there's no
25 question under (b) this was filed well after a year after

1 Green was decided. But under (c), I think that's -- if
2 you're going to interpret that statute in favor of the
3 Defendant, which I think you have to, additional fact can be
4 that the case that was -- that caused you to get consecutive
5 sentences has been overturned is certainly an additional
6 fact. And that clearly was filed within one year.

7 THE COURT: All right, well, I'll take that motion
8 under advisement. And then y'all can go based on my ruling
9 on that. But it's going to take me -- I've got a trial next
10 week. I'll put this to the top.

11 MR. WISE: It's not short. I agree.

12 THE COURT: I know. All right. Thank you.

13 ***END OF REQUESTED TRANSCRIPT OF RECORD)***

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Certificate of Reporter

I, the undersigned, Tara T. Scott, CVR, Official Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Lexington County, South Carolina, on the 22nd day of March, 2024.

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

A handwritten signature in black ink, appearing to read "Tara T. Scott", is written over a horizontal line.

Tara T. Scott, CVR

Official Court Reporter

July 5, 2025

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

Edward W. Miller, Circuit Court Judge

JAMES CURTIS COBBERT, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPENDIX

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COURT OF GENERAL SESSIONS

COUNTY OF LEXINGTON

STATE

V.

JAMES COBBERT

DEFENDANT.

TRANSCRIPT OF RECORD

06-GS-32-1445

06-GS-32-1447

08-GS-02-1678

OCTOBER 16, 2008
LEXINGTON, SOUTH CAROLINA

B. E F O R E:

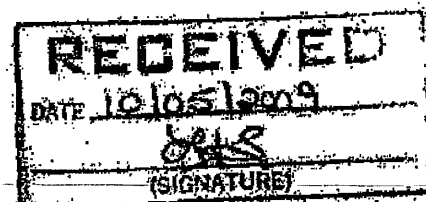
THE HONORABLE WILLIAM F. KEESLEY, JUDGE.

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

SHAWN GRAHAM, ASSIST. SOLICITOR
ATTORNEY FOR THE STATE

ELIZABETH FULLWOOD, ASSIST. PUBLIC DEFENDER
WALLIS ALVES, ASSIST. PUBLIC DEFENDER
ATTORNEYS FOR THE DEFENDANT

STACY L. SHEPPARD, RPR
CIRCUIT COURT REPORTER



1	I N D E X			
2	<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u> <u>RECROSS</u>
3				
4				
5	(There were no witnesses.)			
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1	EXHIBITS			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	Court's 1	Victim Statement	20	
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1 (The following proceedings were held on
2 October 16, 2008.)

3 THE CLERK: Indictment 2008-GS-02-1678, State
4 versus James Cobbert, indicted for shoplifting. He
5 is pleading as charged. He is waiving presentment
6 to the grand jury and is represented by Ms. Alves.

7 Indictment 2006-GS-32-1447, State versus James
8 C. Cobbert, indicted for failure to stop for law
9 enforcement. He is pleading as charged. Indictment
10 2006-GS-32-1445, State versus James C. Cobbert,
11 indicted for reckless homicide. He is pleading as
12 charged. Both indictments are true billed and he is
13 represented by Ms. Fullwood.

14 JAMES COBBERT,
15 having been duly sworn, testified as follows:

16 PROBATION AGENT: Your Honor, he is on YOA
17 parole right now and probation. And Richland County
18 has issued and served a warrant on both of those
19 cases.

20 THE COURT: Are you James Cobbert?

21 DEFENDANT: Yes, sir.

22 THE COURT: Am I pronouncing your name
23 correctly?

24 DEFENDANT: Yes, sir.

25 THE COURT: I have an indictment that charges

1 that in Lexington County on or about February 16,
2 2006, you drove a motor vehicle in reckless
3 disregard for the safety of others, proximately
4 causing the death of Michael A. Wilson. That's an
5 indictment for reckless homicide. Upon your
6 arraignment on that charge, it appears that you wish
7 to plead guilty; is that right?

8 DEFENDANT: Yes, sir.

9 THE COURT: I have another indictment that
10 charges that in Lexington County on or about
11 February 16, 2006, you willfully, knowingly and
12 unlawfully failed to stop a motor vehicle you were
13 driving on a road, street or highway of the state
14 when you were signaled to stop by Deputy Fox, a law
15 enforcement officer with the Aiken County Sheriff's
16 Department, or Officer Crier with the Pelion Police
17 Department who were signaling for you to stop by
18 means of siren or flashing blue light, and that when
19 you were driving, you did perform an act forbidden
20 by law or neglected a duty imposed by law in driving
21 the vehicle that resulted in the death of Michael A.
22 Wilson. That's an indictment for failure to stop
23 for a pursuing law enforcement vehicle resulting in
24 death.

25 Upon your arraignment on that charge, it

1 appears that you wish to plead guilty; is that
2 right?

3 DEFENDANT: Yes, sir.

4 THE COURT: I have another indictment from
5 Aiken County that charges you with shoplifting. It
6 alleges that in Aiken County on or about February
7 16, 2006, you shoplifted two rings from Johnson
8 Jewelers in North Augusta. Upon your arraignment on
9 that charge, it appears that you wish to waive
10 presentment to the grand jury, waive jurisdiction
11 and venue issues related to Aiken County and plead
12 guilty to this here in Lexington County; is that
13 right?

14 DEFENDANT: Yes, sir.

15 THE COURT: Ms. Alves, you represent him on the
16 Aiken case?

17 MS. ALVES: Yes, sir.

18 THE COURT: Ms. Fullwood, you represent him on
19 the two Lexington cases?

20 MS. FULLWOOD: That's right.

21 THE COURT: Ladies, have you fully explained to
22 your client the nature and elements of the offenses,
23 the possible punishment and his constitutional
24 rights, including trial by jury, Ms. Alves?

25 MS. ALVES: Yes, sir.

1 THE COURT: Ms. Fullwood?

2 MS. FULLWOOD: Yes, sir.

3 THE COURT: Are you satisfied there's a factual
4 basis for his plea in Aiken County, Ms. Alves?

5 MS. ALVES: Yes, sir.

6 THE COURT: And, Ms. Fullwood, the two charges
7 from Lexington, are you so satisfied?

8 MS. FULLWOOD: Yes, sir.

9 THE COURT: Do you agree with your client's
10 decision to plead guilty, Ms. Alves?

11 MS. ALVES: I do.

12 THE COURT: And do you, Ms. Fullwood?

13 MS. FULLWOOD: Yes, sir.

14 THE COURT: Mr. Cobbert, today are you under
15 the influence of any medicine, alcohol, drug or
16 anything that affects your thinking?

17 DEFENDANT: No, sir.

18 THE COURT: Do you have physical or mental
19 problems that affect your thinking?

20 DEFENDANT: No, sir.

21 THE COURT: You're clearheaded today? You know
22 what you're doing?

23 DEFENDANT: Yes, sir.

24 THE COURT: When you plead guilty, you give up
25 very important rights, including your right to

1 remain silent and your right to a jury trial; do you
2 know that?

3 DEFENDANT: Yes, sir.

4 THE COURT: If you wanted a jury trial on any
5 of these cases, you would be presumed to be
6 innocent. The State has the entire burden of proof
7 and has to prove to all 12 jurors that you are
8 guilty beyond a reasonable doubt in order for you to
9 be convicted of anything. Do you understand?

10 DEFENDANT: Yes, sir.

11 THE COURT: If you plead guilty, you give up
12 all of those rights. You give up any defenses you
13 have. You give up any challenges to evidence. You
14 admit the charge is true. Do you understand that?

15 DEFENDANT: Yes, sir.

16 THE COURT: If you had a jury trial, you would
17 have the right to confront the witnesses, meaning
18 see, hear and have your lawyer cross-examine those
19 witnesses. You could remain silent and the trial
20 judge would tell the jury that they could not hold
21 your silence against you in any way at all. Do you
22 understand that?

23 DEFENDANT: Yes, sir.

24 THE COURT: Do you want a jury trial on any of
25 these cases?

1 DEFENDANT: No, sir.

2 THE COURT: Is that your own decision made of
3 your own free will?

4 DEFENDANT: Yes, sir.

5 THE COURT: This shoplifting charge is from
6 Aiken County. No one can force you to handle that
7 charge anywhere other than Aiken County. You have
8 an absolute right to have a judge presiding in Aiken
9 County preside over your case. You have a right to
10 have an Aiken County Jury consider your case. You
11 have a right to have the Aiken County Grand Jury to
12 review your indictment. You have a right to have
13 the Clerk of Court in Aiken County witness or attest
14 your signature on any document that requires that.
15 Do you understand?

16 DEFENDANT: Yes, sir.

17 THE COURT: The only way we can go forward with
18 an Aiken County case in Lexington County is if you
19 tell us to; do you understand that?

20 DEFENDANT: Yes, sir.

21 THE COURT: Do you want to handle that
22 shoplifting charge in Aiken County or in Lexington?

23 DEFENDANT: Lexington.

24 THE COURT: Is that your own decision made of
25 your own free will?

1 DEFENDANT: Yes, sir.

2 THE COURT: All right. Who's got the facts?

3 MR. GRAHAM: Thank you, Your Honor.

4 Chronologically, it started at about 10:44 a.m.
5 on February 16th, 2006, in Aiken County at Johnson
6 Jewelers. At that time, Your Honor, the Defendant,
7 who at that time was an unknown black male, went
8 into the store to look at some rings. The store
9 owner, Stan Johnson, became suspicious and he went
10 to take the rings back and put them back in the show
11 case. At that point, Your Honor, the Defendant then
12 grabbed the two rings by force and then ran out of
13 the store. Mr. Johnson pursued him on foot.

14 At some point during the chase outside,
15 Mr. Johnson fell down and was only able to see the
16 Defendant enter a vehicle and he described it as a
17 light blue in color vehicle. And a citizen named
18 James Bouknight saw the store owner chase
19 Mr. Cobbert and he followed him for a while and
20 observed him get into a blue Ford Taurus with
21 license number 341 TYH and he provided that
22 information to the Aiken County Sheriff's
23 Department. The Aiken County Sheriff's Department
24 ran that number and the car was reported stolen out
25 of Richland County.

1 An Aiken County Deputy, Bruce Fox, heard a
2 robbery call come over his dispatch describing the
3 car and the tag number and the last known direction.
4 And he went to I-20 at about the 33 mile marker on
5 onramp and waited. After a period of time, he
6 observed the listed vehicle driven by the suspect
7 come by there. He pulled in behind him. He
8 confirmed the tag number, then he called for backup.

9 At about that time, Your Honor, Mr. Cobbert
10 noticed that he was being followed by the police and
11 began to speed up passing people in the passing
12 lane. At some point after that, the deputy
13 activated his blue lights and sirens and they
14 reached speeds up to about a hundred miles an hour.
15 As they were coming into Lexington County, a Pelion
16 Police Officer, Officer Crier, took over lead
17 pursuit of the vehicle. The Aiken Officer, Deputy
18 Fox, followed in behind him.

19 Members of the sheriff's department set up stop
20 sticks. They tried to put stop sticks in front of
21 him. They got them deployed. He was able to go
22 around them and only put -- I believe, the passenger
23 side of the vehicle ran over the sticks and it did
24 not deflate the tire and the pursuit continued on
25 into the Town of Pelion.

1 Another Lexington Deputy had set up stop sticks
2 about 300 yards farther up in the Town of Pelion.
3 At that point, the Defendant went off on the right
4 side of the road in an attempt to pass some
5 vehicles. He came back on to the roadway and when
6 he came back on, it jerked his car to the left and
7 he overcorrected coming back to the right. At that
8 point, the MAIT team from the highway patrol
9 estimated he was going about 88 miles an hour.

10 When he overcorrected back to the right, his
11 car lost control and he slammed into the back of
12 Michael Wilson, who was driving -- he was actually
13 working for the Department of Transportation driving
14 a Department of Transportation vehicle. As a result
15 of that collision, both of the vehicles lost control
16 and flipped. Mr. Wilson was wearing his seatbelt,
17 but his seat broke and he was ejected from the
18 vehicle suffering injuries on scene that resulted in
19 his death on scene.

20 Mr. Cobbert was also ejected from his vehicle.
21 Officers went over and cuffed him and then the
22 officers went back to check on Mr. Wilson and the
23 other vehicles. At that point, EMS workers came
24 over and told them that Mr. Cobbert was trying to
25 get away, so they went over and reapprehended him

1 and brought him back.

2 There are some photographs which had previously
3 been provided to the defense, Your Honor, of the
4 vehicles. I'm going to hand up to the Court at this
5 time.

6 (Pause.)

7 MR. GRAHAM: I'm sorry, Your Honor. It's a
8 Ford Focus.

9 The State is dismissing some related charges in
10 Lexington County. There's a possession of a stolen
11 motor vehicle, an unlawful possession of a pistol,
12 and he was also arrested for leaving the scene of an
13 accident. And those charges are being dismissed as
14 a result of this plea.

15 When you are ready, Your Honor, there are some
16 victim impact, as well as the Defendant's prior
17 record.

18 MS. ALVES: Your Honor, if I may, on the Aiken
19 charges, he actually has -- he's never actually been
20 served with an Aiken County warrant. He's actually
21 got a warrant pending for common law robbery in
22 Aiken, but in exchange for this plea, the
23 Solicitor's allowing him to plead to the shoplifting
24 charge and the common law robbery warrant is going
25 to be withdrawn.

1 MR. GRAHAM: And that is my understanding as
2 well, Your Honor.

3 THE COURT: Mr. Cobbert, do you admit you're
4 guilty of these three charges?

5 DEFENDANT: Yes, sir.

6 THE COURT: Has anybody forced you, threatened
7 you, coerced you in any way to get you to plead
8 against your will?

9 DEFENDANT: No, sir.

10 THE COURT: Any plea bargains the State made
11 with you, they have to tell me about on the record
12 in open court or you lose what they don't tell me
13 about; do you understand?

14 DEFENDANT: (Defendant nodded head.)

15 THE COURT: Sir?

16 DEFENDANT: Yes, sir.

17 THE COURT: Are there any plea agreements here
18 other than what's been put on the record, Ms. Alves?

19 MS. ALVES: Yes, sir. The Solicitor in Aiken
20 has agreed to negotiate a sentence of -- a
21 concurrent sentence with any sentence that he gets
22 on the Lexington County charges. And as I stated
23 previously, they're withdrawing the warrant on the
24 common law robbery. And we've negotiated a
25 concurrent sentence for anything that he gets here

1 in Lexington.

2 THE COURT: Ms. Fullwood?

3 MS. FULLWOOD: Yes, sir, it's on the record.

4 THE COURT: So other than what's on the record,
5 Mr. Cobbert, has anybody promised you anything or
6 offered you any hope of reward to get you to plead
7 guilty?

8 DEFENDANT: No, sir.

9 THE COURT: Are you fully satisfied with your
10 attorneys?

11 DEFENDANT: Yes, sir.

12 THE COURT: Is there anything that you want
13 either of these attorneys to do on your cases that
14 they have not done for you?

15 DEFENDANT: No, sir.

16 THE COURT: Have you had enough time to meet
17 with your attorneys and discuss things with them so
18 that they can represent you properly?

19 DEFENDANT: Yes, sir.

20 THE COURT: Have you had enough time to make up
21 your own mind about all of this?

22 DEFENDANT: Yes, sir.

23 THE COURT: Your Aiken County case has not been
24 to the grand jury. If you want the grand jury to
25 review it, at least 12 out of the 18 grand jurors

1 would have to agree you're probably guilty or the
2 case stops there; do you understand?

3 DEFENDANT: Yes, sir.

4 THE COURT: The papers indicate you're giving
5 up that right. Is that your own decision made of
6 your own free will?

7 DEFENDANT: Yes, sir.

8 THE COURT: Mr. Cobbert, shoplifting greater
9 than 1,000 less than \$5,000 is a felony, that
10 carries up to five years in prison. Do you
11 understand that?

12 DEFENDANT: Yes, sir.

13 THE COURT: It's a property offense. If you
14 violate property laws again, you face higher
15 punishment. Do you understand?

16 DEFENDANT: Yes, sir.

17 THE COURT: Reckless homicide is a felony that
18 carries up to ten years in prison and a 5,000 dollar
19 fine. Do you understand that?

20 DEFENDANT: Yes, sir.

21 THE COURT: You'll lose your driver's license
22 for at least five years. Do you understand that?

23 DEFENDANT: Yes, sir.

24 THE COURT: Failure to stop for a pursuing law
25 enforcement vehicle which results in death is a

1 felony that carries up to 25 years in prison as a
2 possible punishment. Do you understand?

3 DEFENDANT: Yes, sir.

4 THE COURT: That has a provision that you'll
5 lose your driver's license for at least three years
6 after you are released from incarceration. Do you
7 understand that?

8 DEFENDANT: Yes, sir.

9 THE COURT: Now, in South Carolina, anything
10 that carries a possibility of 20 years or more is
11 classified as a no parole offense. What a no parole
12 offense is commonly called is truth in sentencing.
13 And truth in sentencing means that you have to serve
14 at least 85 percent of the time day-for-day before
15 you can be possibly released from prison. Do you
16 understand that?

17 DEFENDANT: Yes, sir.

18 THE COURT: When you come out, you'll
19 automatically come out on a period of community
20 supervision. You have to successfully complete the
21 period of community supervision or you can be
22 punished separately for violating community
23 supervision. Do you understand?

24 DEFENDANT: Yes, sir.

25 THE COURT: All right. Have you understood

1 everything we've been over so far?

2 DEFENDANT: Yes, sir.

3 THE COURT: Are you sure you want to give up
4 your rights and plead guilty?

5 DEFENDANT: Yes, sir.

6 THE COURT: Mr. Cobbert has made a free,
7 knowing, voluntary and intelligent decision to waive
8 his rights, including presentment to the grand jury
9 in Aiken County, his rights related to jurisdiction,
10 venue and attestation in Aiken County, and enter his
11 pleas of guilty here in Lexington County to these
12 three offenses. He's made his decisions upon the
13 advice of counsel with whom he's fully satisfied.
14 There's a factual basis for each of his pleas.

15 Did you tell me -- I mean, it's obvious from
16 the indictments, but did you tell me that
17 Mr. Wilson, Michael Wilson, died as a result of
18 the --

19 MR. GRAHAM: Yes, Your Honor. When he was
20 ejected, he died on scene.

21 THE COURT: And you said you had some victims
22 who wish to be heard from?

23 MR. GRAHAM: I do, Your Honor.

24 His rap sheet, 2002, Your Honor, he was
25 convicted of burglary third, received a five year

1 sentence suspended with probation for three years.
2 At the same time, he pled to a grand larceny one to
3 \$5,000.

4 June of 2003, he pled to possession of less
5 than one gram of ice or crack cocaine. He received
6 a youthful offender sentence not to exceed five
7 years. At the same time, Your Honor, he pled guilty
8 to possession of a scheduled four -- excuse me -- a
9 scheduled five, one to five controlled substance,
10 received a youthful offender sentence, provided upon
11 time served to 90 days.

12 June 2nd of 2003, at the same time as the drug
13 charges, Your Honor, he pled to a burglary second
14 degree, was also given a youthful offender sentence.
15 He also pled at the same time to possession, sell or
16 disposing of a stolen vehicle one to 5,000 and
17 received a youthful offender sentence. July 2005,
18 he was convicted of entering a premises after
19 warning.

20 There is the -- apparently, the rings were
21 never recovered from the jewelry store, Your Honor,
22 so on the shoplifting, there is \$2,000 of
23 restitution requested by Johnson Jewelers.

24 As far as Mr. Wilson's case, Your Honor,
25 present in the courtroom on behalf of their

1 relative, Michael Wilson, are his parents, Mr. and
2 Ms.. James Wilson; his son, Jamie Wilson; a sister
3 Cheryl Sipes; another sister, Sharon Wilson; his
4 brothers, Chris Wilson and Ronald Wilson; and his
5 ex-wife, Peggy Wilson, is also present.

6 Sharon Wilson, Your Honor, wrote an impact
7 letter that she wanted me to provide to the Court.
8 I'm going to hand that up, and provide a copy to
9 defense counsel.

10 (Pause.)

11 THE COURT: Mark that as a court's exhibit.

12 (Court's Exhibit Number 1, victim statement,
13 marked for identification.)

14 THE COURT: Go ahead, Mr. Graham.

15 MR. GRAHAM: Thank you, Your Honor. Cheryl
16 Sipes, Michael Wilson's other sister, Your Honor,
17 would like to address the Court.

18 THE COURT: Yes, ma'am.

19 MS. SIPES: February 16th, 2006, was the worst
20 day of my life. I arrived to work around 12:00 on
21 that day to find a message from someone at Mike's
22 work asking me to call. I was told that Mike was at
23 the hospital and I needed to get in touch with them.
24 All the hospital told me was that I needed to come
25 there.

1 My mother and I arrived at the hospital only to
2 be told that there had been a wreck in Pelion and
3 that a male around 50 had been brought in. They
4 needed someone to identify him.

5 There we had to see my brother. He had been
6 hurt so bad, no one else needed to see him like
7 that. I will never forget. I still see it
8 everyday. No one should have to go through what my
9 mother and I saw.

10 We had to go home to tell my father that Mike
11 was killed. He had just come home an hour before
12 that from the hospital after having a cancerous lung
13 removed. We had to tell our family. And Jamie,
14 Mike's son, already trying to cope with the loss of
15 his older brother in 2004, Jamie was now left to
16 deal with more pain.

17 I lost my oldest brother that day. Mike was a
18 son, a brother to another sister and two brothers.
19 He was a good father to two sons. He loved his
20 family and we loved him. Mike was a strong part of
21 our family. We all relied on him. Words cannot
22 express the pain and anguish our family has endured.

23 There isn't a day and an hour that doesn't go
24 by that I don't think about Mike. I want to
25 remember all the good times we had, but all I can

1 see is how he was hurt and all alone. I wake up
2 everyday and go to sleep every night living this
3 nightmare.

