



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

### **PROCEDURAL HISTORY**

Applicant is presently confined to the South Carolina Department of Corrections. Applicant was arrested on March 4, 2013, following an investigation into the murder of his girlfriend, Catherine Banty, by manual strangulation and blunt force trauma to her head. During its October 2025 term, the Lexington County Grand Jury indicted Applicant for Murder (2015-GS-32-2341).

On February 21, 2017, Applicant proceeded to a jury trial before the Honorable R. Knox McMahon. Applicant proceeded *pro se* with Eleventh Circuit Deputy Public Defender Sara H. Mauldin appearing as standby counsel. Deputy Solicitor Shawn Graham and Assistant Solicitor Shannon Davis prosecuted the case on behalf of the Eleventh Circuit Solicitor's Office. On February 28, 2017, a jury found Applicant guilty as indicted. Judge McMahon sentenced Applicant to 50 years in prison. At the conclusion of the multi-day trial, the jury convicted Applicant as indicted. Judge McMahon sentenced Applicant to fifty years' imprisonment.

### ***Direct Appeal***



Applicant filed a timely notice of appeal. Appellate Defender David Alexander (Appellate Counsel).<sup>2</sup> Appellate Defender David Alexander perfected Applicant's appeal by raising the following issue:

Whether appellant's statements to police that he had an outstanding warrant for murder were admitted in violation of appellant's Fifth Amendment rights because police failed to give appellant his *Miranda* warnings and their seizure of appellant and questioning amounted to custodial interrogation?

Final Brief of Appellant, p. 1. The State was represented in the matter by Assistant Attorney General Caroline Scrantom. Following briefing, the Court of Appeals affirmed Applicant's conviction and sentence in a published opinion filed May 20, 2020. *State v. Walker*, 430 S.C. 411, 844 S.E.2d 405 (Ct. App. 2020). The Remittitur was returned on June 30, 2020.

### **Facts Giving Rise to Conviction**

#### *Pre-trial*

The circuit court conducted a hearing on March 25, 2015, pursuant to *Faretta v. California*, 422 U.S. 806 (1975). (R. pp. 1198-99). The circuit court found Applicant competent to stand trial and competent to represent himself pursuant to *State v. Barnes*, 407 S.C. 27, 753 S.E.2d 545 (2014). The circuit court relieved Ms. Mauldin as trial counsel and ordered her to serve as standby counsel for Applicant. On February 21, 2017, the first day of trial, the court convened a pretrial *Blair*<sup>3</sup> hearing, and Applicant was found competent.

### **Summary of Evidence Adduced at Trial**

According to forensic pathologist Dr. Janice Ross, Carrie Banty died as a result of asphyxiation due to manual strangulation. (R. p. 1030, lines 1-7). Petechial hemorrhages in the

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<sup>2</sup> Before initial briefs were filed, on January 25, 2018, Applicant filed a motion to relieve Appellate Counsel and proceed *pro se*. The Court denied Applicant's motion by order on February 15, 2018.

<sup>3</sup> *State v. Blair*, 275 S.C. 529, 273 S.E.2d 536 (1981).



victim's eyes substantiated her finding. (R. p. 1026, line 17 - p. 1027, line 9). Dr. Ross also opined that a victim of strangulation would have sustained a significant consistent application of force for four to five minutes, and that it was not necessary to crush one's windpipe to cause death. (R. p. 1027, lines 7-9; R. p. 1028, lines 10-18; R. p. 1029, lines 18-25). In addition to biological evidence of strangulation, the victim had sustained a series of abrasions, marks, bruises and contusions to the bridge of her nose, her neck, chest, left shoulder, upper arm, forearm, knees, left ankle, and the tops of her feet. (R. p. 1019, lines 11-20). The victim also had internal bruising over her collarbones, anterior sternum, chest, and underneath the scalp over the top of her head "just to the right of the midline." (R. p. 1024, lines 16-20). These injuries "were approximately one and a half inches each in the greatest." (R. p. 1026, lines 11-12).

When scheduling the autopsy, Dr. Ross received information that a looped belt was found near the victim's body in a manner suggesting it may have been used as a tourniquet. (R. p. 1006, lines 1-8). Dr. Ross also noted the victim had two parallel, linear bruises on her upper arm which could be consistent with the belt or with the impression of two fingers, as well as what could be a needle puncture in the crease of her elbow. (R. p. 1015, line 24 - p. 1016, line 21). Law enforcement indeed recovered a looped belt by the body and an empty syringe from inside the herby curby trash can outside of the home. (R. p. 694, lines 13-17; R. p. 695, line 21 - p. 696, line 8). The residue inside the syringe tested positive for cocaine and a cutting agent. (R. p. 782, lines 16-23).

However, the postmortem toxicology screen performed on the victim came back negative. (R. p. 778, lines 12-24). She had not used any illicit or prescription drugs prior to her death. (R. p. 776, lines 4-22). In fact, the only positive screen on the victim's toxicology report was for ethanol, or alcohol, at a very low level of 0.016% grams per deciliter. (R. p. 779, lines 3-9). This amount, only slightly above the threshold of 0.010%, was "equivalent to about one beer or slightly less than



one alcoholic beverage." (R. p. 779, lines 9-13). But the victim's ocular fluid tested negative for ethanol. (R. p. 780, line 25 - p. 781, line 1). In most cases, where there is a very low level of ethanol in the blood and no ethanol in the ocular fluid, the ethanol in the blood results from postmortem production due to decomposition. (R. p. 781, lines 1-9). Otherwise, the results of these screens indicate that the victim could have ingested one alcoholic beverage "almost immediately prior to death." (R. p. 781, lines 3-6).

The victim was discovered midday on December 11, 2012, when she and Applicant's three year-old daughter left their home and was found by a neighbor walking near the road, crying and wringing her hands. (R. p. 587, line 14 - p. 588, line 8). The neighbor, Eugene Ray, recognized the girl from one of the trailers at the top of the hill and stopped his truck to speak with her out of concern. The girl led him to her mother. (R. p. 588, line 1 - p. 589, line 25). The little girl thought her mother was dead, so Mr. Ray put the girl in his truck, gingerly entered the trailer, and found the victim lying near the end of the bed in a room down the hall. (R. p. 590, line 8 - p. 591, line 22). Mr. Ray, a CNA, could identify that the victim, without a pulse and cold to the touch, exhibited signs of lividity and rigor mortis. (R. p. 592, lines 1-8; R. p. 603, lines 19-25). He saw bruises on her arms and face, but not a scratch or bruise on the child.<sup>4</sup>

Law enforcement arrived and began working the scene. (R. p. 617, lines 2-21). It was a two-bedroom single-wide trailer with no signs of forced entry. (R. p. 619, lines 3-20). The victim lay face-down on the floor near the foot of a bed. Partially covered by a blanket, someone had colored on her skin with magic markers found in the bedroom. (R. p. 620, lines 5-11). Missing

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<sup>4</sup