4 Our family will never be the same. There is
5 someone missing. Holidays and family get-togethers
6 are no longer happy occasions. Mike's life was
7 taken away and a part of me died with him. The
8 affect on me has been devastating. His life was
9 worth so much more. I didn't get to say goodbye and
10 that I loved him.

11 Mike cared enough about other people's lives.
12 Just to steal two rings, it's just wrong. And it
13 leaves a long hard effect on families and it's not
14 something that you can take back. For this reason,
15 I'm asking you to please sentence this man to the
16 maximum penalty of the law so that no other family
17 has to endure this pain.

18 THE COURT: Thank you, ma'am.

19 Anything else from the State?

20 MR. GRAHAM: No, Your Honor.

21 THE COURT: Ms. Fullwood, are you ready or do
22 you need some time?

23 MS. FULLWOOD: I'm ready, Your Honor.

24 Your Honor, Mr. Cobbert is before the Court
25 this afternoon with his mother, Lori Cobbert, who

1 lives out in the Hopkins area.

2 Judge, this is just such a -- it's a terrible
3 tragedy all the way around. There's just no way
4 around that. What happened that day is just
5 heartbreaking.

6 James is almost 24 years old. He is the son of
7 a career Army man. I believe he was born in Germany
8 and he's lived all over in New Jersey, Panama,
9 Georgia. I think it was when his dad came to be
10 stationed at Fort Jackson that the family settled
11 down here.

12 Right now his father is retired military and he
13 is an RN at a V.A. Hospital in Atlanta. He simply
14 could not get off work today to come. His parents
15 are divorced. They divorced when he was about 14,
16 15. And, of course, his mom, who works at, I think,
17 Polo Road Elementary, is here today. She took off
18 work so that she could be here with her son.

19 He has a GED. And he has worked, I think,
20 almost all of his life. He started mowing lawns for
21 the neighbors when he was just a little kid. When
22 he was in high school, he worked for a number of
23 fast food restaurants, Burger King, Golden Corral,
24 Bojangles', Hardees. He learned welding at
25 Production Metals and did that work a little bit.

1 He didn't like it so much. And at the time that
2 this offense was committed, he was working at the
3 Fort Jackson Commissary.

4 I know there's nothing I can say to make these
5 people feel any better. What I can say is just to
6 explain what happened. He did not set off that day
7 with the idea in mind that he was going to go steal
8 some property. He had been a customer of that
9 jewelry store over in Aiken County and he took back
10 something he'd purchased and wanted them to let him
11 take it back and give him a refund. The owner would
12 not allow him to return the merchandise and it upset
13 him. And he got angry and he snatched a piece of
14 jewelry and ran off.

15 The police started chasing him. And when I
16 asked him, Why didn't you just stop, why did you
17 keep running, he said that the adrenaline just
18 surged in him. And he said he had a hard time -- he
19 just couldn't control himself. Between the fear and
20 the adrenaline, he was just sort of driven by
21 instinct during that chase, just the instinct to get
22 away from something chasing you.

23 I know it's small consolation to anybody, but
24 that's just what happened. It's not like it was
25 some premeditated situation that he ever thought he

1 would get himself into that day.

2 He was 21 when it happened. He was young. I
3 will tell Your Honor this, that in the more than two
4 years that I've been representing him, I really have
5 seen a change in this man. You know, when I first
6 met him, he struck me as kind of an immature, young
7 man just coming into adulthood and really didn't
8 have his thinking quite straight. I think he has
9 matured into somebody who is a lot more aware of the
10 consequences of his conduct, has a lot more
11 compassion for other people and who just, in
12 general, has a more mature outlook on the world and
13 his role in it.

14 I know that he's sorry. I know that he's
15 remorseful. I know that he would do anything he
16 possibly could to take it back, but he can't.

17 He's coming in here today, Judge, he is
18 stepping up. He is accepting responsibility. He's
19 so young and he's pleading guilty to such serious
20 crimes. We hope that you will extend to him as much
21 mercy as you can under the circumstances of this
22 case.

23 I know that he wants to speak to you briefly.
24 He's kind of emotional right now so he's not sure
25 how much he can say.

1 I know his mama had wanted to talk to you a
2 little bit, too, but as you can see, she's feeling
3 very, very bad. I don't know if she'll be able to
4 speak to you or not, but I'd ask you to give her the
5 opportunity.

6 THE COURT: Thank you.

7 Ms. Alves.

8 MS. ALVES: Your Honor, I would just say as to
9 the situation in Aiken, based on my investigation
10 and talking to Mr. Cobbert, it is as Mr. Fullwood
11 said. I did have one of my investigators go out and
12 talk to the victim in that case and the Solicitor
13 also talked to him. What he says happened is that
14 he did have one ring in his hand. He was showing
15 Mr. Cobbert the rings and he had another in his open
16 palm and that's when he snatched it out of his open
17 palm.

18 He said there weren't any cross words. There
19 weren't any threats made. There wasn't any type of
20 fighting with him or any type of force, but there's
21 no question that the rings were taken.

22 And I don't tell you that to mitigate anything
23 that he did because he was wrong in stealing the
24 rings out of the store and as -- as he has pleaded
25 to the shoplifting, but that's why the Solicitor

1 reduced that charge down because there was some
2 question about the man actually had his hand open,
3 was showing him the ring and giving him the ring
4 when it was taken and he ran out of the store.

5 Your Honor, I would just say in addition to
6 what Ms. Fullwood said, Mr. Cobbert does -- he does
7 understand the consequences and he does understand
8 there are consequences for what happened, for what
9 he did both in Aiken and here in Lexington. But his
10 mother -- his mother tells me that, and as Ms.
11 Fullwood said, I don't know if she'll be able to
12 speak, but she did want to address the Court and
13 tell what she knew about her son.

14 She says that he was a good son. He went to
15 Richland Northeast. She said he played sports in
16 school, that he was -- everything seemed to be
17 pretty good with him up until the time of the
18 divorce when he started having some problems,
19 started hanging out with the wrong people and that's
20 probably what led to at least some of what -- some
21 of what his record has, not that he doesn't have any
22 -- didn't have any blame in what he's done in the
23 past.

24 But, Your Honor, she says that this is not the
25 son that she knows, that she doesn't -- knows that

1 he wouldn't have done this -- that he would not have
2 intentionally gone out that day and planned to do
3 this. And, clearly, that's not what happened here.
4 But he made a bad choice in Aiken and,
5 unfortunately, led to tragic results here in
6 Lexington.

7 During the past two years -- two plus years
8 that this has happened, Mr. Cobbert has had some
9 reason to gain some maturity. He did have a child
10 who was born while he was in jail and that child,
11 he's not visited with that child because that child
12 was too young to visit. So he knows that he has --
13 he has a child who he's not played any material part
14 in his life. His mother does have a relationship
15 with that child and hopefully some day he can, too,
16 but that is one of the consequences he has faced as
17 a result of his actions on the day that we're here
18 for.

19 I would just ask that you take into
20 consideration his age, the fact that he is
21 remorseful.

22 I know he does want to address the Court and I
23 hope he can adequately express the remorse that he
24 has expressed to me to the Court and to the victims
25 -- the Wilson family.

1 However, Your Honor, I would ask you to take
2 all of that into consideration in your sentencing of
3 him and I would ask you to be as -- to extend to him
4 as much mercy as possible as you can. I would ask
5 you to consider concurrent sentences for
6 Mr. Cobbert. And I would ask you to accept the
7 negotiation for the Aiken charge to allow that to
8 run concurrent with the Lexington charges as well.

9 And I would ask his mother, Ms. Cobbert, if
10 she's able to speak.

11 THE COURT: Do you want to say anything, ma'am?

12 MS. COBBERT: Yes, sir.

13 THE COURT: What's your name?

14 MS. COBBERT: Lori Ann Cobbert.

15 THE COURT: Yes, ma'am.

16 MS. COBBERT: I would like to, first of all,
17 say that I'm very sorry to the family members and
18 this is not the son that I raised. I don't know
19 what happened, but I have really hurt -- hurting
20 right now. And I understand what the family's going
21 through. And only God knows.

22 And my son, I love him dearly. And I hope that
23 whatever decision you make changes him because like
24 I said, I don't know what happened. It was bad how
25 I found out about the incident.

1 THE COURT: Thank you very much, ma'am.

2 Do you want to say anything, Mr. Cobbert?

3 DEFENDANT: Yes, sir. Your Honor, everything
4 that happened was an accident. You know, I tried to
5 exchange some jewelry that I had bought from the man
6 and we had got into a negotiated argument. I never
7 took nothing around his store. I just left. I was
8 mad, you know, and I got scared and I was running.
9 I just got scared and I just -- I ran.

10 THE COURT: What do you mean you didn't take
11 anything and run --

12 DEFENDANT: I didn't run, you know, it was I --
13 he made me mad. I was trying to get my money back
14 for the jewelry that I had purchased from him and he
15 would not give me a refund and so we had an
16 argument.

17 I came to the store two times, two different
18 times, and then we had an argument and then I had
19 left out. I said, well, I kept the jewelry he gave
20 me. But, no, I didn't take it and run. I didn't
21 hit him, I didn't do none of that. I just put it in
22 my pocket and walked out the store and I left. And
23 the police got behind me and I was just so -- the
24 adrenaline kicked in and I was just running.

25 And I didn't mean for none of this to happen.

1 I don't know this man. I'm sorry. I didn't mean
2 for this to happen. I didn't mean for it to happen.
3 It just happened. I did not set out that day to
4 hurt nobody. All I did was try to exchange some
5 jewelry and made a bad decision, that's all I did.
6 I didn't -- I never try to hurt nobody.

7 I don't know this man. I don't know his
8 family. I know they're hurting because I would be
9 mad, too, if I lost my father, but it was an
10 accident. I didn't try to do this. I didn't try to
11 hurt nobody.

12 THE COURT: Where is the jewelry store?

13 DEFENDANT: It's in Aiken.

14 THE COURT: What part of Aiken?

15 DEFENDANT: Like North Augusta. I used to go
16 back and forth there. I know some people in Augusta
17 and Valentine's day was coming up, so I purchased
18 the ring.

19 THE COURT: Where did the wreck happen?

20 DEFENDANT: In Pelion.

21 THE COURT: How far is it from North Augusta to
22 Pelion?

23 DEFENDANT: I really don't know nothing about
24 Lexington. I just was running. I just running. I
25 just ran. That's where my accident happened at in

1 Pelion.

2 I don't really know how -- I come from the
3 highway from Columbia to Augusta and I stopped at
4 the store and I purchased the ring. I've been
5 paying on it for like three weeks and I paid for it.
6 Then when I didn't give the ring to the person on
7 Valentine's day, I tried to take it back to him two
8 days after that and he wouldn't give me a refund on
9 the ring and that's how everything started.

10 THE COURT: When did the cops get in behind
11 you? In North Augusta?

12 DEFENDANT: No, sir. It was further down the
13 road.

14 THE COURT: Did you go down the interstate?

15 DEFENDANT: Yes, sir.

16 THE COURT: So they got in behind you somewhere
17 on I-20?

18 DEFENDANT: Yes, sir.

19 THE COURT: Do you think that was in Aiken
20 County?

21 DEFENDANT: I can't say whether or not it was.

22 THE COURT: But they chased you into Lexington
23 County with blue lights going?

24 DEFENDANT: Yes, they chased me. I did commit
25 that crime. I panicked and I ran. I just panicked.

1 It wasn't that I was running from the crime or the
2 nature of what happened, it scared me and I panicked
3 and ran, that's what happened.

4 MR. GRAHAM: Your Honor, to answer your
5 question, the highway patrol estimated that the
6 chase was about 21 miles.

7 THE COURT: You got arrested on February the
8 16th?

9 DEFENDANT: Yes, sir.

10 THE COURT: Please don't anyone misunderstand
11 this. I'm not trying to be crass. This is part of
12 my job.

13 Did you have insurance on the car?

14 DEFENDANT: No, sir.

15 THE COURT: He was working?

16 MR. GRAHAM: I'm sorry?

17 THE COURT: The victim was working?

18 MR. GRAHAM: To my understanding, he was
19 work --

20 THE COURT: So he drew worker's comp death
21 benefit, the family did?

22 MR. GRAHAM: Yes, Your Honor.

23 THE COURT: Again, please don't misunderstand,
24 I'm not trying to be insensitive in asking those
25 questions. It deals with part of what I have to do.

1 (Pause.)

2 THE COURT: All right. If there's nothing
3 further, the Court renews the findings previously
4 made. Mr. Cobbart's made a free, knowing, voluntary
5 and intelligent decision to waive his rights and
6 plead guilty. He's done so upon the advice of
7 counsel with whom he's fully satisfied. There's a
8 factual basis for each plea.

9 He's also made a free, knowing, voluntary and
10 intelligent decision to waive presentment, waive
11 grand jury presentment on the Aiken charge and waive
12 jurisdiction and venue related to Aiken.

13 Folks, it's always a temptation for me to sit
14 up here and try to make a speech. I'm not going to
15 do that. The best thing for me to do is just
16 announce the sentence.

17 The sentence of the Court on indictment
18 2006-GS-32-1445, reckless homicide resulting in
19 death, is that you be committed to the South
20 Carolina Department of Corrections for ten years
21 plus costs and assessments. You're given credit for
22 jail time served under section 24-13-40, that will
23 be calculated and applied by the department of
24 corrections. I've written on your sentence sheet to
25 give you credit for jail time from February the

1 16th, 2006. Restitution is deferred. For other
2 conditions, you are to refer to indictment 1447
3 sentence sheet.

4 On the Aiken charge, 2008-GS-02-1678,
5 shoplifting, the sentence is five years plus costs
6 and assessments concurrent, credit for jail time
7 served under section 24-13-40. You're given credit
8 for time from February the 16th, 2006. You have to
9 pay \$2,000 in restitution plus a 20 percent handling
10 fee at a rate set by probation, parole and pardon
11 services for Stan Johnson Jewelers.

12 Failure to stop for a blue light resulting in
13 death, the sentence is 25 years consecutive plus
14 costs and assessments. Restitution is deferred.
15 Pay your court costs at a rate set by probation,
16 parole and pardon services while on community
17 supervision.

18 Any appeal from any of this has to be filed in
19 writing promptly. If you want to file an appeal,
20 you have to tell your lawyers. Do you understand
21 all of that, Mr. Cobbert?

22 DEFENDANT: (Defendant shook head.)

23 THE COURT: Sir?

24 DEFENDANT: No, sir.

25 THE COURT: You don't understand what part?

1 (Defense attorneys conferring with
2 Defendant.)

3 THE COURT: You have a ten year sentence that
4 you're currently serving. You get credit for your
5 jail time on that. When you finish that sentence,
6 you start a 25 year no parole offender sentence -- a
7 no parole sentence. The five year sentence is
8 running concurrent with your ten year period. It
9 will be over before the ten years does. Do you
10 understand?

11 DEFENDANT: (Defendant nodded head.)

12 THE COURT: He understands. He understands his
13 right to appeal. Good luck.

14

15 END OF PROCEEDINGS

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FILED

STATE OF SOUTH CAROLINA

County of Lexington

2009 JAN -9 A 9 13
In the Court of Common Pleas

James Curtis Cobbett III
Full name and prison number of applicant

293748

vs.

STATE OF SOUTH CAROLINA
Name of Respondent

APPLICATION FOR
POST-CONVICTION RELIEF

Henry D. McMurtrie, Atty. General

2009CP3200127

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 it clear to which question any such continued answer refers.

Since every application must be sworn to 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 applicant was convicted.

1. Place of detention:

LFE Correctional Institute 990 Wilsack
 Hwy Bishopville, Sc 29012

2. Name and location of Court which imposed sentence:

Lexington County Judicial Center
205 E Main St Lexington Sc 29072

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

(a) _____

(b) _____

(c) _____

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

(a) Failure to stop for Law Enforcement Vehicle (Death involved) 56-5-750(a)

(b) Reckless Homicide 56-5-2910, 25 yrs and 10 yrs

(c) ~~Reckless Homicide~~ ~~25 yrs~~ respectfully

5. Check whether a finding of guilty was made:

(a) after a plea of guilty ☒

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

6. Did you appeal from the judgement of conviction or the imposition of sentence?

(yes) I sent letter to my lawyer, Beth Fullwood to put in Appeal but

7. If you answered "yes" to (6), list

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

i. Lennan County Judicial Center

ii. (N/A)

iii. _____

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

i. Haven't received notice of anything

ii. (N/A)

iii. _____

(c) the date of each such result:

- i. NA
- ii. _____
- iii. _____

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

- i. _____
- ii. (N/A)
- iii. _____

8. If you answered "no" to (8), state your reasons for not so appealing:

- (a) _____
- (b) (N/A)
- (c) _____

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

- (a) Double Jeopardy
- (b) Harsh and unusually punishment
- (c) Involuntary Guilty Plea

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

- (a) Sentenced twice for same offense (crime)
- (b) Harsh lengthy sentence which is uncommon for crime
- (c) Plea was entered under Galt's pretense

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

- (a) any petition in the State Court under South Carolina Law? NO
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? _____

NO

(c) any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (7)? NO

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

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

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

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

(c) the disposition thereof:

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

(d) the date of each such disposition:

- i. _____
 - ii. _____
 - iii. _____
 - iv. _____
- N/A

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

N/A

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion, or application which you have filed?

NO

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

N/A

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

- i. _____
- ii. _____
- iii. _____

N/A

15. If any ground set forth in (9) 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) First opportunity since guilty plea!

- (b) _____
- (c) _____

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

- (a) your arraignment and plea? Yes
- (b) your trial, if any? N/A
- (c) your sentencing? Yes

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

N/A

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

N/A

17. If you answered "yes" to one or more parts of (16), list:

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

i. Donch Gullward Attorney At Law.

ii. _____

iii. _____

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

i. Guilty Plea & Sentencing.

ii. _____

iii. _____

18. State clearly the relief you seek in filing this application.

Plea vacated & Sentence vacated!

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

NO

STATE OF SOUTH CAROLINA)

County of Lexington)

James C. Cobbitt Jr.,)

I, A, 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.

FILED

VERIFICATION

2009 JAN -9 A 9:13

SWORN to and subscribed before me this _____
day of _____, 2_____.

Notary Public (L.S.)

My Commission Expires: _____

2009CP3200127

FILED

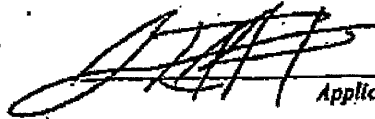
APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

BETH A. CARRIGG
CLERK OF COURT
JAN - 9 A 9 13

JAMES C. Cobble III,

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

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.



Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
CITY JUDICIAL CIRCUIT
COUNTY OF [REDACTED]

1/14/17
66

APPLICANT,

V.

STATE OF SOUTH CAROLINA,
RESPONDENT,

DOCKET NO: 2009-cp-32-127
(POST CONVICTION RELIEF)
AMENDMENTS TO ORIGINAL
APPLICATION

COMES NOW THE APPLICANT, JAMES CORBERT, WHO ARCHIVES HIS ORIGINAL
APPLICATION FOR POST-CONVICTION RELIEF, AND REQUESTS THAT THE
HONORABLE COURT ON JANUARY 18, 2011 TO SET THE ORIGINAL
APPLICATION ASIDE.

AMENDMENT NO. 1

APPLICANTS ATTORNEY WAS DEFICIENT IN HER PERFORMANCE BY FAILING
TO REQUIRE THE COURT TO STRICTLY AND CONSCIENTIOUSLY OBSERVE
THE RULES OF EVIDENCE (17) 33 AS TO ADOPTING THE
WITNESS (UNDER THE GUISE OF VICTIM-IMPACT STATEMENTS) AT
APPLICANTS SENTENCING, THUS, FATALLY PREJUDICING THE APPLICANT
BY THE RECEIPT OF A CONSECUTIVE SENTENCE.

AMENDMENT NO. 2

APPLICANTS ATTORNEY WAS INHERENTLY DEFICIENT IN HER PERFORMANCE
TO COMMENT MADE BY SOLICITOR IN REGARDS TO AN FIRE ARM CHARGE
THAT WAS FALSELY BROUGHT UPON APPLICANT. SOLICITOR STATED THAT
IN RESULTS OF THIS PLEA THE CHARGE WAS BEING DISMISSED, THUS
MAKING APPLICANT RECEIVE FULL CREDIT FOR SERVICE, THEREBY
MAKING APPLICANT RECEIVE TO AN FAIR TRIAL, AND PREJUDICING
APPLICANT'S CHARACTER AND RIGHT TO A FAIR TRIAL.

AMENDMENT NO. 3

CONFLICT OF INTEREST

AMENDMENT NO. 4

INDICTMENT CONSIST OF 1 WITNESS, WHO ALSO IS THE OFFICER THAT
FED THE AN GUN ON APPLICANT, AND WAS NOT A WITNESS OF
THE CRIME, AND WAS NOT A WITNESS.

State of South Carolina)
County of Lexington)

IN THE COURT OF COMMON
PLEAS

James Cobbert #293798

VS.

MOTION TO ADDRESS
ALL ISSUES

State of South Carolina
Respondent

The applicant, James Cobbert #293798. By and through his court appointed attorney, DAVID N. TRUITT. Ask this honorable court to require the attorneys involved in this action to be meticulous in the preparation of any order in this matter.

SPECIFICALLY, the applicant request that each and every issue raised in the record and/or raised at the hearing of be addressed in the order of the court to be issued in this matter.

This motion is requested pursuant to S.C CODE, SEC.17-27-80. And citing Pruitt v. state 423 S.E.2d 127 (1992) Bryson v. state.

WHEREFORE THE MOTION SHOULD BE GRANTED AS REQUIRED
BY SOUTH CAROLINA LAW

RESPECTFULLY SUBMITTED

JAMES COBBERT

SWORN TO BEFORE ME THIS
DAY OF

NOTARY PUBLIC FOR SOUTH
CAROLINA
MY COMMISSION EXPIRES.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

James C. Cobbert, III, #293798,
Applicant,

v.

State of South Carolina,
Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2009-CP-32-0127

RETURN AND REQUEST FOR
APPOINTMENT OF COUNSEL

BEITH A. CAMPBELL
CLERK OF COURT
LEXINGTON

2009 DEC 16 A 11:53

FILED
2009

ORIGINAL

9/2/09

William Salley

49

The Respondent, making its Return to the application for post conviction relief (PCR) filed January 9, 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the May 2006 term of the Lexington County Grand Jury for Failure to Stop for Law Enforcement Vehicle, Blue Light Resulting in Death (2006-GS-32-1447), and Reckless Homicide (2006-GS-32-1445). Applicant thereafter waived presentment on an Aiken Shoplifting charge (2008-GS-02-1678), and also waived jurisdiction. He was represented by Elizabeth Fullwood, Esquire, and Wallis Alves, Esquire. On October 16, 2008, the Applicant pled guilty as charged. He was sentenced by the Honorable William P. Keesley to confinement for a period of ten (10) years for the reckless homicide charge, a concurrent period of five (5) years on the shoplifting charge, and a consecutive period of twenty-five (25) years on the failure to stop for a blue light resulting in death charge. The Applicant states that he sent a letter to his lawyer to put in an appeal, but 'hasn't heard

I

anything on that yet.' The State notes that there is no appeal presently pending within the Office of the Attorney General.

Attached herewith and incorporated herein are the records of the Lexington County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, and the guilty plea transcript. The Respondent reserves the right to amend and/or supplement this Return upon receipt with any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Involuntary Guilty Plea
 - a. "Plea was entered under false pretense."
2. Double Jeopardy
 - a. "Sentenced twice for same offense (crime)"
3. Cruel and Unusual Punishment
 - a. "Harsh lengthy sentence which is uncommon for crime."

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered

adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. Nevertheless, the allegation of ineffective assistance of counsel probably raises a question of fact which cannot be conclusively refuted by the record and, therefore, requires that an evidentiary hearing be held. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983); Delancy v. State, 269 S.C. 555, 238 S.E.2d 679 (1977).

IV.

Respondent submits that the Applicant's allegation that his guilty plea was involuntary is without merit. In PCR cases, a defendant asserting a constitutional violation must frame the issue as one of ineffective assistance of counsel. Al-Shabazz v. State, 338 S.C. 354, 527 S.E.2d 742 (1999). A defendant who pleads guilty on the advice of counsel may collaterally attack the plea only by showing that (1) counsel was ineffective and (2) there is a reasonable probability that but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial.

Roscoe v. State, 345 S.C. 16, 546 S.E.2d 417 (2001). A defendant alleging that his guilty plea was induced by ineffective assistance of counsel must prove that counsel's advice was not "within the competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985). A guilty plea is a solemn, judicial admission of the truth of the charges against the defendant. Statements made during the plea should be considered conclusive unless the defendant presents reasons why he should be allowed to depart from the truth of those statements. Crawford v. U.S., 519 F.2d 347 (4th Cir. 1975); Edmonds v. Lewis, 546 F.2d 566 (4th Cir. 1976).

Respondent submits that the record fully supports the knowing and voluntary nature of the Applicant's plea. However, allegations regarding ineffective assistance of counsel and the voluntariness of the plea may raise a question of fact that is not conclusively refuted by the record. Accordingly, Respondent requests an evidentiary hearing on this allegation. Sharper v. State, 305 S.E.2d 247.

V.

Respondent submits that the Applicant's second and third allegations raise direct appeal issues that are procedurally barred by S.C. Code Ann. § 17-27-20(b) (2003). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Applicant could have raised these issues at trial or on appeal. His failure to do so has waived this allegation as a ground for relief. Therefore, the Court should summarily dismiss these allegations.

VI.

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

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

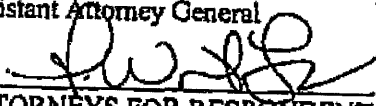
Respectfully submitted,

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

A. WEST LEE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

December 11, 2009.

1 STATE OF SOUTH CAROLINA

IN THE CIVIL COURT

2 COUNTY OF LEXINGTON

3
4
5 JAMES CURTIS COBBERT, III,

6 Applicant,

7 -vs-

8 STATE OF SOUTH CAROLINA,

9 Respondent.

TRANSCRIPT OF RECORD

09-CP-32-0127

10
11 November 29, 2011
12 Lexington, South Carolina

13
14 B E F O R E:

15 HONORABLE EDWARD W. MILLER, Judge.
16
17

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

19 RONALD R. HALL, Esquire
Attorney for the Applicant

20 KAELOE E. MAY, Asst. Attorney General
21 Attorney for the State
22
23
24

25 L. COCONUT PANTSARI, R.P.R.
Circuit Court Reporter

INDEX OF WITNESSES

<u>WITNESSES:</u>	<u>PAGE</u>
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ELIZABETH FULLWOOD	
Direct By Ms. May	27
Cross By Mr. Hall	36
Recross By Mr. Hall	39

APPLICANT'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
1	Motion (Summary Judgment)		24
2	Handwritten statement		26

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1 (The following proceedings are reported on
2 November 29, 2011.)

3 THE COURT: Yes, ma'am.

4 MS. MAY: The next case we would like to call
5 is James Cobbert versus State. It's Case
6 Number 2009-CP-32-0127. This case comes from the P.C.R.
7 application filed by Mr. Cobbert on January 9, 2009.

8 He was charged with reckless homicide and
9 failure to stop for a blue light resulting in death. On
10 October 16, 2008, he came before Judge Keesley and
11 entered a guilty plea to reckless homicide and failure
12 to stop for a blue light.

13 He was sentenced to ten years for reckless
14 homicide and 25 years consecutive for the failure to
15 stop for a blue light. There was no appeal and Mr. Hall
16 is representing Mr. Cobbert today.

17 THE COURT: Okay.

18 MR. HALL: Your Honor, if it please the Court.
19 I believe he was sentenced to 25 years concurrent.

20 THE COURT: All right.

21 MR. HALL: For failure to stop, not
22 consecutive.

23 THE COURT: Okay. You are the moving party.

24 MR. HALL: Yes, sir.

25 JAMES CURTIS COBBERT, III,

JAMES COBBERT -- DIRECT -- MR. HALL

4

1 being first duly sworn, testified as follows:

2 CLERK: State your full name for us when you
3 are comfortably seated.

4 THE WITNESS: My full name is James Curtis
5 Cobbert, III.

6 DIRECT EXAMINATION

7 BY MR. HALL:

8 Q Mr. Cobbert, are you comfortable up there?

9 A I'm all right..

10 Q You can pull that microphone toward you if you want
11 to.

12 A Give me just a second.

13 THE WITNESS: Can I?

14 THE COURT: Yes, go ahead.

15 A Before I get started, I would like the request of
16 the Court that this Court take judicial notice to
17 the issues alleged within my P.C.R. application. I
18 would also like for the record to reflect --

19 COURT REPORTER: You will have to slow down a
20 little bit now. "I would also like for the record to
21 reflect..."

22 A That I request counsel review the order as the
23 Supreme Court has state (verbatim), "That counsel
24 have to review the order and file 59(e), S.C. Code
25 17-27-80. If counsel fail in this matter --

1 COURT REPORTER: Wait a minute. If you could
2 speak up and slow down, please. "If counsel," what?

3 A If counsel fail in this matter, it would deny me my
4 due process and my full bite at the apple. His
5 failure would also prejudice my substantial
6 rights --

7 COURT REPORTER: Wait a minute, "prejudice my
8 substantial rights," and then what?

9 A "And all my remedies. My first allegation being
10 brought before the Court today is ineffective
11 assistance of counsel. My plea was involuntary.
12 If it wasn't for counsel's advice --

13 COURT REPORTER: Wait a minute. "If it wasn't
14 for counsel's advice," what?

15 A "Counsel's advice, I would not have pled guilty but
16 insisted on going to trial."

17 Q Mr. Cobbert, we are going to cover all that on the
18 questions.

19 A Okay. You are going to question?

20 Q Yes. All right?

21 A Yes.

22 Q You appeared before this Court on October 16, 2008,
23 and you pled guilty to reckless homicide and
24 failure to stop for a blue light?

25 A Yes, sir.

JAMES COBBERT -- DIRECT -- MR. HALL

6

- 1 Q You also agreed through a plea agreement to include
2 some Aiken County -- an Aiken County charge?
- 3 A Yes, sir.
- 4 Q With the Lexington County charge?
- 5 A Yes, sir.
- 6 Q And your attorney at that hearing -- you actually
7 had two hearings -- was Elizabeth Fullwood?
- 8 A Uh-huh. (Indicating affirmative response.)
- 9 Q And then a Ms. Alves?
- 10 A I can't pronounce her name, sir.
- 11 Q A-L-V-E-S.
- 12 MS. MAY: It's Alves.
- 13 BY MR. HALL:
- 14 Q And you waived -- you understand and, of course,
15 the judge asked you -- you waived your right to a
16 jury trial?
- 17 A Yes, sir.
- 18 Q You decided to plead guilty?
- 19 A Yes, sir.
- 20 Q Can you explain to the Court, what was the basis
21 for you waiving your right for a jury trial and
22 deciding to plead guilty?
- 23 A Well...
- 24 Q How was that decision reached?
- 25 A Well, I pled guilty because I was looking for a

1 favorable lesser sentence offering to plead guilty.
2 That's why I plead guilty. I was under the
3 impression I would receive no more than 12 years if
4 I pled guilty.

5 Q And where did that impression come from?

6 A My attorney.

7 Q Your attorney?

8 A Yes, sir.

9 Q Ms. Fullwood?

10 A Ms. Fullwood.

11 Q Okay. And did you know at the time or prior to
12 your pleading guilty in 2008 that there would be
13 members of the family of the deceased party
14 testifying?

15 A No, sir, she never made me aware of that.

16 Q Did you discuss with Ms. Fullwood prior to coming
17 to court on October 16, 2008, about the possibility
18 of the issue of double jeopardy?

19 A No, sir, I never -- she never discussed that.

20 Q She never discussed that with you?

21 A Never, sir.

22 Q And did Ms. Fullwood explain -- did Ms. Fullwood
23 explain to you what a Brady motion is?

24 A I think she told me about it one time before. I'm
25 not sure but I know what a Brady motion is.

JAMES COBBERT -- DIRECT -- MR. HALL

8

1 Q Do you know whether or not Ms. Fullwood undertook
2 any kind of discovery prior to you pleading guilty?

3 A No, sir.

4 Q And you did not know that the relatives of the
5 victim would be testifying in court that day?

6 A No, sir, I did not know that.

7 Q And, of course, you responded to Judge Keesley's
8 questioning October 16, 2008?

9 A Yes, sir.

10 Q But your responses to those questions were based on
11 what, on your prior discussions with Ms. Fullwood?

12 A Yes, sir. I responded to the best of my ability at
13 the time. I was not really prepared. After the
14 fact that the family spoke against me, I wasn't
15 prepared to respond to it. I just responded the
16 best I know now.

17 After she made her statement, it pretty
18 much -- you know what I'm saying -- shift the whole
19 courtroom. Everybody was crying. It kind of
20 messed up the courtroom. I couldn't respond
21 properly to it.

22 Q I understand. After the sentencing hearing --

23 A Uh-huh. (Indicating affirmative response.)

24 Q -- you made a request of Ms. Fullwood?

25 A Yeah. After sentence I actually asked her in the

1 courtroom -- she actually left but someone went and
2 got her -- to file a direct appeal. Then I wrote
3 to the Clerk of Court asking about the direct
4 appeal, and they said they was going to forward a
5 copy to it, and I never heard anything else about
6 it.

7 Q You never heard anything else about this?

8 A No, sir.

9 Q How many times did you meet with Ms. Fullwood prior
10 to your sentencing hearing?

11 A Probably about three or four.

12 Q Three or four?

13 A Uh-huh. (Indicating affirmative response.)

14 Q And she went over the details of the crime and what
15 the elements were and what you were being charged
16 with?

17 A She didn't go over the details for discussion, but
18 she told me what I was charged with. We never went
19 over exactly no details. The only thing she
20 basically would explain to me is we would try to
21 get a good plea in front of a good judge and get a
22 good plea.

23 Q I didn't catch that. And get a what?

24 A A good plea, like a favorable plea.

25 Q And you also understood that -- or at least your

JAMES COBBERT -- DIRECT -- MR. HALL

10

1 impression was that the solicitor would make what
2 kind of recommendation?

3 A From what she told me I, would go in and plead,
4 and there would be no recommendation from the
5 State. I went up there pleading thinking that I
6 would get no recommendation. No sentence would be
7 opposed.

8 Q So what happened at the hearing on October 16,
9 2008, that was a total surprise to you?

10 A Well, after the solicitor read off the facts of the
11 case, he said, "Your Honor, his sister would like
12 to speak, but first let me pass around the victim
13 impact statement."

14 So they passed a statement around and asked
15 everybody to read it. So we read it. That's the
16 first time I knew exactly how they felt about me.
17 I didn't know they felt that way. So when I read
18 it, it sent shock waves through me. You know what
19 I'm saying?

20 It really like shocked me. So then this other
21 sister came up, and she started crying and
22 saying -- she was speaking her grief. She was
23 explaining herself and I understood it, but still I
24 wasn't prepared to answer to that.

25 I didn't know nothing about it. I wasn't

1 prepared. So the thing about it -- and also the
2 fact that she also asked that I receive the maximum
3 sentence. Both sisters did. I actually have
4 the -- if you would, sir, make this an exhibit.

5 Q What is it?

6 A This is the victim impact testimony right here.

7 Q That's a matter of record, Mr. Cobbert.

8 A It's a matter of record. Right here she is asking
9 for me to receive the maximum sentence. The other
10 sister also stated verbally in court that she was
11 asking for me to receive the maximum sentence.

12 Under Ms. Fullwood she told me that I would
13 not receive -- nobody would tell me I would
14 receive --

15 COURT REPORTER: I'm sorry. I didn't
16 understand you. "Nobody would tell me I would receive"
17 what?

18 A Basically what I'm saying is she told me I would
19 never receive a sentence from the solicitor, from
20 the State. I would only go in there and plead.
21 She never told me I would go in there and somebody
22 would be asking for the maximum sentence.

23 I wouldn't have pled guilty if I am going in
24 the courtroom and somebody is asking for the
25 maximum sentence. That is a breach of my plea

JAMES COBBERT -- DIRECT -- MR. HALL

12

1 agreement.

2 My plea was no recommendation, but I got two
3 people from the State saying they want me to get
4 the maximum sentence. That is violating my Eight
5 Amendment, my due process right.

6 Q Mr. Cobbert, all of this took place after the judge
7 asked you a series of questions. He asked you a
8 series of questions: If you understood why you
9 were in court and if your plea was voluntary?

10 A I think so.

11 Q He asked you a series of those questions. Then
12 this impact statement and all this other took
13 place?

14 A Yes, sir.

15 Q So you didn't have any idea that that was going to
16 come into the record or in the court until after
17 you had acknowledged to the Court that your plea
18 was voluntary?

19 A Uh-huh. (Indicating affirmative response.)

20 Q And that you understood you were waiving a right to
21 a jury trial?

22 A Yes, sir.

23 Q Then all of that other came in?

24 A Yes, that's when they sprung it on me.

25 Q Okay. Just to reiterate, you did ask Ms. Fullwood

1 to take a direct appeal?

2 A Yes, sir, I wrote to her and I asked in the
3 courtroom. I asked somebody to tell her in the
4 courtroom to do it, but she -- I don't know what
5 the situation was, why she didn't do it, but she
6 didn't do it.

7 Q Answer any questions the State has for you.

8 CROSS EXAMINATION

9 BY MS. MAY:

10 Q Mr. Cobbert, is it Cobbert (phonetic)?

11 A Cobbert.

12 Q Cobbert, I'm sorry.

13 A It's okay.

14 Q Excuse me. You stated that after the plea hearing,
15 somebody went to go get Ms. Fullwood?

16 A I think my attorney, I believe it was. I don't
17 want to say it was, but I believe it was, went to
18 go get her and tell her to come back to the
19 courtroom and file a direct appeal.

20 Q Did you ask Ms. Alves to go --

21 A Yes, I talked to her. I actually went in the back
22 and talked to her too after everything took place.

23 Q After the plea hearing. What did you say to her?

24 A I really can't recall.

25 Q You don't remember?

1 A: I can't recall.

2 Q I believe you testified that the understanding was
3 the solicitor would not make or the State would not
4 make any recommendations?

5 A Yes, that was my plea agreement.

6 Q And that's what happened; correct? The solicitor
7 did not make any recommendations?

8 A He did not make a recommendation, but the family
9 did make a recommendation.

10 Q But the solicitor didn't; correct?

11 A No, he did not make a recommendation.

12 Q And I believe -- just for clarity -- it appears
13 that the Court on page -- do you have your
14 transcript, a copy of your transcript?

15 A Not the whole thing, just basically the things I am
16 going to be using. I am familiar with it.

17 Q It appears prior to the victim impact statement
18 coming in, the Court did find that you had made a
19 voluntary and intelligent plea?

20 A Yes, ma'am.

21 Q If the transcript reflects that, would you dispute
22 it?

23 A I made a voluntary plea based on the fact that I
24 was receiving no plea recommendation, no sentence.

25 That's the plea I entered, you know.

1 Q So are you saying today that had you received
2 different advice, you would go to trial instead of
3 pleading?

4 A Had I known that somebody was going to be in the
5 courtroom asking for the maximum sentencing, I
6 would have gone to trial. Who would plead for the
7 maximum sentence?

8 Q I believe after the victims made their statement,
9 Ms. Fullwood made a mitigation response; is that
10 correct?

11 A Yeah, she spoke up and she tried to speak on my
12 behalf.

13 Q It appears it's about three or four pages in the
14 transcript. Then after that Ms. Alves discussed
15 mitigation on your behalf as well?

16 A Yes, ma'am.

17 Q And then it appears that you as well responded and
18 apologized to the Court?

19 A Yeah, I tried to respond.

20 Q It appears you did that twice, two different times;
21 correct?

22 A I don't know.

23 Q It might have been broken up.

24 A I don't know.

25 Q Did you say anything to either of your attorneys

JAMES COBBERT -- CROSS -- MS. MAY

16

1 during the plea when the victims were reading their
2 statements?

3 A Yeah, I asked Ms. Fullwood to withdraw the plea.

4 Q You did?

5 A Oh, yeah.

6 MS. MAY: Beg the Court's indulgence.

7 THE COURT: Yes, ma'am.

8 (Pause.)

9 MS. MAY: I have no further questions. Thank
10 you.

11 THE COURT: Any redirect?

12 MR. HALL: No redirect.

13 THE COURT: Thank you, sir. You may step
14 down.

15 THE WITNESS: Sir, I also have a double
16 jeopardy issue I did not discuss. We just went into
17 victim impact. I did not talk about double jeopardy.

18 THE COURT: Tell me about double jeopardy.

19 THE WITNESS: My probable with double jeopardy
20 is the State prosecuted me for the same set of facts. I
21 have my transcript page 10 through 12. If you want to,
22 you can look at it and see that it's the original. It's
23 the original transcript pages.

24 THE COURT: I have got a copy of the
25 transcript.

1 THE WITNESS: If you will follow me to page
2 11. It's the beginning of the actual crime. "About
3 that time, Your Honor, Mr. Cobbert noticed that he was
4 being followed by the police and began to speed up --

5 COURT REPORTER: Wait a minute, "began to
6 speed up." Go ahead.

7 THE WITNESS: "About that time, Your Honor,
8 Mr. Cobbert noticed that he was being followed by the
9 police and began to speed up in the passing lane --
10 began to speed up past people in the passing line.

11 "At some point after that, the deputy
12 activated his blue lights and siren and reached up to
13 speeds of about 100 miles an hour. As they were coming
14 through the Town of Lexington --

15 COURT REPORTER: Wait a minute. "As they were
16 coming through the Town of Lexington..."

17 THE WITNESS: "The Town of Lexington -- excuse
18 me -- into the County of Lexington, a Pelion police
19 officer, Officer Carey --

20 THE COURT: Officer Crier?

21 THE WITNESS: Crier, excuse me. Thank you.
22 "Took over the lead pursuit of the vehicle in Aiken
23 County. The Aiken officer, Deputy Fox, followed in
24 behind him --

25 COURT REPORTER: I'm sorry, Judge.

1 THE COURT: You are just reading the
2 transcript, right?

3 THE WITNESS: Yeah, I'm going through it.

4 THE COURT: Do you want me to do it?

5 THE WITNESS: Okay. You can.

6 THE COURT: "Members of the Sheriff's
7 Department set up stop sticks and tried to put stop
8 sticks in front of him. They got them deployed. He was
9 able to go around them and only put -- I believe the
10 passenger side of the vehicle ran over the sticks, and
11 it did not deflate the tire. The pursuit continued on
12 into the Town of Pelion.

13 "Another Lexington deputy had set up stop
14 sticks about 300-yards farther up in the Town of Pelion.
15 At that point the defendant went off on the right side
16 of the road in an attempt to pass some vehicles, came
17 back on the roadway.

18 "When he came back on, it jerked his car to
19 the left, and he overcorrected, coming back to the
20 right. At that point the M.A.I.T. team from the Highway
21 Patrol estimated he was going about 88 miles an hour.

22 "When he overcorrected back to the right, his
23 car lost control and he slammed into the back of Michael
24 Wilson who was driving. He was actually working for the
25 Department of Transportation driving a Department of

1 Transportation vehicle.

2 "As a result of that collision, both
3 vehicles -- both of the vehicles lost control and
4 flipped. Mr. Wilson was wearing his seat belt, but his
5 seat broke and he was ejected from the vehicle suffering
6 injuries on the scene that resulted in his death on
7 scene."

8 THE WITNESS: That's correct, Your Honor.

9 THE COURT: Is that all you want to read?

10 THE WITNESS: Yes, sir. My problem is the
11 judge gave me ten years for the reckless homicide
12 initially at first. So the problem is the reckless act
13 -- once they charge you with reckless homicide, what
14 they are punishing you for is the reckless act.

15 THE COURT: Okay.

16 THE WITNESS: My reckless act is on page 12,
17 lines 3 through 12.

18 THE COURT: Okay.

19 THE WITNESS: Traveling at a high rate of
20 speed, attempting to pass a vehicle on the right, and
21 lost control and collided with another Chevy Blazer.
22 The problem is the judge gave me ten years for this
23 reckless act right there.

24 THE COURT: Okay.

25 THE WITNESS: Basically this is a separate and

1 distinctive act from everything else that happened. He
2 separated it.

3 THE COURT: Okay.

4 THE WITNESS: So my problem is how can they
5 try me for failure to stop for a blue light resulting in
6 death without punishing me for the reckless act twice
7 according to the facts.

8 Basically what I'm saying is it's one
9 continuous act from the beginning to the end resulting
10 in death. What I'm saying is it's one continuous act.
11 By the State charging me with reckless homicide, they
12 are saying it's a separate and distinctive act.

13 My problem is according to these facts, now
14 that you punish me for ten years, how can you punish me
15 for this when I am being punished for this twice? You
16 see what I'm saying?

17 THE COURT: Yes, I got you.

18 THE WITNESS: I got a foundation case right
19 here. My foundation case is Illinois versus --

20 COURT REPORTER: Illinois versus who?

21 THE WITNESS: Battle. Battle, I believe.

22 THE COURT: Let me take a look and help you
23 out with that. Illinois versus Vitale, V-I-T-A-L-E.

24 THE WITNESS: Vitale. Thank you.

25 THE COURT: This is 447 U.S. 410, 100 S.Ct.

1 2260; is that right?

2 THE WITNESS: Yes, sir.

3 THE COURT: And decided in 1980. That's the
4 case you are relying on?

5 THE WITNESS: Yes, sir, that's it right there.
6 That's my foundation case.

7 THE COURT: All right.

8 THE WITNESS: I also dispute under the
9 Blockburger test that these two charges will constitute
10 the same offense.

11 THE COURT: The two charges are characterized
12 as one --

13 THE WITNESS: Characterized as one offense.

14 THE COURT: Characterized as one offense.
15 Okay.

16 THE WITNESS: I submit to the courtroom that
17 driving in a reckless disregard, that's the reckless
18 homicide. Running from the police is driving the
19 automobile in a reckless disregard. The elements are
20 the same.

21 THE COURT: Okay.

22 THE WITNESS: So basically the State used
23 artful phrasing --

24 COURT REPORTER: I didn't get it.

25 THE COURT: Awkward phrasing of the elements?

1 THE WITNESS: Artful, artful.

2 THE COURT: Inartful?

3 THE WITNESS: No, artful.

4 THE COURT: Artful?

5 THE WITNESS: Artful, like draw art, artful
6 phrasing of the evidence to convict me of both
7 charges --

8 THE COURT: Okay.

9 THE WITNESS: -- when purely different
10 offenses are properly characterized as one offense. By
11 them charging me with failure to stop resulting in
12 death, they are saying it's one offense.

13 THE COURT: I got you. Let's see. Do you
14 have any questions you want to ask him counsel?

15 MR. HALL: No, sir.

16 THE COURT: Any cross on that?

17 MS. MAY: No, Your Honor.

18 THE COURT: Anything else you need to tell me
19 on that, Mr. Cobbert? I think I've got the essence of
20 your argument.

21 THE WITNESS: I also would like to submit
22 summary judgment on that issue.

23 THE COURT: Summary judgment?

24 THE WITNESS: Yes, sir. I would like to move
25 for summary judgment on that issue. I already got it

1 typed up.

2 THE COURT: Oh, you've got a motion?

3 THE WITNESS: Yes, sir.

4 (Hands to Court.)

5 THE COURT: Summary judgment motion. You want
6 to submit this as -- this is one document?

7 THE WITNESS: Yes, sir.

8 THE COURT: Can I staple it for you?

9 THE WITNESS: Yes, sir.

10 THE COURT: You want to submit it as an
11 exhibit?

12 THE WITNESS: I actually have a brief too. I
13 actually move for summary judgment on the issue. I want
14 the issue addressed, the double jeopardy issue
15 addressed. I also have a brief right here too.

16 THE COURT: What I'm asking is do you want me
17 to make this part of the record?

18 THE WITNESS: Yes, sir, I would love for you
19 to make it part of the record.

20 MS. MAY: Your Honor?

21 THE COURT: Would you like to view it?

22 MS. MAY: I do have a copy of that.

23 Mr. Cobbert --

24 THE WITNESS: It's actually a different one.
25 That right there is a different one.

1 MS. MAY: No, I have not seen it. Mr. Cobbert
2 tried to file a summary judgment motion previously
3 without his attorney undersigning. And when Mr. Hall
4 learned of that, he wouldn't undersign it.

5 THE COURT: He is introducing this. While
6 this is -- this document which Mr. Cobbert handed to me
7 is unsigned and undated -- I am going to admit it as an
8 exhibit in the hearing.

9 (Applicant's Exhibit Number 1 is received into
10 evidence.)

11 THE COURT: I have done that without showing
12 it to counsel. Would y'all like to look at it?

13 MS. MAY: Just briefly.

14 MR. HALL: No, sir.

15 (Pause.)

16 THE COURT: Okay. Anything else, Mr. Cobbert?

17 THE WITNESS: I think I covered everything. I
18 would also like to say that it's a double jeopardy
19 issue. Under Blockburger these two would constitute the
20 same offense.

21 The characterization of the elements are the
22 same. Failure to stop for a blue light is operating an
23 automobile in a reckless disregard for the safety of
24 others.

25 THE COURT: Okay.

1 THE WITNESS: Also, under proof of facts, the
2 State relied on and used the record that they did to
3 establish reckless homicide also to convict me of
4 failure to stop for a blue light resulting in death.

5 The State sought to establish the essential
6 elements of the second crime by using the conduct I was
7 already convicted for in the first crime, which would be
8 double jeopardy.

9 THE COURT: Okay.

10 THE WITNESS: Thank you, Your Honor.

11 THE COURT: Thank you very much. Can y'all
12 help him get his stuff together here?

13 THE WITNESS: Sir, can I submit in the record
14 what I wrote down to expand the record?

15 THE COURT: Any objection?

16 MR. HALL: No, sir.

17 THE COURT: You just read that stuff?

18 THE WITNESS: I didn't get to go through it
19 all.

20 THE COURT: You summarized it?

21 THE WITNESS: Yeah, I tried to summarize it,
22 but I would like to submit it in.

23 THE COURT: Show me what it is you want to do.

24 THE WITNESS: Right here.

25 (Hands to Court.)

1 THE COURT: This document is stapled and
2 handwritten.

3 THE WITNESS: Yes, sir.

4 THE COURT: This is also your opening
5 comments; right?

6 THE WITNESS: Yes, sir.

7 THE COURT: Why don't y'all take a look at it.

8 MR. HALL: I have seen it, Judge.

9 THE COURT: Okay.

10 MS. MAY: This was in the record. It's word
11 for word?

12 THE COURT: It's pretty close to what he
13 testified to.

14 THE WITNESS: I'm really not comfortable with
15 my testimony because of the fact I was shaken up a
16 little bit.

17 THE COURT: Sure.

18 THE WITNESS: So if you would admit that in to
19 further my ability.

20 THE COURT: We will put it in as your second
21 exhibit without objection.

22 (Applicant's Exhibit Number 2 is received into
23 evidence.)

24 THE COURT: We will get a copy made for you
25 and get it back to you. Is that it?

1 THE WITNESS: That basically sums it up.

2 THE COURT: Thank you very much.

3 (Witness leaves the witness stand.)

4 THE COURT: Mr. Hall, anything else?

5 MR. HALL: Nothing, no, sir.

6 THE COURT: Mr. Cobbett, I would tell you at
7 this time I am going to decline to grant your summary
8 judgment motion. I guess it's sort of presented in the
9 same manner as a directed verdict motion. I will let
10 the State put up their case at this time.

11 MS. MAY: Your Honor, we'd like to call
12 Ms. Fullwood.

13 THE COURT: All right. Come around, Lawyer
14 Fullwood.

15 ELIZABETH FULLWOOD, being
16 first duly sworn, testified as follows:

17 CLERK: When you are comfortably seated, state
18 your full name for us, please.

19 THE WITNESS: Elizabeth Fullwood.

20 MS. MAY: May it please the Court, Your Honor.

21 THE COURT: Yes, ma'am.

22 DIRECT EXAMINATION

23 BY MS. MAY:

24 Q Ms. Fullwood, how long have you been practicing
25 law?

ELIZABETH FULLWOOD -- DIRECT -- MS. MAY

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1 A Since 1979.

2 Q And how much of that has been in criminal law?

3 A In the high 90 percents.

4 Q And were you appointed to represent Mr. Cobbert?

5 A I was.

6 Q And where were you employed or I guess still
7 employed during Mr. Cobbert's representation?

8 A At the Lexington Public Defender's Office.

9 Q And were you able to meet with Mr. Cobbert to
10 discuss the charges?

11 A I was.

12 Q Do you recall how many times that you were able to
13 meet with him?

14 A From my time records, it looks like I met with him
15 March 6, 2006; November 7, 2006; September 17,
16 2007; July 1, 2008; August 6, 2008; October 9,
17 2008.

18 Q Okay. And did y'all discuss the indictments and
19 the elements of the offenses?

20 A Yes, we discussed the nature and elements of the
21 offenses and the potential penalties for each one.

22 Q And I believe that Mr. Cobbert was also charged
23 with...

24 THE COURT: Shoplifting?

25 Q Shoplifting, as well as possession of a weapon

1 and...

2 A Leaving the scene of an accident.

3 Q Yes. Those were eventually dropped or dismissed?

4 A Well, he pled to the Aiken County larceny type
5 charge, but the other two charges were dismissed.

6 Q And did you review the possible punishments for the
7 charges with Mr. Cobbert?

8 A Yes.

9 Q Did you, in discussing the possible punishment,
10 explain to him the minimum and the maximum, that it
11 could be concurrent or consecutive?

12 A That's right.

13 Q And did you discuss his version of the events?

14 A I did.

15 Q Do you recall what he told you?

16 A Well, he was running from the police. He was of
17 the belief that the victim, being a Highway
18 Department employee, somehow had access to the
19 police broadcasts and had heard that a chase was
20 coming in the direction he was at and had pulled
21 his work vehicle in front to block the road and
22 that the vehicle was stopped when the collision
23 occurred;

24 Based on that I hired Woody Poplin, who is an
25 engineer, to look at the M.A.I.T. report and the

ELIZABETH FULLWOOD -- DIRECT -- MS. MAY

30.

1 raw data that had been collected by the Highway
2 Department and run his own numbers.

3 Mr. Poplin said that that vehicle was not
4 stationary. It was moving at the time that the
5 collision occurred. So it was -- I'm not sure that
6 that would have been a defense in any event, but we
7 were able to rule out that type of activity had
8 taken place.

9 Q Did you discuss Mr. Poplin's -- I guess if he had a
10 report or his findings with Mr. Cobbert?

11 A He did not write me a report at my request, but we
12 did have a long telephone conversation. I went
13 over with Mr. Cobbert what Mr. Poplin told me.

14 Q And did you file a discovery motion?

15 A Yes, I filed a Rule 5 and a Brady motion.

16 Q And do you recall the items that you received in
17 the discovery materials?

18 A I know I got a M.A.I.T. report. There were
19 photographs, statements, C.A.D. reports, copies of
20 everything, collision report forms. Mr. Cobbert
21 received a copy of every piece of discovery
22 material that we got.

23 Q Did you have a chance to review most of the
24 discovery with Mr. Cobbert?

25 A Yes.

1 Q Based on your meetings with Mr. Cobbert and y'all's
2 review of the discovery, did y'all discuss any
3 possible defenses?

4 A To the extent they existed, yes.

5 Q And did he -- had Mr. Cobbert given any statements
6 to the police? Do you recall?

7 A I don't recall. I don't think he had though. Now,
8 I don't know about as far as the Aiken County case.
9 I don't know about that.

10 Q And did you feel you had enough or sufficient time
11 to prepare Mr. Cobbert's case?

12 A I do, I do. In reviewing my notes, it looks like
13 he had always wanted to work out some type of plea
14 arrangement.

15 Q Okay.

16 A He was hoping to get a guarantee that he would not
17 get much, if any time at all, as a result of all of
18 this, but we never could get the prosecution to
19 agree on a cap or a recommendation or anything like
20 that.

21 Q So you did try to engage in plea negotiations with
22 the State?

23 A That's right.

24 Q Did you discuss those negotiations --

25 A That's right.

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1 Q -- with Mr. Cobbert. Okay. Did you also
2 discuss -- although he informed you he did want to
3 plead -- did you discuss the pros and cons of a
4 trial versus pleading guilty?

5 A I'm sure that would have been the nature of what we
6 would have discussed, yes.

7 Q Did you feel that a plea was in his best interest?

8 A Yes, because I felt that he would undoubtedly be
9 convicted at a trial. His only chance of receiving
10 some consideration in sentencing would be to plead.

11 Q Did you ever at any point promise him that he
12 wouldn't receive the maximum or he would receive a
13 certain sentence?

14 A Absolutely not.

15 Q And was it Mr. Cobbert's decision alone to plead
16 guilty?

17 A Yes.

18 Q Going back, in your review of the indictments and
19 the elements of the offenses, specifically the
20 reckless homicide and failure to stop for a blue
21 light resulting in death, did you find any double
22 jeopardy issues?

23 A No, no. If you would like me to elaborate, I will.

24 Q Please.

25 A The argument Mr. Cobbert is making in my opinion --

1 and I really haven't brushed up recently on double
2 jeopardy -- is an argument that might have gotten
3 him somewhere in the '80s.

4 Because the Courts had moved away from a
5 strict Blockburger view to sort of looking at an
6 entire transaction. Very closely related offenses
7 may have been, you know, considered multiple
8 punishments for the same offense. It was the
9 conduct rather than the straight Blockburger
10 elements test.

11 However, in the past 20 some-odd years, we
12 have moved back to the Blockburger analysis and
13 certainly that is the analysis the Courts were
14 using at the time that this case went to court.
15 Under a Blockburger analysis, these are clearly
16 separate offenses, and he can be prosecuted for
17 both crimes.

18 Q So Mr. Cobbert was not sentenced twice for the same
19 offense?

20 A Not in my opinion.

21 Q At the guilty plea, you had the opportunity to
22 present mitigation in response to -- or after the
23 victims' statements to the Court? That's correct?

24 A Right.

25 Q And did you and Mr. Cobbert discuss what you would

ELIZABETH FULLWOOD -- DIRECT -- MS. MAY

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1 say during mitigation or how that part of the
2 hearing would proceed?

3 A I normally don't discuss every word I am going to
4 say. I have notes here about his background, about
5 his work history, about what it had been like for
6 him at the jail, getting names of family members
7 who might come and stand with him and support him
8 during the plea.

9 Q I believe I touched on this earlier, but one of
10 Mr. Cobbert's claims concerns a firearm charge and
11 that it was falsely brought. However, that charge
12 was later dismissed?

13 A That's right.

14 Q And Mr. Cobbert has also alleged a conflict of
15 interest in his application due to Rob Madsen's
16 move to the Public Defender's Office?

17 A Right.

18 Q How does your office typically handle a situation
19 where a solicitor moves from the Solicitor's Office
20 to the Public Defender's Office?

21 A Well, it doesn't often happen. In this particular
22 case, Mr. Madsen had originally been the solicitor
23 on this case. Then he came over to our office, and
24 it would seem like any complaint would be going
25 from the other way.

1 Mr. Cobbert never really complained to me
2 directly about that, but he complained about it in
3 a letter he wrote to the Supreme Court. As a
4 result, I e-mailed Dayton Riddle and asked for a
5 hearing and to "Let's get this case resolved
6 anyway," because he had been in jail a couple of
7 years.

8 Between Mr. Madsen changing his employment and
9 the next solicitor down the line had been on
10 extended maternity leave, the case had just kind of
11 stagnated.

12 Mr. Cobbert just never raised it again. I
13 think he just seemed to be wanting more attention
14 to get something done with his case rather than
15 making a genuine complaint.

16 Q Upon Mr. Madsen's move to the Public Defender's
17 Office, did he have any involvement in
18 Mr. Cobbert's case?

19 A No, he did not.

20 Q And do you recall Mr. Cobbert asking you to file an
21 appeal on his behalf?

22 A No. If he had I would have.

23 Q Going back to Mr. Cobbert's claim regarding the
24 victim impact statement, did you have an
25 opportunity to view the written statement that was

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1 provided to the Court?

2 A Yes, and I believe he testified earlier that we had
3 a chance to read it.

4 Q And did Mr. Cobbert ever ask you during the plea
5 to -- I guess specifically after the victims made
6 their statement to withdraw, that he wanted to
7 withdraw his plea?

8 A No.

9 Q And if he had indicated to you that he did want to
10 withdraw, would you have withdrawn it?

11 A Well, I would have made the motion, but the plea
12 had already been accepted. It would certainly have
13 been difficult to withdraw it at that stage.

14 MS. MAY: I have no further questions.

15 THE COURT: Cross.

16 CROSS EXAMINATION

17 BY MR. HALL:

18 Q Ms. Fullwood, you say you don't recall or your
19 notes don't reflect Mr. Cobbert asking you about an
20 appeal?

21 A No, sir. If a client asks me to appeal, even after
22 a guilty plea, I always do because it's just a
23 form. All I have to do is mail the form to the Court
24 of Appeals and to Appellate Defense. It's not like
25 it's some sort of burdensome thing for me to do.

1 To protect anybody's rights whenever they ask, I
2 will file an appeal.

3 Q Okay. Now, during the sentencing Judge Keesley --
4 reading from page 17 of the transcript of record,
5 line 9 -- Judge Keesley is saying, "Now, in South
6 Carolina anything that carries a possibility of
7 20 years or more is classified as a no-parole
8 offense.

9 "What a not parole offense is commonly called
10 is truth in sentencing. Truth in sentencing means
11 that you have to serve at least 85 percent of the
12 time day for day before you can be possibly
13 released from prison."

14 Did you discuss that with Mr. Cobbert? That
15 by pleading guilty he might receive that maximum
16 sentence, and that would be a no-parole offense?

17 A Every time I discuss the sentencing possibilities a
18 client is facing, whether it's classified as
19 violent or nonviolent, whether it's a no-parole
20 crime, whether it's a strike, classified as serious
21 or most serious, and whether there are other
22 collateral consequences, like child abuse registry,
23 sex offender registry, I always discuss that, those
24 types of items --

25 Q Elements?

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1 A -- yeah, as part of my sentencing discussions with
2 clients.

3 Q So in your mind you feel that he was prepared for
4 that statement from the Court?

5 A Yes, sir. Yes, sir, he was.

6 Q And in your mind the reason the issue of double
7 jeopardy didn't come up is you felt it was a
8 non-meritorious claim?

9 A That's right.

10 (Pause.)

11 MR. HALL: No further questions.

12 THE COURT: Anything else?

13 MS. MAY: Nothing further.

14 THE COURT: Ms. Fullwood, as a defense lawyer,
15 if you had known beforehand that your client was going
16 to get the maximum sentence on a plea, if you had a
17 crystal ball, you wouldn't have allowed him to plead;
18 would you? You would have gone to trial?

19 THE WITNESS: Of course not. There would be
20 nothing to lose at that point.

21 THE COURT: Just for Mr. Cobbert's benefit, it
22 was your professional opinion that the most likely
23 opportunity for him to receive a lower sentence would be
24 to acknowledge his guilt and enter a guilty plea; is
25 that right?

1 THE WITNESS: That's right, and hope that he
2 would get some consideration in sentencing by coming
3 forward, accepting responsibility, and expressing his
4 remorse for his conduct.

5 THE COURT: Anything else from anybody?

6 MR. COBBERT: Yeah, I got some questions.

7 THE COURT: Tell your lawyer.

8 (Pause.)

9 RECROSS EXAMINATION

10 BY MR. HALL:

11 Q Ms. Fullwood, at the request of the applicant, do
12 you feel that -- I mean, you have already stated
13 you didn't feel that there was a double jeopardy
14 issue -- but do you feel that he was prosecuted
15 based on the same set of facts for each sentence?

16 A Well, he was prosecuted for his conduct on that
17 day. My understanding of the law is that the
18 General Assembly can make certain discreet elements
19 of your conduct punishable as separate crimes, and
20 that's what occurred in this case. So, no, I do
21 not think he was -- under the Blockburger test --
22 he was not punished --

23 Q Twice for the same set of facts?

24 A Twice for the same set of facts, that's right.

25 (Pause.)

1 BY MR. HALL:

2 Q Mr. Cobbert is a bit confused. He feels that he
3 was punished twice for the same set of facts.

4 A Well, I think that I have said the reason I did not
5 think he was being subjected to double jeopardy and
6 multiple punishments. He believes the law is
7 different, and he has set forth his position on the
8 record. You know, I could be wrong. It's all on
9 the record, and our appellate courts can review it
10 and let us all know one way or the another.

11 Q Thank you, ma'am.

12 MR. HALL: No further questions.

13 THE COURT: Anything?

14 MS. MAY: No, Your Honor.

15 THE WITNESS: Thank you, Your Honor.

16 (Witness leaves the witness stand.)

17 THE COURT: Anything else from the State?

18 MS. MAY: No, Your Honor.

19 THE COURT: Anything else from the applicant?

20 MR. HALL: No, sir.

21 THE COURT: Well, Mr. Cobbert, clearly you
22 have done -- you have worked hard, done a lot of
23 research, and have put a lot of thought into your
24 position. However, at this time I'm going to deny your
25 application.

1 I find that counsel, Ms. Fullwood, as you
2 probably know, in order to get relief under the Post
3 Conviction Relief Act, you've got to show that the
4 conduct of your lawyer fell below an objective standard
5 of reasonableness and also that there is prejudice.

6 I don't think that Ms. Fullwood's conduct fell
7 below an objective standard of reasonableness. Your
8 argument about the double jeopardy clause is
9 interesting, and obviously you have given it a lot of
10 thought, but I disagree with you.

11 It's the same -- I guess you could say that a
12 similar analogous situation would be somebody who was
13 charged with armed robbery and possession of a weapon
14 during a violent offense.

15 You have to have some kind of weapon to commit
16 the armed robbery. It's the same -- this is very
17 similar to that, analogous as you might say. As
18 Ms. Fullwood has pointed out, I think, the State of the
19 law is that this is not a violation of the double
20 jeopardy clause.

21 But perhaps on appeal an appellate court might
22 disagree with that ruling. I am going to deny your
23 motion for summary judgment and your application, and I
24 hope you are doing well.

25 MR. COBBERT: Is he going to file a 59(e)?

1 THE COURT: You will have to talk to your
2 lawyer about what he is going to do. I will ask the
3 State to prepare an order, and we take it from there.

4 MR. HALL: Thank you, sir.

5 THE COURT: Good luck to you.

6 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

ORIGINAL

2009-CP-32-0127

James C. Cobbett, III, #293798,

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before the Court pursuant to an application for post-conviction relief (PCR) filed January 9, 2009. Respondent made its Return on December 11, 2009. An evidentiary hearing into the matter was convened on November 29, 2011, at the Lexington County Courthouse. The Applicant was present at the hearing and was represented by Ronald Hall, Esquire. The Respondent was represented by Kaelon E. May of the South Carolina Attorney General's Office.

At the hearing, the Applicant testified on his own behalf. The State offered the testimony of Elizabeth Fullwood, Esquire (Ms. Fullwood) Applicant's plea counsel. This Court also had before it the records of the Lexington County Clerk of Court, the transcript of the proceedings against the Applicant, and the Applicant's records from the South Carolina Department of Corrections.

I. PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Lexington County Clerk of Court. The Applicant was indicted at the May 2006 term of the Lexington County Grand Jury for Failure to Stop for Law Enforcement Vehicle, Blue Light Resulting in Death (2006-GS-32-1447), and Reckless Homicide

~~(2006-GS-32-1445). Applicant thereafter waived presentment on an Aiken Shoplifting charge~~

(2008-GS-02-1678), and also waived jurisdiction. He was represented by Elizabeth Fullwood, Esquire, and Wallis Alves, Esquire. On October 16, 2008, the Applicant pled guilty as charged. He was sentenced by the Honorable William P. Keesley to confinement for a period of ten (10) years for the reckless homicide charge, a concurrent period of five (5) years on the shoplifting charge, and a consecutive period of twenty-five (25) years on the failure to stop for a blue light resulting in death charge. The Applicant did not appeal his guilty plea or sentence.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Involuntary Guilty Plea
 - a. "Plea was entered under false pretense."
2. Double Jeopardy
 - a. "Sentenced twice for same offense (crime)"
3. Cruel and Unusual Punishment
 - a. "Harsh lengthy sentence which is uncommon for crime."

FILED
2012 SEP 21
CLERK OF COURT
JANET F. BROWN

On September 2, 2011, Applicant filed an Amendment to his Application which included the following claims:

4. Ineffective Assistance of Counsel
 - a. Failure to ensure court adhered to §16-3-1550(f) and allowed response to victim's statement
 - b. Failure to file appeal
 - c. Failure to object to sentence based on double jeopardy;
 - d. Failure to object to solicitor's comment of a firearm charge
5. Conflict of Interest:
 - a. Solicitor Rob Vadsen transferred to the public defender's office where Applicant's attorney was currently working on Applicant's case.

II. SUMMARY OF TESTIMONY AND EVIDENCE PRESENTED AT THE PCR

EVIDENTIARY HEARING

Applicant's Testimony

At the PCR hearing Applicant testified that he waived his right to a jury trial and pled guilty because Applicant was looking for a lesser sentence. Applicant testified that plea counsel informed Applicant that he would receive a lesser sentence if Applicant pled guilty instead of proceeding to trial. Applicant testified that he was not aware that the victims would be present during his guilty plea; that plea counsel never discussed double jeopardy with Applicant; and that plea counsel informed Applicant about a Brady motion one time. Applicant testified that plea counsel did not undertake any discovery; that Applicant's responses to the plea judge were based on plea counsel's advice; and that after Applicant's plea hearing someone asked plea counsel to file an appeal for Applicant. Applicant testified that he wrote a letter to the clerk of court inquiring about his appeal; that Applicant met with plea counsel three to four times prior to the plea; and that plea counsel explained to Applicant what he was charged with.

Applicant testified that plea counsel informed Applicant that in order to receive a good plea that Applicant needed to plea in front of a good judge. Applicant testified that it was his understanding that the solicitor would make no recommendation or oppose the sentence. Applicant testified that the solicitor provided the facts of the case to the plea judge and then provided the victim impact statement for Applicant to review. Applicant testified that the victims requested that Applicant receive the maximum sentence at the plea hearing. Applicant testified that he was not prepared to properly respond after the victims provided statements to the plea court. Applicant

Em

~~testified that had he known the victims were going to testify at his guilty plea he would have~~
proceeded to trial instead. Applicant testified that his guilty plea and sentence resulted in a doubt
jeopardy issue. Applicant testified that the plea judge sentenced Applicant to ten years for the
'reckless act;' that the incident was one continuous act; and that Applicant is being punished for
reckless homicide twice. Applicant testified that the charges he pled to qualify as the same offense
under the Blockburger test and that the state used artful phrasing of the evidence. Applicant offered
into evidence a Motion for Summary Judgment as well a prepared memorandum of his arguments as
exhibits.

Applicant testified that the solicitor did not make a recommendation at his guilty plea hearing
but that the victims made a recommendation by asking the plea judge to sentence Applicant to the
maximum. Applicant testified that he would admit prior to the victim's impact statement the plea
judge determined that Applicant's guilty plea was entered voluntarily. Applicant testified that he
asked plea counsel to withdraw his plea after hearing the victim impact statement.

Ms. Fullwood's Testimony

At the PCR hearing plea counsel testified that she has been practicing law since 1979 and that
ninety percent of her practice is in criminal law. Counsel testified that she was appointed to represent
the Applicant and that her notes reflected she met with Applicant six times prior to Applicant's plea.
Counsel testified that she discussed Applicant's version of the facts. Counsel testified that she hired
an engineer, Mr. Woody Poplin, to review Applicant's case including the MAIT report and whether
the vehicle was stationary. Counsel testified that Mr. Poplin was able to rule out that the vehicle was
stationary. Counsel testified that she informed Applicant of Mr. Poplin's review and findings of
Applicant's case. Counsel testified that she filed Rule 5 and Brady motions and received the state's

discovery which included but was not limited to the MAIT report, photographs, statements, and copies of the collision report form.

Counsel testified that she and Applicant discussed possible defenses to the extent that they existed and that Applicant always wanted to enter a plea rather than proceed to trial. Counsel testified that she and the Applicant discussed the pros and cons of pleading guilty versus proceeding to trial, and that counsel never promised Applicant a specific sentence. Counsel testified that in her review of the Applicant's indictments and the elements of the offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. Counsel testified that the Applicant was given the opportunity to present mitigation in response to the victim's statement to the plea court and that counsel discussed mitigation with Applicant.

Counsel testified that with regard to the firearm charge, the charge was dismissed as a part of the plea deal and that Applicant did not enter a plea to the firearm charge. Counsel testified that in regards to Applicant's claim that a conflict of interest existed due to Mr. Rob Madsen's move from the solicitor's office to the public defender's office, that Mr. Madsen was the original solicitor handling Applicant's case but that Mr. Madsen did not have any involvement in Applicant's case upon his move to the public defender's office. Counsel testified that Applicant did not ask her to file an appeal and that if Applicant had requested that counsel file an appeal, counsel would have filed an appeal. Counsel testified that she and Applicant were able to view the victim impact statement at the plea hearing and that Applicant never asked counsel to withdraw his plea upon viewing the victim

impact statement. Counsel testified that if Applicant indicated that he wanted to withdraw his plea then counsel would have moved for the plea to be withdrawn. Counsel testified that if she had known the plea judge was going to sentence Applicant to the maximum then they would have proceeded to trial instead. Counsel testified that she felt it was best for Applicant to enter a plea and accept responsibility in order to try to get the lowest sentence as possible.

III. APPLICABLE LAW

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed 2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable

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probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.Ct. at 117-18, 586 S.E.2d at 625. With respect to guilty plea counsel, the Applicant must show there is a reasonable probability that, but for counsel's alleged errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has reviewed the testimony 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 subject convictions, the Applicant's records from the South Carolina Department of Corrections, the application for post-conviction relief, the transcripts and documents from the prior proceedings, the exhibits introduced into evidence at the hearing, and legal arguments of counsel. Pursuant to S.C. Code Ann. §17-27-80 (2003), this Court makes the following findings of fact based upon all of the probative evidence presented.

1. Involuntary Guilty Plea

Applicant asserts that his guilty plea was involuntary because he entered into the plea under false pretenses. This Court finds that this allegation is without merit. At the plea hearing counsel indicated to the plea judge that she fully explained to Applicant the nature and elements of the offenses, the possible punishments, and his constitutional rights (Tr. p.6, line21 – p. 7, line2). The plea judge asked Applicant if Applicant understood and knew about his right to a jury trial, and Applicant indicated that he did not want a jury trial. (Tr. p. 8-9). Applicant informed the plea judge

that he had not been threatened or coerced into pleading guilty by anyone. (Tr. p.14, lines6-9).

Applicant indicated to the plea judge that he understood the possible penalties of the charges to which he was pleading guilty. (Tr. p.17-18). Additionally, Applicant indicated to the plea judge that he was satisfied with counsel's representation and that counsel had done everything Applicant asked. (Tr. p.15, lines9-15). Applicant told the plea judge that he wanted to plead guilty to reckless homicide and failure to stop for a blue light resulting in death because Applicant was guilty of the two charges. (Tr. p.5-6; p.14, line3-5). Applicant informed the plea judge that he was pleading guilty of his own free will and accord. (Tr. p.9, line2-4). This Court finds the overwhelming evidence in the record and presented through the testimony of the witnesses at the hearing reflects that the plea was knowingly and voluntarily entered. Boykin v. Alabama, 395 U.S. 238 (1969); Vickery v. State, 258 S.C. 33, 186 S.E.2d 827 (1972). Therefore, this Court finds that this allegation is denied and dismissed.

2. Ineffective Assistance of Counsel

a. Failure to Ensure Court Adhered to §16-3-1550(f)

Applicant asserts that plea counsel was ineffective for failing to ensure that the plea court adhered to S.C. Code Ann. §16-3-1550(f) and allow Applicant to make a response to the victim's statement. Section 16-3-1550(f) requires that "[w]ithin a reasonable period of time before sentencing, the prosecuting agency must make available to the defense any written victim impact statement and the court must allow the defense an opportunity to respond to the statement." Applicant, by his own testimony admitted that he and plea counsel were provided the victim impact statement to review prior to being sentenced by the plea judge. Plea counsel testified and the record reflects that plea counsel was given the opportunity after the victim's statements to the court to

page 3 of 7

[Signature]

present mitigation which plea counsel did present. (Tr. p. 22-26). Additionally, Applicant addressed the plea court presenting his own mitigation. (Tr. p. 30-32). This Court finds and the record clearly demonstrates that Applicant and plea counsel were given the opportunity to respond to the victim's statement and did so as per d. Applicant has failed to show that counsel's performance was deficient and any resulting prejudice.

Applicant further claims that not he known what the victim's statement was going to be or that the victims were going to request that Applicant be sentenced to the maximum that Applicant would not have pled and proceeded to trial. This Court finds plea counsel's testimony credible. This Court does not find Applicant's testimony credible. Plea counsel testified that she and Applicant discussed presenting mitigation and that she did not promise a certain sentence to Applicant. There were no recommendations made by the solicitor at the Applicant's plea and the victims are entitled to speak at a guilty plea. This Court finds that Applicant was fully aware of the potential sentence he could receive and was not misadvised by plea counsel. Plea Counsel testified that if Applicant had requested that she withdraw his plea upon hearing the victim impact statement she would have done so. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore these allegations are denied and dismissed.

b. Failure to File Appeal

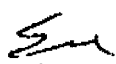
This Court finds that Applicant's claim that plea counsel was ineffective for failing to file an appeal is without merit. Applicant testified that after his plea hearing someone asked plea counsel to file an appeal for Applicant. Applicant did not state whether he requested counsel to file an appeal; however, plea counsel testified that Applicant did not request her to file an appeal. Counsel further explained that she would have filed an appeal if Applicant requested her to do so. When the question

is whether counsel was ineffective in failing to file a direct appeal from the conviction and sentence,

the United States Supreme Court has held that counsel has a constitutionally-imposed duty to consult with a defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal, or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 120 S.Ct. 1029 (2000). The plea transcript reflects that Applicant was informed of his right to appeal by the plea court. (Tr. p.35-36). This Court finds that counsel's testimony that Applicant did not express interest in an appeal to be credible. Under these circumstances, counsel's failure to file an appeal was not unreasonable. Applicant has failed to show any resulting prejudice. This Court finds that counsel was not ineffective in failing to an appeal; therefore, this allegation is denied and dismissed.

c. Failure to Object to Sentence Based on Double Jeopardy

Applicant asserts that plea counsel was ineffective for failing to object to Applicant's sentence because Applicant's plea to Reckless Homicide and Failure to Stop for a Blue Light resulted in Double Jeopardy. This Court finds that this allegation is without merit. Counsel testified that in her review of the Applicant's indictments and the elements of offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. This Court agrees with plea counsel. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. Stogdill v. Nelson, 316 S.Ct. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under



the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76

L.Ed. 306 (1932), Stevenson v. State, 133 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two "distinct" offenses. State v. Mead, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996). This Court has reviewed the entire record and does not find that Applicant's plea to the charges placed Applicant in double jeopardy. This Court finds Applicant has failed to show plea counsel's performance was deficient or any resulting prejudice; therefore counsel was not ineffective for failing to object to Applicant's sentence based on double jeopardy. This Court finds that this allegation is denied and dismissed.

d. Failure to Object to Solicitor's comment of a Firearm Charge

Applicant asserts that plea counsel was ineffective for failing to object to the solicitor's ~~comment concerning a firearm charge that was falsely brought against the Applicant. This Court~~ finds that Applicant has failed to meet his burden of proof. The solicitor informed the plea court that the state was dismissing some related charges in Lexington County as a result of Applicant's plea and that one of the dismissed charges was unlawful possession of a pistol. Counsel testified that with regard to the firearm charge, the charge was dismissed as a part of the plea deal and that Applicant did not enter a plea to the firearm charge. The record reflects Applicant did not enter a plea to any firearm charge and that the firearm charge was in fact dismissed. Applicant has failed to provide what objection to the solicitor's information regarding the charges being dismissed plea counsel failed to make. This Court finds that Applicant has failed to show counsel's performance was deficient and any resulting prejudice; therefore, this allegation is denied and dismissed.

3. Conflict of Interest

Applicant asserts that a conflict of interest existed when solicitor Rob Madsen transferred to the public defender's office where plea counsel was currently working on Applicant's case, when Mr. Madsen was the original defender in Applicant's case. The mere possibility of a conflict of interest is insufficient to challenge a criminal conviction. Langford v. State, 310 S.C. 357, 426 S.E.2d 793 (1993). "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." Duncan v. State, 281 S.C. 435, 438, 315 S.E.2d 809 (1984). The Applicant must show that his attorney actually owed duties to a party whose interests were adverse to the Applicant. Id.; Thomas v. State, 346 S.C. 140, 551 S.E.2d 254 (2001). Plea counsel testified that Mr. Madsen did not have any involvement in Applicant's case upon his move to the public defender's office. This Court finds that counsel's testimony regarding Mr. Madsen to be credible. Applicant has failed to demonstrate that an actual conflict of interest adversely affected plea counsel's performance. This Court finds that Applicant has failed to meet his burden of proof; therefore, this allegation is denied and dismissed.

All Other Claims

Except as discussed above, this Court finds that the Applicant affirmatively waived the remaining allegations set forth in his application at the hearing. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 367 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BML,

V. CONCLUSION

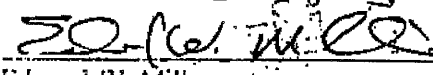
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violation or deprivations that would require this Court to grant his application for post conviction relief. Therefore, this application for post conviction relief must be denied and dismissed 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, 326 S.C. 137, 620 S.E.2d 743 (2005), for the 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:

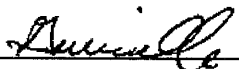
1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. Applicant must be remanded to the custody of Respondent

AND IT IS SO ORDERED this 18 day of January, 2012.


Edward W. Miller
Presiding Judge

FILED

2012
JAN 21

 South Carolina

Fulwood

WITNESSES

SCHP
hallman

DOCKET NO. 2006-GS-32-1445

The State of South Carolina
County of Lexington

COURT OF GENERAL SESSIONS

May TERM 2006

THE STATE
vs.
James C Cobbert

A-2006-32-00559 4/13/2006 10:27 AM

ARREST WARRANT NUMBER

K063291

TRUE BILL

ACTION OF GRAND JURY

Andrew M. Cuddy

Foreperson of Grand Jury
Date:

5-15-06

VERDICT

CDR# 0135

Indictment for
Reckless Homicide ✓

\$56-5-2910

DONALD V. MYERS, SOLICITOR

Foreperson of Petit Jury

Date:

03 10 years
Go through
was recommended
all
the negotiations

A TRUE COPY
[Signature]
Lex. Co. C.D.C.P. G.S. & E.G.

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

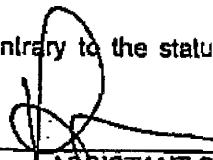
INDICTMENT FOR
Reckless Homicide

§56-5-2910

At a Court of General Sessions, convened on May, 2006, the Grand Jurors of Lexington County present upon their oath:

That James C Cobbert did in Lexington County on or about February 16, 2006, drive a motor vehicle in reckless disregard of the safety of others, proximately causing the death of Michael A Wilson, in violation of § 56-5-2910, Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State; and contrary to the statute in such case made and provided.



ASSISTANT SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

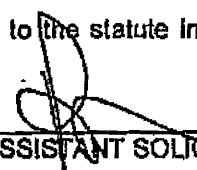
INDICTMENT FOR
Failure to Stop for Law Enforcement Vehicle, Blue Light,
resulting in Death

§56-5-750(C)(2)

At a Court of General Sessions, convened on May, 2006, the Grand Jurors of Lexington County present upon their oath:

That James C Cobbert did in Lexington County on or about February 16, 2006, willfully, knowingly and unlawfully failed to stop a motor vehicle, while driving said motor vehicle on a road, street or highway of this State when Deputy Fox, a law enforcement officer with the Aiken County Sheriffs Department and/or Officer Crider, a law enforcement officer with the Pelion Police Department, signaled and sounded their sirens and/or turned on their flashing blue lights, and when driving he did perform an act forbidden by law or neglected a duty imposed by law in the driving of the vehicle that resulted to the death of Michael A Wilson, in violation of § 56-5-750 (C) (2), Code of Laws of South Carolina, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.


ASSISTANT SOLICITOR

ORIGINAL

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED

MAY 31 2012

Certiorari to Lexington County

Edward W. Miller, Circuit Court Judge

S.C. Supreme Court

JAMES CURTIS COBBERT, III,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER

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ISSUE PRESENTED

Whether plea counsel was ineffective for failing to file an appeal?

STATEMENT

On October 16, 2008, petitioner appeared before the Honorable William P. Keesley in Lexington County and pled guilty to reckless homicide, shoplifting, and failure to stop for a blue light resulting in death. Respective sentences of ten years, five years, and a consecutive twenty-five years were imposed. Elizabeth Fullwood, Esquire was plea counsel.

Petitioner filed an application for post-conviction relief on January 9, 2009. An evidentiary hearing was held on November 29, 2011, before the Honorable Edward M. Miller. Petitioner was present and was represented by Kaelon May, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing.

On January 18, 2012, Judge Miller issued an order denying and dismissing petitioner's application for post conviction relief. Because Judge Miller found that petitioner was not entitled to a belated appeal that issue will be addressed. A "Statement of Issues on Appeal" will follow.

ARGUMENT

Plea counsel was ineffective in failing to file an appeal.

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudice by counsel's ineffective performance. Strickland v. Washington, 466, U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Roseboro v. State, 317 S.C. 292, 454 S.E. 2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to request a jury instruction that should have been given. He can be held for ineffective for failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E. 2d 53 (2006).

Attorneys can also be held accountable for failing to file an appeal for their clients. In White v. State, 263 S.C. 110, 208 S.E.2d 35 (1974) the South Carolina Supreme Court wrote that attorneys can not rely on assumptions about whether a client is aware of his right to appeal. Instead, they must make certain that a client is fully aware of his right to appeal. 263 S.C. at 118, 208 S.E.2d at 39. Cherry v. State, 300 S.C. 386 S.E.2d 624 (1989) the Court wrote that "an indigent has the right

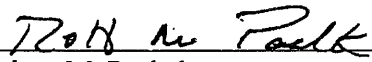
to be informed of an appeal and the manner and method for taking the appeal.” In that case, the Court found that there was “no evidence that trial counsel informed Cherry as to the manner and method for taking the appeal.” Neither did counsel attempt to find out if Cherry wanted to appeal. 300 S.C. at 119-120, 386 S.E.2d at 626. In the Matter of Anonymous Member of the Bar, 303 S.C. 306, 400 S.E.2d 483 (1991), the Court reiterated that “trial counsel in all cases has a duty to make certain that the client is fully aware of the right to appeal. Counsel should give the client his professional judgment whether an appeal should be taken and ascertain whether the client wishes to appeal.” 303 S.C. at 307, 400 S.E.2d at 483.

Petitioner alleged in his application for post-conviction relief that he put in for an appeal but did not get one. (App. p. 40). Plea counsel testified at the evidentiary hearing that she did not recall petitioner asking her to file an appeal. She said if she had asked she would have filed an appeal. (App. p. 88, lines 20-22). The problem with plea counsel’s testimony is that she never ascertain if petitioner wanted to appeal.

CONCLUSION

Petitioner's writ should be granted.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

This 31st day of May, 2012.

STATEMENT OF ISSUES ON APPEAL

Whether petitioner's guilty plea complied with the mandates set forth in Boykin v. Alabama? (pursuant to Anders).

RECEIVED

OCT 19 2012

S.C. Supreme Court

State of South Carolina
In the Supreme Court

Certiorari to Lexington
County

Edward W. Miller, Circuit Court Judge

James Curtis Cobbett, III

Petitioner,

v.

State of South Carolina,

Respondent

Petition For WRIT OF CERTIORARI

James C. Cobbett, III,
Defender Pro se

Broodriver CI
4460 Broodrive Rd
Columbia, SC 29210

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Issue Presented

Whether plea counsel was ineffective for failing to object to the failure to stop for blue lights result/Death charge, after Petitioner already pled to reckless homicide.

Statement

On October 16, 2008, Petitioner appeared before the Honorable William P. Keesley in Lexington County and pled guilty to reckless homicide, shoplifting, and failure to stop for a blue light resulting in death. Respective sentences of ten years, five years, and a consecutive twenty-five years were imposed. Elizabeth Fullwood, Esquire was plea counsel.

Petitioner filed an application for post-conviction relief on January 9, 2009. An evidentiary hearing was held on November 29, 2011, before the Honorable Edward M. Miller. Petitioner was present and was represented by Kaelon May, Assistant Attorney General. Both petitioner and plea counsel testified at the hearing.

On January 18, 2012, Judge Miller issued an order denying and dismissing petitioner's application for post-conviction relief. Because Judge Miller found that Petitioner was not violated by the double jeopardy clause. That issue will be addressed.

Argument

Plea counsel was ineffective for failing to object to sentence based on double jeopardy

In post-conviction, a petitioner may be granted relief based on ineffective assistance of counsel under the Sixth Amendment to the United States Constitution if he shows: (1) that trial counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by counsel's ineffective performance. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984). To prove prejudice petitioner must show that there was a reasonable probability that but for counsel's errors, the result of proceeding would be different. Cherry v. State, 300 S.C. 386, 58 S.E.2d 624 (1989). A "reasonable probability" is simply a probability sufficient to undermine confidence in the outcome of the trial. Johnson v. State, 325 S.C. 182, 480 S.E.2d 733 (1997). In addition, "counsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness." Boiseboro v. State, 317 S.C. 292, 454 S.E.2d 312 (1995). Trial counsel can be found ineffective for failing to object to an improper jury instruction or in failing to object to the improper admission of character evidence, or prior bad acts, or illegally obtained statements, confessions, or improper searches. Failing to move for a continuance may also constitute ineffective assistance of counsel. Morris v. State, 371 S.C. 278, 639 S.E.2d 53 (2006).

The double jeopardy clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional guarantee is applicable to the state through the due Process Clause of the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 2062, 23 L.Ed. 2d 707 (1969).

According to law, "The first step in double jeopardy analysis is for the court to inquire whether congress intended to punish each statutory violation separately." State v. Crib (S.C. 1993) 310 S.C. 518, 426 S.E. 2D 306. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983). Multiple charges and punishments will not violate double jeopardy when, "clearly expressed legislative." Supports the imposition of cumulative punishments. U.S. v. Salameh, 261 F.3D 271, 277-78 (2D Cir. 2001), U.S. v. Terry, 86 F.3D 353, 357 (4th Cir 1996). However when legislative intent is ambiguous, The blockburger test determines whether multiple charges constitute the "same offense" See Hunter, 459 U.S. at 367-68. See Ball v. U.S., 470 U.S. 856, 861 (1985). Absent legislative intent to impose cumulative punishments, the blockburger test also determines whether one offense is a lesser included offense of another. See Butledge v. U.S. 445 U.S. 684, 693-94 (1980). When in dispute, the determination of the answer depends on whether each statute in question requires proof of a fact which the

other does not Blockburger v. U.S., 284 U.S. 299, 525 CT. 180 76 L.ED 306.

Under South Carolina law, The offense of reckless homicide is found in S.C. Code Ann § 56-5-2910. Under this section, legislation never made an clear determination as to whether or not, it would be permissible to charge an offender of both Reckless homicide and failure to stop for blue lights resulting in death. The offense ~~of~~ of reckless homicide only asks for proof of operation of a vehicle in a reckless disregard. State v. Watson (S.C. 2002) 349 S.C. 372, 563 S.E. 2D 336. There where no explicit acts in which legislation explained would be permissible for this ~~part~~ particuar offense. The mere driving in a reckless disregard was substantail enough evindence.

Reckless Driving S.C. Code Ann § 56-5-2920, also backs that South Carolina legislation never stated precisely what acts would be considered reckless. However, a suggested instruction to the jury about reckless driving was given. Reckless Driving 56-5-2920: "Willfull can be defined as doing something deliberately. Wanton is to act unruly or without any checks or limitation. As general

rule, what constitutes reckless driving is to be determined from all the surrounding circumstances where the statute does not specifically declare what particular acts shall comprise the offense. What constitutes reckless driving under some conditions may not be such under other conditions. As a general rule, something more than mere negligence in the operation of a motor vehicle is necessary to constitute the offense of reckless driving. Generally, the offense denotes operation of a vehicle under such manner as to show a willful or reckless disregard of consequences.

The offense of failure to stop for blue lights result/Death is found in S.C. Code Ann § 56-5-750(c)(2).

Traditionally, this act involves the intentional commission of failing to stop for law enforcement vehicle. In U.S. v. Roschore 551 F.3d 226 C.A.4 (N.C), 2009. Court's wrote, "Applying the categorical approach, we find that failing to stop for a blue light generally proscribes conduct that poses the potential for serious injury to another. Most cases of failing to stop for blue lights involve the deliberate choice by driver to disobey the police officer's signal. This disobedience poses

the threat of a direct confrontation between the police officer and the occupants of the vehicle, which, in turn, creates a potential for serious physical injury to the officer, other occupants of the vehicle, and even bystanders." Courts also wrote, "In considering the South Carolina statute, the Fourth Circuit found it telling that the elements as set forth by the South Carolina Supreme Court simply do not require that the defendant acted either willfully or knowingly. The absence of either a willful or knowing requirement strongly suggests that the South Carolina legislature intended a violation to rest in the event that the defendant acted either recklessly or negligently."

Relying on § 56-5-750 (A) under South Carolina law. The description given by legislation was an act of a conscious indifference to the rights and safety of others. § 56-5-750 (A) in the absence of mitigating circumstances it is unlawful for a motor vehicle driver, while driving on a road street or highway of the state, to fail to stop when signaled by a law enforcement vehicle by means of siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement

vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles or other road conditions are such that it would be reasonable for driver to hear or see the signals from the law enforcement.

At P.C.R. hearing counsel testified that, "In her opinion," She didn't believe petitioner was punished twice for the same offense. (App.p. 86, Lines 18-20) However, counsel did not use any facts or conclusions of law, to support her opinion. There was no case law backing her finding nor did she articulate her reason for believing that the two offense was separate according to Blockburger. (App.p. 85, Lines 18-25) (App.p. 86, Lines 1-25) (App.p. 91, Lines 6-9). The problem with her testimony is that plea counsel openly stated that she ~~was~~ haven't brushed up recently on double jeopardy (App.p. 86, Lines 1-2) and the only analysis that she was going by was, That from the courts! (App.p. 86, Lines 11-17) Counsel did not testify that she constructed an blockburger test, nor did she try at that present time.

Petitioner alleged that under the Blockburger test, that the two charges would be properly characterized as one offense. (App.p. 74, Lines 8-15) (App.p. 77, Lines 19-24) State according to law did not take the proper steps for an alleged double jeopardy (App.p. 93, Lines 21-25) (App.p. 94, Lines 1-24) ~~At~~ And it's clear from the record that there was some uncertainties about the issue. (App.p. 93, Lines 6-10) (App.p. 94, Lines 21-22). Therefore we bring the issue to the appellate court.

Conclusion

Petitioner's writ should be granted.

Respectfully Submitted

A handwritten signature in black ink, appearing to read 'James C. Cobbent III', written over a horizontal line.

James C. Cobbent III
Prose Attorney

This 16th day of Oct, 2012

STATE OF SOUTH CAROLINA
In The Supreme Court

RECEIVED

FEB - 5 2013

S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

The Honorable Edward W. Miller, Circuit Court Judge

Appellate Case No. 2012-207554

James Curtis Cobbett III, ... Petitioner,

v.

State of South Carolina, ... Respondent.

**RETURN TO PETITION FOR
WRIT OF CERTIORARI**

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

- 1. Did the PCR Judge err in finding that Petitioner failed to prove his guilty plea was entered involuntarily because plea counsel failed to advise him of an alleged double jeopardy violation?**

STATEMENT OF THE CASE

The Lexington County Grand Jury indicted Petitioner at the May 2006 term of General Sessions for Failure to Stop for a Blue Light Resulting in Death (2006-GS-32-1447) and Reckless Homicide (2006-GS-32-1445). (App.pp.125-28). Elizabeth Fullwood, Esquire, and Wallis Alves, Esquire, represented Petitioner.

After the State called the case to trial, Petitioner pled guilty as charged. On October 16, 2008, the Honorable William P. Keesley sentenced Petitioner to consecutive terms of ten years for Reckless Homicide and twenty-five years for Failure to Stop for a Blue Light Resulting in Death. (App.pp.1-37). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on January 9, 2009. (App.pp.39-46). A hearing was convened at the Lexington County Courthouse on November 29, 2011. (App.pp.54-95). Petitioner was present and represented by Ronald R. Hall, Esquire. Kaelon E. May, Esquire of the South Carolina Attorney General's Office represented Respondent. The Honorable Edward W. Miller denied relief in an order dated January 18, 2012. (App.pp.111-24).

STANDARD OF REVIEW

The proper standard for review of a PCR evidentiary hearing is whether “any evidence of probative value” exists to sustain the post-conviction relief judge’s findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E.2d 624, 626 (1989). In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

ARGUMENT

The PCR judge did not err in finding that Petitioner failed to prove his guilty plea was entered involuntarily because plea counsel failed to advise him of an alleged double jeopardy violation.

At the PCR hearing, Petitioner argued that plea counsel was ineffective for advising Petitioner to enter a guilty plea the violated his Fifth Amendment right against double jeopardy. Petitioner stated “my problem is how can [the State] try me for failure to stop for a blue light resulting in death without punishing me for reckless act twice.” (App.p.73, ln. 4-6).

At the PCR hearing, Plea counsel testified that in investigating the State’s case against Petitioner, she did not see a double jeopardy issue with the State proceeding on Reckless Homicide and Failure to Stop for a Blue Light Resulting in Death charges. (App.p.85). Plea counsel testified that under a Blockburger analysis, the State had the discretion to prosecute Petitioner on both offenses. (App.p.86). The PCR Judge further opined that “the State of the law is that this not a violation of the double jeopardy clause.” (App.p.94, ln. 18-20).

In denying Petitioner’s application for post-conviction relief, the PCR judge found Petitioner failed to prove that he involuntarily entered his guilty plea as a result of the ineffective assistance of counsel. (App.p.120). The Court found that Petitioner was not sentenced for the same offense twice. (App.p.120).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel’s

ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Cherry v. State, 300 S.C. at 117-18, 386 S.E.2d at 625. “A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial.” Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984)). An Applicant who enters a plea on the advice of counsel may only attack the voluntary and intelligent character of the plea by showing that trial counsel’s representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for trial counsel’s errors, the defendant would not have pled guilty, but would have insisted on going to trial. Roscoe v. State, 345 S.C.16, 546 S.E.2d 417 (2001); Richardson v. State, 310 S.C. 360, 426 S.E.2d 795 (1993). Given the Applicant’s burden of proof and the analysis to be applied to this claim, the Applicant’s claim of involuntary plea is, in essence, a claim of ineffective assistance of counsel, and it will be treated as such.

The PCR judge did not err in holding Petitioner failed to prove plea counsel was in ineffective in failing to advise Petitioner of an alleged double jeopardy violation. (App.p.121).Accordingly, Petitioner failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms.

Petitioner failed to prove he would refrain from pleading guilty if counsel was not

ineffective in advising him of the alleged double jeopardy violation. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the “same elements” test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two ‘distinct’ offenses. State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996).

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) is instructive to the present case. Easler was convicted for Felony DUI and Reckless Homicide and appealed alleging the convictions constituted a double jeopardy violation. Id. at 132, 489 S.E.2d at 623. This Court employed the Blockburger test and found Easler’s allegation lacked merit. The Easler Court stated, “This Court has held that reckless homicide is not a lesser included offense of felony DUI causing death, as felony DUI does not require proof of recklessness. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). See also State v. Carter, 291 S.C. 385, 353 S.E.2d 875 (1987) (recognizing that a defendant may be convicted of both offenses in one trial). Id. at 132-33, 489 S.E. at 623-24 (1997).

Applying Easler, Petitioner’s argument similarly fails a Blockburger analysis. Simply, “recklessness” is not an element of the Failure to Stop for a Blue Light Resulting in Death or Serious Bodily Injury offense. See S.C. Code Ann. § 56-5-750(C)(2). Thus, Petitioner’s double jeopardy argument is without merit. Therefore, Petitioner fails to

prove his guilty plea was entered involuntarily pursuant to ineffective assistance of counsel.

Similarly, Petitioner also failed to prove the second prong of Strickland – that he was prejudiced by trial counsel’s performance.

As Petitioner failed to meet this burden of proving ineffective assistance of trial counsel on this issue, the PCR judge did not err in denying the PCR application. See Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (“The burden of proof is on the applicant to prove his allegations by a preponderance of the evidence.”).

CONCLUSION

For the foregoing reasons, Respondent submits this Court should deny the Petition for Writ of Certiorari. However, if this Court grants certiorari, Respondent requests the opportunity to fully brief the issue discussed above.

Respectfully submitted,

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Attorney General

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By: 
ATTORNEYS FOR RESPONDENT

Feb 5th, 2013

State of South Carolina
In the Supreme Court

Appeal From Lexington County
Court of Common Pleas

The honorable Edward W. Miller, Circuit
Court Judge

Appellate Case No. 2012-207554

James Curtis Cobbett III, ... Petitioner,

V.

State of South Carolina, ... Respondent.

Reply to Return For
Petition for Writ
of Certiorari

James Cobbett
Pro se
4460 Broadriver rd
Columbia Sc 29210

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FEB 13 2013

S.C. Supreme Court

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Statement

The Lexington County Grand Jury indicted Petitioner at the May 2006 term of General Sessions for Reckless Homicide (2006-GS-32-1445) and Failure to stop for blue lights result in death (2006-GS-32-1447), (App. p. 125-28). Elizabeth Fullwood, Esquire and Wallis Alves, Esquire, represented Petitioner.

After the State called the case to trial, Petitioner pled guilty as charged. On October 16, 2008, the Honorable William P. Keesley sentenced Petitioner to consecutive terms of ten years for Reckless Homicide and twenty-five years for Failure to stop for Blue lights result in death. (App. p. 1-37). Petitioner did not appeal his convictions or sentences.

Petitioner filed an application for post-conviction relief (PCR) on January 9, 2009. (App. p. 39-46). A hearing was convened at the Lexington County Courthouse on November 29, 2011. (App. p. 54-95). Petitioner was present and represented by Ronald B. Hall, Esquire. Kaelon E. May, Esquire of the South Carolina Attorney General's office represented Respondents. The Honorable Edward W. Miller denied relief in an order dated January 18, 2012 (App. p. 111-24).

Standard of Review

The proper standard of review for a PCR evidentiary hearing is whether "any evidence of probative value" exists to sustain the Post-conviction relief judge's findings. Cherry v. State, 300 S.C. 115, 119, 386 S.E. 2d 624, 626 (1989).

In a post-conviction relief proceeding, the applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 442, 334 S.E. 2d 813, 814 (1985).

Argument

The PCR judge did err in not finding Plea counsel to be ineffective for allowing Petitioner to plea to an double Jeopardy Violation.

At PCR hearing, Petitioner argued that (1) Under the proof of facts, the state could not prosecute him for both Reckless Homicide and Failure to stop for Blue light result in death without punishing him for the reckless act need needed to convict of Reckless Homicide twice. (App.p.69, Lines 19-20) (App.p.73, Lines 4-7) (App.p.73, Lines 13-16) And (2) that under the BlockBurger Test, Reckless Homicide is a lesser included offense or "Same offense" of Failure to stop for Blue lights result in death. (App.p.74, Lines 8-10) (App.p.77, Lines 17-20).

However, in Petition for Writ of Ceriorari Petitioner abandon the Proof of Facts argument and Pursued the BlockBurger Test. The petitioner's position in the matter, is not to intertwine the two arguments and not to use what was said about the proof of facts to cloud the BlockBurger Issue.

At the PCR hearing counsel did testify that she did not see any double jeopardy issue's (App.p.85, Lines 18-23) However, this statement was based upon an opinion. (App.p.86, Lines 18-20) Counsel testified that under the BlockBurger analysis, these are clearly separate offenses and Petitioner could be prosecuted for both crimes (App.p.86, Lines 15-17)

However, when reviewing both statutory provisions in which we look to see whether congress intended to punish each offense separately, Petitioner found no such ruling. Failure to stop for blue lights result in death 56-5-750(c)(2), Reckless Homicide 56-5-2910.

Judge Miller also opined that "I think that the state of Law is that this is not a violation of the double jeopardy clause." (App.p.94, Lines 18-20) But his opinion was not supported by factual findings of Law. The only analogous that was given, to support his position served as no probative value in this particular ~~case~~ case. (App.p.94, Lines 11-17)

Respondents argue's that State v. Easter, 327 S.C. 121, 489 S.E.2d 617 (1997) is instructive to this present case. However, Easter was convicted for Felony DUI, Petitioner is convicted for Failure to stop for Blue lights result in death. The dictum in Easter was correct in its formal. However Easter doesn't set precedents over this case Because Felony DUI contains different elements from Failure to stop for Blue lights result in death. In Easter after applying the BlockBurger Test courts determined that Reckless homicide was not an lesser included offense of Felony DUI because Felony DUI does not require reckless ness. State v. Easter, 327 S.C. 121, 489 S.E.2d 617 (1997)

When reviewing the offense, Failure to stop for Blue light result in death, State must look to the plain meaning of the elements as set forth

A court interpreting a statute looks first to the statute's plain language:

The Cardinal Rule of statutory interpretation is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be ~~consider~~ construed in light of the intended purpose of the statute. Absent an ambiguity, the court will look to the plain meaning of the words used to determine their effect.

State v. Whitner, Op. No. 27142 (S.C. Sup. Ct. Filed Jul. 11, 2012) (Shearouse Adv. Sh. No. 23 at 46, 49) (citations and quotations marks omitted).

Failure to stop for blue lights death results

- (1) was driving a motor vehicle
 - (2) on a road street or highway of this state
 - (3) was signaled to stop by means of siren or flashing light, And
 - (4) did not stop.
- (c)(2) where death results

Giving effect to the plain meaning of the elements as set forth by legislation is proof of recklessness.

For starter's, Actor had to break some kind of traffic offense or raise an suspicion to law enforcement to be blue lighted! Now, ontop of the traffic offense, whether Recklessly or negligently Failed to stop. "Negligently and Reckless will be explained in turn."

(1) Negligently. An actor is driving along the road listening to his IPOD with headphones on. While driving actor attempts to change stations and swerve's off the road. Patrol officer spots the event and activates his blue lights for driver to stop. However, actor is unaware of the patrolman because he has on headphones and continue's to drive for several more blocks. After a few blocks actor see's officer and pulls over. Actor is charged with Failure to stop for Blue lights. Actor pleads that he had on headphones but is still convicted.

56-5-750(A)

Failure to see the Flash light or hear the Siren does not excuse a failure to stop when the distance between the vehicles or other road conditions are such that it would be reasonable for driver to hear or see the signals from the law enforcement.

(2) Picklessly. An actor driving along the road with no license is signaled to stop by law enforcement. With the thought of getting away actor increase's in speed and lead pursuing officer on a chase. After an wild chase actor is caught and charged with failure to stop for blue lights.

56-5-750(A)

An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or Flashing light is prima facie evidence of a violation of this section.

In U.S. v. Roseboro 551 F.3d 226 (A.4 (N.C), 2009 Court's wrote, "In considering the South Carolina Statute, the Fourth Circuit found it telling that the elements as set forth by the South Carolina Supreme court simply do not require that the defendant acted either willfully or knowingly.

The absence of either willful or knowing requirement strongly suggests that the South Carolina legislature intended a violation to rest in the event that the defendant acted either recklessly or negligently."

Now the offense of failure to stop for blue lights resulting in death 56-S-750 (c)(2), should fall under the same categorical approach but a different construction. Petitioner finds it erroneous to say that one can commit the offense of failure to stop for blue lights result in death negligently. ~~Let~~ let's say hypothetically an actor is signaled to stop and doesn't hear or see patrol officer. What are the odds that he recks in that same intent instance and kills someone?

From logic and reasoning, with all the Cop shows and personal experience. When hearing someone was charged with fail to stop and resulted in the death of someone. The first thought is a high speed chase!

For the issue at hand Petitioner asks the courts if whether or not if failing to stop for blue lights is operating an vehicle in a reckless disregard for the safety of others.

Black Law Dictionary

Reckless Disregard- The intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know or has reason to know the facts That would lead a reasonable person to realize that the actor's conduct Both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result.

Accordingly, the question of whether or not Failure to stop for Blue lights resulting in death and Reckless homicide constitute's the "same offense" is a novel issue in South Carolina. And need's to be addressed!

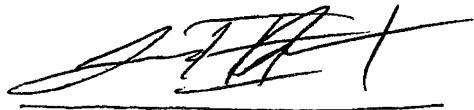
With the granting of this double jeopardy claim Petitioner would satisfy the first and second prong of Strickland. Which would prove counsel's representation fell below reasonable standards by allowing petitioner to plead to double jeopardy. And that by Counsel error's Petitioner recieved two sentence's instead of one.

Conclusion

For the foregoing reason, Petitioner's Writ of certiorari should be granted.

Respectfully
Submitted,

James Curtis Cobbett III
4460 Broadriver rd
Columbia Sc 29210



Feb 11th, 2013

On the 11th day of February, 2013
Susan H. Frye

My Commission Expires
March 5, 2018

The South Carolina Court of Appeals

James Curtis Cobbett III, Petitioner,

v.

State of South Carolina, Respondent.

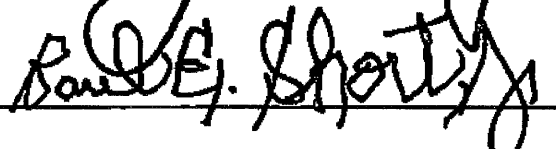
Appellate Case No. 2012-207554

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of Petitioner's application for post-conviction relief. The petition for a writ of certiorari is denied.



C.J.



J.

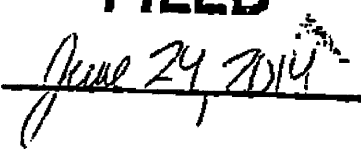


J.

Columbia, South Carolina

cc: John Walter Whitmire, Esquire
James Curtis Cobbett III, 293798

FILED



June 24, 2014

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

James Curtis Cobbett, III,

Petitioner,

v.

Warden Robert M. Stevenson, III,

Respondent.

C/A No. 9:14-3331-TMC

OPINION & ORDER

Petitioner James Curtis Cobbett, III, a state inmate proceeding pro se, filed this petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254.¹ Before the court is the magistrate judge's Report and Recommendation ("Report"), recommending that Respondent's motion for summary judgment and amended motion for summary judgment (ECF Nos. 31 and 56) be granted and that the habeas petition be denied. (ECF No. 61). Petitioner timely filed objections. (ECF No. 66).²

The court is obligated to conduct a de novo review of every portion of the magistrate judge's report to which objections have been filed. *Id.* However, the court need not conduct a de novo review when a party makes only "general and conclusory objections that do not 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). In the absence of a timely filed, specific objection, the magistrate judge's conclusions are reviewed only for clear error. *See Diamond v. Colonial Life &*

¹ In accordance with 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02, DSC, this matter was initially referred to a magistrate judge.

² The court notes that after the time to file objections had passed, Petitioner filed a supplement to his Objections. (ECF No. 71). Petitioner did not file a motion seeking leave to file such a supplement and the rules do not allow for any such supplement, and thus the supplement is not properly before the court. However, even if the court were to consider the supplement, Petitioner does address any specific portions of the Report and merely reiterates and elaborates upon his arguments set forth in his Objections. In short, the supplement would not cause this court to alter this decision.

Accident Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005).

I. Background/Procedural History

In May 2006, Petitioner was indicted for reckless homicide and failure to stop for a law enforcement vehicle blue light resulting in death. On October 16, 2008, Petitioner who was represented by Elizabeth Fullwood and Wallis Alves, waived presentment to the grand jury of an indictment for shoplifting and pled guilty to all three charges.³ He was sentenced to ten (10) years imprisonment for the reckless homicide, twenty-five (25) years imprisonment for the failure to stop for a blue light resulting in death, and five (5) years for shoplifting, the 10-year and 25-five-year sentences to run consecutively and the 5-year sentence to run concurrently. Petitioner did not file a direct appeal.

On January 9, 2009, Petitioner filed an application for post-conviction relief ("PCR"), raising the following grounds for relief: double jeopardy; cruel and unusual punishment; and involuntary guilty plea. A hearing was held on November 29, 2011, at which Petitioner was represented by Ronald R. Hall. On January 23, 2012, the PCR court denied Petitioner PCR. Petitioner, represented by Appellate Defender Robert M. Pachak filed a petition for a writ of certiorari in the Supreme Court of South Carolina, raising one issue: whether plea counsel was ineffective for failing to file an appeal.

On September 26, 2012, at Petitioner's request, the Supreme Court of South Carolina relieved Pachak and allowed Petitioner to proceed pro se. The Court informed Petitioner that the petition filed by Pachak was being treated as withdrawn and that Petitioner had thirty days to submit a pro se petition for a writ of certiorari. On October 16, 2012, Petitioner filed a pro se

³As part of the plea negotiations, the State dismissed some related charges, including possession of a stolen motor vehicle, unlawful possession of a pistol, leaving the scene of an accident, and common law robbery.

petition for writ of certiorari, raising one issue: whether plea counsel was ineffective for failing to object to the failure to stop for blue lights result/death charge, after Petitioner already plead to reckless homicide. The court transferred Petitioner's PCR appeal to the South Carolina Court of Appeals, which denied the petition on June 24, 2014.

On August 13, 2014, Petitioner filed this habeas petition raising one ground for relief:

Ground One: Ineffective assistance of counsel

Supporting Facts: Under the *Blockburger* Test, State cannot prosecute for both offenses of reckless homicide and failure to stop for blue lights resulting in death; Double Jeopardy.

(ECF No. 1 at 3, 5; Pet. at 3, 5).

On February 27, 2015, Petitioner filed an Amended Petition clarifying his ground for relief, quoted verbatim:

Ground One: Ineffective assistance of counsel. Based on the double jeopardy clause, plea counsel was ineffective for allowing Petitioner to plea to an double jeopardy violation. Which violates Petitioner's 5th and 6th Amendment of the United States constitution.

Supporting Facts: Under the *Blockburger* Test, State cannot prosecute for both offenses of Reckless Homicide and Failure to stop for blue lights resulting in death, therefore resulting in double jeopardy.

(ECF No. 50, Am. Pet.). Respondent filed a motion for summary judgement (ECF No. 31), and an amended motion for summary judgment (ECF No. 56) after Petitioner filed his Amended Petition.

II. Discussion

The magistrate judge discussed the two offenses to which Petitioner pled - reckless homicide and failure to stop for a blue light resulting in death - and concluded that each offense has a unique element of proof. Therefore, the magistrate judge found that the PCR court's denial of PCR was neither contrary to, nor an unreasonable application of, Supreme Court precedent. (Report at 19).

In his objections, Petitioner sets out three separate objections. However, in his first two objections, Petitioner raises basically the same issue - that the PCR court impermissibly relied on trial counsel's testimony that, in her opinion, there was not a double jeopardy violation rather than conducting his own *Blockburger* analysis. In his third objection, Petitioner contends that the offenses have the same elements under *Blockburger*. The court notes that Petitioner raises numerous other claims regarding trial counsel's representation. (Objections at 15-18). However, in his petition, he raises only that trial counsel was ineffective for allowing him to plead guilty to two offenses in violation of the double jeopardy clause, and therefore this is the only ground properly before the court. See *United States v. Humphreys*, 194 F.3d 1306, 1306 (4th Cir.1999) (rejecting the appellant's argument "that the district court abused its discretion when it refused to consider an ineffective assistance of counsel claim [the petitioner] raised for the first time in his objections to the magistrate judge's recommendation"); *Kelley v. Bollinger*, C/A No. 8:12-CV-03008-JMC, 2013 WL 4460155, at *2 (D.S.C. Aug.15, 2013) (declining to address a new ground upon which the petitioner sought habeas relief because the ground-an ineffective assistance claim-was raised for the first time in the petitioner's objections to the magistrate's report).⁴

As to Petitioner's objection that the PCR court impermissibly relied on trial counsel's opinion in finding no double jeopardy violation, the court finds this objection to be without merit. The PCR court did not rely on trial court's opinion. The PCR court set out trial counsel's opinion and then stated that he agreed with her - not because she opined there was no violation, but because he also found none. In his third objection, Petitioner contends that the elements of the two offenses to which he plead guilty are the same. The court disagrees.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the

⁴Moreover, the court notes that Petitioner raises these new claims for the first time here, and thus these issue have not been fairly presented in any of the state court proceedings below.

Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 715 (1969) (footnotes omitted). Only the third guarantee - prohibiting multiple punishments for the same offense - is implicated here.

It is well-established that "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Blockburger v. United States*, 284 U.S. 299, 304 (1932); see also *United States v. Shavers*, 820 F.2d 1375 (4th Cir. 1987). Applying the *Blockburger* test to a claim of double jeopardy involving multiple conspiracies, the Supreme Court concluded that conspiracy to import marijuana and conspiracy to distribute marijuana did not proscribe the same offense because each crime "require[d] proof of a fact [that] the other does not." *Albernaz v. United States*, 450 U.S. 333, 339 (1981) (quoting *Blockburger*, 284 U.S. at 304). Further, the Supreme Court has concluded that "cumulative punishments can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*." *Missouri v. Hunter*, 459 U.S. 359, 367 (1983) (citing *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)).

Here, Petitioner pled guilty to reckless homicide and failure to stop for a blue light resulting in death. In South Carolina, "[w]hen the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless homicide. . . ." S.C. Code Ann. § 56-5-2910(A). Reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused

injury to the victim; and (4) within three years, the victim died as a result of these injuries. *State v. Horton*, 598 S.E.2d 279 (S.C. 2004) (citing *State v. Watson*, 563 S.E.2d 336 (S.C. 2002)).

The offense of failure to stop a motor vehicle when signaled by law enforcement vehicle is codified in S. C. Code Ann. § 56-5-750. This section provides

(A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

...

(C) A person who violates the provisions of subsection (A) and when driving performs an act forbidden by law or neglects a duty imposed by law in the driving of the vehicle:

(1) where great bodily injury resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years; or

(2) where death resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty-five years.

S.C. Code Ann. § 56-5-750.

Failure to stop for a blue light resulting in death requires proof of the following elements:

(1) that the defendant was driving a motor vehicle; (2) that he was driving it on a road, street, or highway of the State; (3) that he was signaled to stop by a law enforcement vehicle by means of a siren or flashing light; and (4) that he did not stop. See *United States v. James*, 337 F.3d 387 (4th Cir. 2003) (citing *State v. Hoffman*, 186 S.E.2d 421 (S.C. 1972)). Petitioner argues that a person cannot commit the offense of failure to stop for a blue light without operating his vehicle in a reckless manner. (Objections at 20). Further, he argues that to act recklessly, one must be aware of his conduct and consciously disregard a risk. *Id.* However, the failure to stop for a blue light

statute is a strict liability statute and it "explicitly criminalizes a broad swath of unintentional conduct." *United States v. Rivers*, 595 F.3d 558, 565 (4th Cir. 2010). And as Petitioner recognizes, reckless homicide requires a conscious disregard of a risk. As the magistrate judge found, these two offenses are distinct and clearly require the establishment of different elements.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the court finds Petitioner's objections are without merit. Accordingly, Respondent's Summary Judgment Motions (ECF Nos. 31 and 56) are **GRANTED**; and the Petition is **DISMISSED with prejudice**.

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 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); *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." Accordingly, the court declines to issue a certificate of appealability.

IT IS SO ORDERED.

s/Timothy M. Cain
United States District Judge

Anderson, South Carolina
September 2, 2015

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

2024 AUG 16 PM 12:11

James Curtis Cobbert, III, SCDC #298728K OF COURT Case No. 2021-CP-32-3337
LEXINGTON SC

Applicant,

v.

State of South Carolina,

Respondent.

ORDER OF DISMISSAL

This matter comes before this Court by an original and amended application for post-conviction relief filed by James Curtis Cobbert, III (Applicant) on October 14, 2021 and amended on August 16, 2023. The Applicant is represented in these proceeding by C. Rauch Wise of the South Carolina Bar. In his initial application for post-conviction relief, Applicant alleged he was being held in custody unlawfully based on the following (verbatim):

1) "Unconstitutional Statute"

a. "Sentencing and characterization is in conflict with federal law."

2) "Ex Post Facto"

a. "Applied law to case that wasn't law at the time of [sic] committed.

In the August 16, 2023 amended application, through counsel Wise, the applicant alleged:

I. The consecutive sentences on the two charges violated the double jeopardy clause of Article I, §12 of the Constitution of the State of South Carolina and the Fifth Amendment of the Constitution of the United States of America.

a. At my sentencing, Judge William P. Keesley sentenced me to 10 years in prison for reckless homicide and 25 years in prison for failure to stop for a blue light resulting in death. The 25 year sentence was consecutive to the 10 year sentence. Both charges arise out of a single act of failing to stop for a blue light.

My original Post Conviction Relief Petition was denied based upon State v. Easler, 327 S.C. 121 , 489 S.E.2d 617 (1997). On or about February 20, 2023, I learned that Easier had been overturned in State v. Greene, 423 S.C. 263, 814 S.E;2d 496 (2018). This case represented a change in the law as to the issue of double jeopardy. I was not aware of this decision prior to February of 2023.

On March 5, 2024, the Respondent State of South Carolina filed its Return and Motion to dismiss. The Respondent makes a Motion to Dismiss because the Application untimely and successive to the initial PCR action Cobbert v. State, 2009-CP-32-0127 and the earlier federal habeas corpus action Cobbert v. Stevenson, No. 8:14-3331-TMC (D.S.C. Aug. 4, 2015) which both addressed on the merits the underlying federal constitutional claim of double jeopardy related to the convictions and sentences for reckless homicide (2006-GS-32-1445) and failure to stop for law enforcement vehicle, blue light resulting in death (2006-GS-32-1447).

This matter was heard by the Court on March 22, 2024. The Applicant was present and represented by his counsel C. Rauch Wise. The Respondent was represented by Deputy Attorney General Donald J. Zelenka. No testimony was taken in the case. After argument from counsel, this Court took the matter under advisement. .

For the reasons set forth below, this Court denies the application for post-conviction relief, as amended. The Applicant contends that he is entitled to a second PCR application because of the subsequent South Carolina Supreme Court decision in State v. Greene, 423 S.C. 263, 814 S.E;2d 496 (2018). However, this Court concludes that Greene has no impact on the Applicants' conviction or sentences and does not have retroactive effect. This Court further finds his application is still untimely since Greene was decided on May 23, 2018 over one year before his application was filed on October 14, 2021 and his guilty plea conviction was on October 16, 2008.

In making its decision, this Court has before it the following documents:

1. State v. Cobbert, Guilty Plea Transcript.

2. Cobbert v. State, PCR Appendix.
3. Cobbert v. State, 2009-CP-32-0127, Order of Dismissal, (Hon. Edward Miller, January 18, 2021).
4. Cobbert v. State, Return to Petition for Writ of Certiorari.
5. Cobbert v. State, Order denying certiorari, S.C. Court of Appeals, June 24, 2014.
6. Cobbert v. Stevenson, No. CA 9:14-3331-TMC, 2015 WL 5158976, (D.S.C. Sept. 2, 2015)(Judge Timothy Cain).
7. Lexington County Clerk of Court records regarding the subject convictions.

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Lexington County Clerk of Court. Applicant was arrested on February 17, 2006, following an investigation into a traffic stop and subsequent high speed vehicle chase that ended in a fatal crash. During its May 2006 term, the Lexington County Grand Jury indicted Applicant for reckless homicide (2006-GS-32-1445) and failure to stop for law enforcement vehicle, blue light resulting in death (2006-GS-32-1447).

On October 16, 2008, Applicant appeared before the Honorable William P. Keesley and pleaded guilty to as indicted.¹ The State withdrew the Aiken County common law robbery warrant and allowed Applicant to plea to shoplifting in exchange for Applicant's Lexington County and

¹ Thereafter, Applicant waived presentment to the grand jury on an Aiken County indictment for shoplifting (2008-GS-02-1678); waived jurisdiction and venues issues related to Aiken County; and pled guilty to shoplifting.

Aiken plea. Elizabeth Fullwood and Wallis Alves, Esquires (collectively Counsel) represented Applicant. Assistant Solicitor Shawn Graham, prosecuted the case.

Without negotiations or recommendations, Judge Keesley sentenced Applicant to ten years' imprisonment for reckless homicide, a concurrent term of five years' imprisonment for shoplifting, and a consecutive term of twenty-five years' imprisonment for failure to stop for blue light resulting in death. No direct appeal was filed.²

A. Initial PCR Action and Subsequent Appeal: 2009-CP-32-0127

On January 9, 2009, Applicant filed his first PCR action, raising the following grounds for relief (excerpted verbatim):

1. "Double Jeopardy"
 - a. "Sentenced twice for same offense (crime)!"
2. "Cruel and unusually [*sic*] punishment"
 - a. "Harsh lengthy sentence which is uncommon for crime!"
3. "Involuntary Guilty Plea"
 - a. "Plea was entered under false pretense!"

Applicant subsequently amended his application. The State requested an evidentiary hearing through its return filed on December 16, 2009. On November 29, 2011, the PCR court convened an evidentiary hearing before the Honorable Edward W. Miller. Applicant was present at the hearing and represented by Ronald R. Hall, Esquire. Assistant Attorney General Kaelon E. May appeared on behalf of the State. Applicant testified on his own behalf. The State presented testimony from Applicant's plea counsel, Elizabeth Fullwood. By order signed January 18, 2012,

² Applicant contended in an earlier proceeding that he sent a letter to his lawyer to file an appeal; however, the State has no record that a direct appeal was ever filed in this matter. It was the subject of the earlier PCR appeal in Cobbett v. State, 2009-CP-32-0127.

and filed January 23, 2012, Judge Miller denied the application on all grounds and dismissed the action with prejudice.

Pertinent to this proceeding, Judge Miller ordered and dismissed the following ground:

c. Failure to Object to Sentence Based on Double Jeopardy

Applicant asserts that plea counsel was ineffective for failing to object to Applicant's sentence because Applicant's plea to Reckless Homicide and Failure to Stop for a Blue Light resulted in Double Jeopardy. This Court finds that this allegation is without merit. Counsel testified that in her review of the Applicant's indictments and the elements of offenses Applicant was charged with that counsel did not find any double jeopardy issues. Counsel testified that a double jeopardy argument in Applicant's case may have been viable in the 1980's but that under the current test, which is the Blockburger test, the offenses were clearly separate. Counsel testified that Applicant was not sentenced for the same offense twice. This Court agrees with plea counsel. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses. State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996). This Court has reviewed the entire record and does not find that Applicant's plea to the charges placed Applicant in double jeopardy. This Court finds Applicant has failed to show plea counsel's performance was deficient or any resulting prejudice; therefore counsel was not ineffective for failing to object to Applicant's sentence based on double jeopardy. This Court finds that this allegation is denied and dismissed.

Cobbett v. State, 2009-CP-32-0127, Order of Dismissal, (Hon. Edward Miller, January 18, 2021.(p. 10-11).

Applicant filed a timely notice of appeal. Appellate Defender Robert M. Pachak perfected Applicant's appeal by filing a petition for writ of certiorari with the Supreme Court, raising the following issue:

Whether plea counsel was ineffective for failing to file an appeal on the issue of whether Petitioner's guilty plea complied with the mandates set forth in *Boykin v. Alabama*?

On September 26, 2012 our Supreme Court, in response to a letter from Applicant, relieved appellate counsel and allowed Applicant to proceed *pro se*. Further, our Supreme Court informed Applicant that the petition for writ of certiorari was being treated as withdrawn and he had thirty days to submit a *pro se* petition for writ of certiorari.

On October 16, 2012, Applicant filed a *pro se* petition for writ of certiorari with our Supreme Court, raising the following issue:

Whether plea counsel was ineffective for failing to object to the failure to stop for blue lights result/death charge, after Petitioner had already plead to reckless homicide?

The case was subsequently transferred to the Court of Appeals.

The Respondent, through Assistant Attorney General Walt Whitmire made a Return to the petition. In the Return, the State asserted:

Petitioner failed to prove he would have refrained from pleading guilty if counsel was not ineffective in advising him of the alleged double jeopardy violation or objecting to an alleged double jeopardy violation. The Double Jeopardy Clauses of the United States and South Carolina Constitutions protect against multiple punishments for the same offense. State v. Nelson, 336 S.C. 186, 519 S.E.2d 786 (1999). In both multiple punishment and successive prosecution cases, double jeopardy claims are evaluated under the "same elements" test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932). Stevenson v. State, 335 S.C. 193, 516 S.E.2d 434 (1999). A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two 'distinct' offenses. State v. Moyd, 321 S.C. 256, 468 S.E.2d 7 (Ct. App. 1996).

State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997) is instructive to the present case. Easler was convicted for Felony DUI and Reckless Homicide [S.C. Code Ann. Section 56-5-2910] and appealed alleging the convictions constituted a double jeopardy violation. Id. at 132, 489 S.E.2d at 623. The South Carolina Supreme Court employed the Blockburger test and found Easler's allegation lacked merit. The Easler Court stated, "This Court has held that reckless homicide is not a

lesser included offense of felony DUI causing death, as felony DUI does not require proof of recklessness. State v. Cribb, 310 S.C. 518, 426 S.E.2d 306 (1992). *See also State v. Carter*, 291 S.C. 385, 353 S.E.2d 875 (1987) (recognizing that a defendant may be convicted of both offenses in one trial). Id. at 132-33, 489 S.E. at 623-24 (1997).

Applying Easler, Petitioner's argument similarly fails a Blockburger analysis. Simply, "recklessness" is not an element of the Failure to Stop for a Blue Light Resulting in Death or Serious Bodily Injury offense. *See* S.C. Code Ann. § 56-5-750(C)(2). Therefore, Petitioner failed to prove his guilty plea was entered involuntarily pursuant to ineffective assistance of counsel.

Cobbert v. State, Return to Petition for Writ of Certiorari, p. 7-8.

On June 24, 2014, the Court of Appeal issued an order summarily denying Applicant's petition. The case was remitted back to the circuit court on July 11, 2014.

B. Initial Federal Habeas Corpus Action: 8:14-3331-TMC-JDA

On August 13, 2014, Applicant filed a *pro se* 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 Cobbert v. Stevenson*, No. 8:14-3331-TMC-JDA. Applicant raised the following allegations in his *pro se* petition (verbatim):

1. "Ineffective assistance of counsel/Double Jeopardy. Plea counsel was ineffective for allowing Petitioner to plea to a double Jeopardy violation. Which violates Petitioner's 5th Amendment and 6th Amendment of the United States Constitution"
 - a. "Under the Blockburger Test, state cannot prosecute for both offenses of reckless homicide and failure to stop for blue lights resulting in death; Double Jeopardy."

Subsequently, on February 27, 2015, Applicant filed an amended petition clarifying his issue as follows:

1. "Ineffective assistance of counsel. Based on the double jeopardy clause, plea counsel was ineffective for allowing Petitioner to plea to a double jeopardy violation. Which violates Petitioner's 5th and 6th Amendment of the United

States Constitution.”

- a. “Under the Blockburger Test, State cannot prosecute for both offenses of Reckless Homicide and Failure to stop for blue lights resulting in death, therefore resulting in double jeopardy.”

Respondent filed a return and motion for summary judgment on December 3, 2014.³ In response to Applicant’s amended petition, Respondent filed an amended return and motion for summary judgment on March 6, 2015.

On July 13, 2015, the Honorable Jacquelyn D. Austin, United States Magistrate Judge, issued a report and recommendation that Respondent’s motion for summary judgment be granted. Applicant filed objections to the R&R on July 30, 2015.

On August 4, 2015, the Honorable Timothy M. Cain, United States District Judge, 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. *Cobbett v. Stevenson*, No. 8:14-3331-TMC (D.S.C. Aug. 4, 2015).

In particular, Judge Cain addressed the double jeopardy claim in the following manner:

The magistrate judge discussed the two offenses to which Petitioner pled—reckless homicide and failure to stop for a blue light resulting in death—and concluded that each offense has a unique element of proof. Therefore, the magistrate judge found that the PCR court’s denial of PCR was neither contrary to, nor an unreasonable application of, Supreme Court precedent. (Report at 19).

In his objections, Petitioner sets out three separate objections. However, in his first two objections, Petitioner raises basically the same issue—that the PCR court impermissible relied on trial counsel’s testimony that, in her opinion, there was not a double jeopardy violation rather than conducting his own *Blockburger* analysis. In his third objection, Petitioner contends that the offenses have the same elements under *Blockburger*. The court notes that Petitioner raises numerous other claims regarding trial counsel’s representation. (Objections at 15–18). However, in

³ In the Return to the District Court the Respondent made a similar argument to what was raised in the PCR Appeal Certiorari Return.

his petition, he raises only that trial counsel was ineffective for allowing him to plead guilty to two offenses in violation of the double jeopardy clause, and therefore this is the only ground properly before the court. See *United States v. Humphreys*, 194 F.3d 1306, 1306 (4th Cir.1999) (rejecting the appellant's argument "that the district court abused its discretion when it refused to consider an ineffective assistance of counsel claim [the petitioner] raised for the first time in his objections to the magistrate judge's recommendation"); *Kelley v. Bollinger*, C/A No. 8:12-CV-03008-JMC, 2013 WL 4460155, at *2 (D.S.C. Aug. 15, 2013) (declining to address a new ground upon which the petitioner sought habeas relief because the ground—an ineffective assistance claim—was raised for the first time in the petitioner's objections to the magistrate's report).⁴

As to Petitioner's objection that the PCR court impermissibly relied on trial counsel's opinion in finding no double jeopardy violation, the court finds this objection to be without merit. The PCR court did not rely on trial court's opinion. The PCR court set out trial counsel's opinion and then stated that he agreed with her—not because she opined there was no violation, but because he also found none. In his third objection, Petitioner contends that the elements of the two offenses to which he plead guilty are the same. The court disagrees.

The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Fifth Amendment guarantee against double jeopardy consists of three separate constitutional protections. "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 715 (1969) (footnotes omitted). Only the third guarantee—prohibiting multiple punishments for the same offense—is implicated here.

It is well-established that "a single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); see also *United States v. Shavers*, 820 F.2d 1375 (4th Cir.1987). Applying the *Blockburger* test to a claim of double jeopardy involving multiple conspiracies, the Supreme Court concluded that conspiracy to import marijuana and conspiracy to distribute marijuana did not proscribe the same offense because each crime "require[d] proof of a fact [that] the other does not." *Albernaz v. United States*, 450 U.S. 333, 339, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) (quoting *Blockburger*, 284 U.S. at 304). Further, the Supreme Court has concluded that "cumulative punishments can presumptively be assessed after conviction for two offenses that are not the 'same' under *Blockburger*." *Missouri v. Hunter*, 459 U.S. 359, 367, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983) (citing *American Tobacco Co. v. United States*, 328 U.S. 781, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946)).

Here, Petitioner pled guilty to reckless homicide and failure to stop for a blue light resulting in death. In South Carolina, "[w]hen the death of a person ensues within three years as a proximate result of injury received by the driving of a vehicle in reckless disregard of the safety of others, the person operating the vehicle is guilty of reckless homicide...." S.C.Code Ann. § 56-5-2910(A). Reckless homicide requires proof that the defendant (1) operated an automobile; (2) in reckless disregard for the safety of others; (3) the defendant's conduct proximately caused injury to the victim; and (4) within three years, the victim died as a result of these injuries. *State v. Horton*, 359 S.C. 555, 598 S.E.2d 279 (S.C.2004) (citing *State v. Watson*, 349 S.C. 372, 563 S.E.2d 336 (S.C.2002)).

The offense of failure to stop a motor vehicle when signaled by law enforcement vehicle is codified in S.C.Code Ann. § 56-5-750. This section provides

(A) In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.

...

(C) A person who violates the provisions of subsection (A) and when driving performs an act forbidden by law or neglects a duty imposed by law in the driving of the vehicle:

(1) where great bodily injury resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than ten years; or

(2) where death resulted, is guilty of a felony and, upon conviction, must be imprisoned for not more than twenty-five years.

S.C.Code Ann. § 56-5-750.

Failure to stop for a blue light resulting in death requires proof of the following elements: (1) that the defendant was driving a motor vehicle; (2) that he was driving it on a road, street, or highway of the State; (3) that he was signaled to stop by a law enforcement vehicle by means of a siren or flashing light; and (4) that he did not stop. *See United States v. James*, 337 F.3d 387 (4th Cir.2003) (citing *State v. Hoffman*, 257 S.C. 461, 186 S.E.2d 421 (S.C.1972)). Petitioner argues that a person cannot commit the offense of failure to stop for a blue light without operating his vehicle in a reckless manner. (Objections at 20). Further, he argues that to act recklessly, one must be aware of his conduct and consciously disregard a risk. *Id.* However, the failure to stop for a blue light statute is a strict liability

statute and it “explicitly criminalizes a broad swath of unintentional conduct.” *United States v. Rivers*, 595 F.3d 558, 565 (4th Cir.2010). And as Petitioner recognizes, reckless homicide requires a conscious disregard of a risk. As the magistrate judge found, these two offenses are distinct and clearly require the establishment of different elements.

After a thorough review of the Report and the record in this case pursuant to the standards set forth above, the court finds Petitioner's objections are without merit. Accordingly, Respondent's Summary Judgment Motions (ECF Nos. 31 and 56) are **GRANTED**; and the Petition is **DISMISSED with prejudice**.

Cobbert v. Stevenson, No. CA 9:14-3331-TMC, 2015 WL 5158976, at *2–4 (D.S.C. Sept. 2, 2015), dismissed, 654 F. App'x 632 (4th Cir. 2016).

The Applicant made a *pro se* petition to appeal to the Fourth Circuit. The Court dismissed the appeal. Cobbert v. Stevenson, 654 F. App'x 632, 633 (4th Cir. 2016). On October 18, 2016, Applicant filed an untimely petition for rehearing *en banc*. The Court determined that Applicant's failure to file a timely petition was a result of an extraordinary circumstance wholly beyond his control and granted his motion to extend the filing time. After review of the petition for rehearing, the Court denied the petition by order issued December 2, 2016. An attempt to seek certiorari in the United States Supreme Court was denied as being out of time. Cobbert v. Stevenson, 582 U.S. 928, 137 S. Ct. 2319, 198 L. Ed. 2d 722 (2017).

C. Second Federal Habeas Corpus Action

Applicant filed a motion for an order authorizing the district court to consider a second or successive application for relief pursuant to 28 U.S.C. § 2244 in the United States Court of Appeals on May 25, 2018. On March 23, 2018, the Fourth Circuit issued an order denying Applicant's motion to file a successive application. In RE: James Curtis Cobbert, III, Movant, No. 18-152, Order, (4th Cir. March 23, 2018).

III. MOTION TO DISMISS

The State moved and argued for the post-conviction relief application to be denied as a matter of law. on the basis that there is basis for relief based upon the record before the Court. *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). *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 return in support of the motion for summary judgment, the State would respectfully show this Court:

A. Statute of Limitations

First, this Court finds that the application should be dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act⁴ (Act). Specifically, the 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

⁴ S.C. Code Ann. §§ 17-27-10 to -160.

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*, 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 pleaded guilty on October 16, 2008. This application was filed on October 14, 2021—almost *twelve 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).

During the hearing, the Applicant urged that there was an exception to the limitations period because the Applicant was not personally aware of the *Greene* decision until February 2023, even though *Greene* was decided on May 23, 2018. This Court finds that the Application must be dismissed because it was not filed, assuming *arguendo* that *Greene* applied retroactively by May 23, 2019, one year after the *Greene* decision. S.C. Code Ann. § 17-27-45(A), (B).

B. Successive

This Court finds that action should alternately be dismissed because it is successive to Applicant's previous PCR application. 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). Section 17-27-90 of the South Carolina Code 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.

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.”). 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 failed to show that a successive application is appropriate or why he could not have raised these allegations in his prior post-conviction relief actions; thus, these allegations are 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))). Applicant has failed to meet the burden imposed upon him, and this Court should summarily dismiss the application as successive to Applicant’s previous PCR action.

Here, the Applicant did raise before the state court whether his convictions and sentences violated the double jeopardy clause of the federal constitution. In the order of Judge Miller in his first PCR and in the Order of Federal District Cain they fully addressed the federal constitutional claim in denying relief.

The Applicant asserts some entitlement to a belated second application because of an intervening decision in *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018). He contends now that because *Greene* overruled a decision that the Respondent cited in its Return to Certiorari, *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997) that he is entitled to relief. However, a closer reading of *Greene* does not support the Applicant assertion. In *Greene*, the Court held to avoid double jeopardy, one homicide is limited to one homicide punishment per defendant, overruling *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617. *Greene* involved convictions for homicide by child abuse and involuntary manslaughter. In its decision, the *Greene* Court stated:

This issue is presented to us in an unusual posture. While both homicide charges were properly presented to the jury, the jury was not instructed in accordance with Appellant's proper request—Appellant could not be found guilty of both homicide by child abuse and involuntary manslaughter. In this situation, the jury should have been instructed that, depending on their view of the evidence, they could find Appellant not guilty of both homicide offenses, guilty of homicide by child abuse, or guilty of involuntary manslaughter—but may not find Appellant guilty of both homicide charges. The State erroneously contends both homicide convictions and punishments should stand.

The flaw in the State's argument on appeal is best understood by reviewing its theory of criminal liability as the trial unfolded. After indicting Appellant on varying homicide charges (which as a matter of law could not be premised on one theory of liability), the State ultimately elected to pursue a single theory of liability—Alexis's death from morphine poisoning was caused by the morphine in Appellant's breast milk—and the trial court instructed the jury, "That applies to each of the separate charges." The jury could have accepted Appellant's view of the evidence and found Appellant not guilty of homicide by child abuse. Specifically, the jury could have concluded the State failed to prove Appellant "committed a deliberate or intentional act under circumstances revealing an extreme indifference to human life."⁷ In that scenario, the jury may have nevertheless found Appellant guilty of involuntary manslaughter.⁸ But the jury's guilty verdict on Count One in the indictment—homicide by child abuse—precluded a guilty verdict on the charged offense of involuntary manslaughter in Count Two. Thus, under these circumstances, a conviction and sentence for each homicide charge cannot stand.⁹

The situation here should be contrasted with a homicide that would properly fall within multiple homicide statutes. In that situation, a jury may properly return a guilty verdict on more than one homicide charge.

In *State v. Easler*, 327 S.C. 121, 489 S.E.2d 617 (1997), this Court affirmed convictions and sentences for two homicide charges—felony driving under the influence causing death and reckless homicide—arising out of a motor vehicle

accident that killed one person and seriously injured another. The evidence and theory of criminal liability satisfied the elements of both homicide statutes.

Easler, however, went further and affirmed multiple punishments for the single homicide committed by one defendant, and this was error. **We overrule *Easler* to the extent it authorizes multiple homicide punishments involving only one homicide.**

It is because of this rule—one homicide, one homicide punishment—that even were we to accept the State's argument that the involuntary manslaughter guilty verdict should stand, an additional sentence for Alexis's death could not stand. The fact that Appellant received a concurrent five-year sentence for involuntary manslaughter does not change the result. The concurrent sentence likely reflects the learned trial judge's inherent understanding that a consecutive sentence could not be imposed. Yet the conviction itself is considered a punishment and that, too, must be vacated. *Ball v. United States*, 470 U.S. 856, 864–65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985) (“The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. ... Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.”).

State v. Greene, 423 S.C. 263, 282–84, 814 S.E.2d 496, 506–07 (2018).

First, Cobbett pled guilty to failure to stop for law enforcement and reckless homicide. Unlike *Greene*, the legislative intent in the failure to stop for law enforcement clearly reveals a legislative intent for separate punishment to deter individuals from evading lawful stops on the highways. Additionally, as noted above, these matters are grounded in legislative intent to punish in the passage of the act. Unlike *Easler* and *Greene*, this is distinguishable and does not create a double jeopardy violation.

The *Greene* ruling was based on an interpretation of legislative intent involving a state statute, with the court finding “no expression of legislative intent authorizing multiple homicide punishments for a single homicide committed by a single defendant” and “[a]s a result, absent legislative intent to the contrary”, it would follow the prevailing rule — “one homicide is limited to one homicide punishment per defendant.” *See Greene*, 814 S.E.2d at 505. In doing so, the Court specifically noted that it was overruling *Easler* “to the extent it authorizes multiple homicide

punishments involving only one homicide.” *Id.* at 507.

The Applicant brought to this Court’s attention the United States Supreme Court decision in *Robinson v. Neil*, 409 U.S. 505, 93 S.Ct. 876 (1973). In *Robinson* the Court held that the decision in *Waller v. Georgia* which barred on double jeopardy grounds two prosecutions, municipal and state, based upon the same offense is to be accorded full retroactivity. In *Greene*, however, it was purely a substantive state law decision and had no federal constitution double jeopardy consequences. More importantly, it acknowledged that until *Greene*, *Easler* was good law for interpreting state statutes on sentencing.

However, even assuming Applicant may have been sentenced differently today after *Greene*, Applicant has not shown that the ruling in *Greene* applies retroactively to his case on post-conviction relief. *See State v. Belcher*, 685 S.E.2d 802, 811 (S.C. 2009) [retroactive application of new precedent does not extend to matters challenged on post-conviction relief]; *see also Teague v. Lane*, 489 U.S. 288 (1989); *McDougall v. Dixon*, 921 F.3d 518, 539 (4th Cir. 1990) [Not applying new rule retroactively on habeas review where new rule involved in validating sentencing regarding mitigating circumstances]. Therefore, this issue is without merit and should be dismissed.

CONCLUSION

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

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the

appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant's attention is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 13 day of August, 2024.



J. CORDEZZ MADDOX
Presiding Judge
Eleventh Judicial Circuit

Anderson, South Carolina

FILED

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON 2024 AUG 30 AM 9:08 FOR THE ELEVENTH JUDICIAL CIRCUIT

LISA H. COMER
CLERK OF COURT
James Curtis Cobbert, III, SCDC #291 LEXINGTON SC Case No. 2021-CP-32-3337

Applicant,

Rule 59e Motion

v.

State of South Carolina,

Respondent.

James Curtis Cobbert, III, the Applicant above named, pursuant to Rule 59e of the South Carolina Rules of Civil Procedure, to alter or amend the decision rendered in this matter on August 13, 2024 and filed on August 16, 2024 based upon the following grounds:

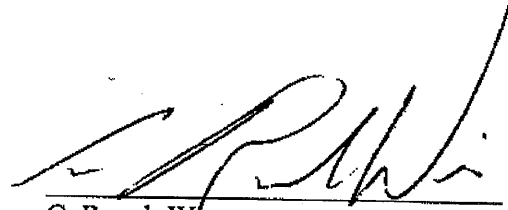
1. The trial court erred in deeming this Post Conviction Relief Action to be successive when the application was based upon the fact that the applicant learned of the change in the law as to his case less than one year before the application was filed. This Court incorrectly found that the applicant pled to failure to stop for a blue light and reckless homicide. In fact the applicant entered a plea to failure to stop for a blue light resulting in death and reckless homicide. Thus, the plea violates the Double Jeopardy provisions the state and federal constitutions as established in *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018). As the applicant entered a plea to two violations of the law that only involved one death, the double jeopardy provision was violated. As this court correctly noted, the *Greene* case held, As a result, absent legislative intent to the contrary, we follow the prevailing rule—one homicide is limited to one homicide punishment per defendant.” *State v. Greene*, at 280, 814 S.E.2d at 505. This Court has not pointed to any legislation in the failure to stop resulting in death statute that

suggests an intent by the legislature to intend cumulative punishment. Even if the legislature did so intend, the legislature can no more violate double jeopardy than a court may.

2. This Court erred in concluding that the *Greene* decision should not be applied retroactively as the *Greene* decision was based upon the constitution and therefore should be applied retroactively. This Court erred in holding the *Greene* decision “was purely a substantive state law decision and had no federal constitution double jeopardy consequences.” Order at 18. The *Greene* decision, while not citing the Double Jeopardy provision of the Fifth Amendment incorporated the basic federal law as to Double Jeopardy. Regardless, the application of the state constitution as to Double Jeopardy, should be applied retroactively as the sentence in this case violates the state constitution.

For the forgoing reasons, this Court should alter or amend the Order issued in this matter and grant the relief requested by the applicant.

August 26, 2024



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Attorney for James Cobbert

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FOR THE ELEVENTH JUDICIAL CIRCUIT

James Curtis Cobbert, III, SCDC #293798

LISA M. COVER
CLERK OF COURT
LEXINGTON, SC

Case No. 2021-CP-32-3337

Applicant,

v.

State of South Carolina,

Respondent.

ORDER DENYING RULE 59
AND CLARIFYING ORDER
OF DISMISSAL

This matter comes before this Court by a timely filed Rule 59 motion by the Applicant through his counsel C. Rauch Wise to the August 16, 2024 Order of Dismissal.

Having reviewed the Applicant's Rule 59 motion, I find no reason to alter or amend the judgment in my previous order. However, I must clarify portions of the ruling due to the Applicant's concerns raised within his motion.

In his Rule 59 motion, Applicant initially asserts that the Court's successive application ruling was in error because the order of dismissal misstated at one point that the applicant pled guilty to failure to stop for a blue light and reckless homicide when he actually pled guilty to failure to stop for a blue light resulting in death and reckless homicide. Motion, page 1. In my order, Order p. 3, the Court wrote that that Applicant was indicted for "reckless homicide" and "failure to stop for law enforcement vehicle blue light resulting in death" and pleaded guilty "as charged." *Order of Dismissal*, p. 3. Within the order at page 17, the Court did state : "First, Cobbert pled guilty to failure to stop for law enforcement and reckless homicide." However, the analysis set forth at Order, p. 17-19 addresses the Court's recognition that the Applicant was asserting the impact of State v. Greene on its "only one homicide" assessment and that the conviction was for

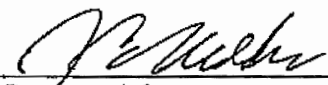
failure to stop for law enforcement blue light resulting in death. It is clear that the Court was addressing the impact of the “resulting in death conviction” and “reckless homicide.” In summary, this Court within the Order was always considering the fact that the Applicant was convicted of on Indictment 2006-GS-32-1447 as to “failure to stop for law enforcement vehicle, blue light resulting in death ” and all references to that conviction should be considered as that “resulting in death” offense.

In the second portion of his motion, Applicant requests that this Court apply the decision in *State v. Greene*, 423 S.C. 263, 814 S.E.2d 496 (2018) retroactively as violation of the state constitution right to double jeopardy. This state constitutional double jeopardy claim was raised in his August 16, 2023 amendment in addition to the federal constitutional claim. The Court addressed was the fact that *Greene* should not be given retroactive application to final decisions in PCR matters under *State v. Belcher*, 685 S.E.2d 802, 811 (S.C. 2009). In making that determination, this Court implicitly concluded that there was no retroactive state constitutional violation under *State v. Greene* assertion was is purely a state law decision, not a matter of the federal constitutional right to double jeopardy which had already been rejected by the federal courts under the proper federal constitutional test. This Court rejected the retroactive application of *Greene* in its Order at page 18. This Court sees no reason to alter or amend its order or judgment its based upon the state constitutional allegation based upon Article I, §12. This Court would further note that it is not aware of any intervening decision by the South Carolina Supreme Court addressing the state constitutional claim raised herein nor requiring a different judgment.

IT IS THEREFORE ORDERED:

That the Applicant's Rule 59 Motion be denied and clarified to the extent set forth

above. AND IT IS SO ORDERED this 20th day of March, 2025.



J. CORDELL MADDOX
Presiding Judge
Eleventh Judicial Circuit

Asks, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
J. Cordell Maddox, Circuit Court Judge

Case № 2021-CP-32-3337

James Curtis Cobbert, III SCDC #293798, ... Appellant,

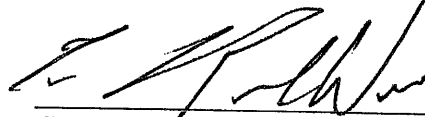
vs.

The State Respondent.

NOTICE OF INTENT TO APPEAL

James Curtis Cobbert, III SCDC #293798 appeals the Orders of Honorable J. Cordell Maddox Order denying Rule 59 and Clarifying Order of Dismissal filed April 18, 2025 and Order of Dismissal filed August 16, 2024. Appellant received a copy of this decision on May 2, 2025.

May 5th, 2025



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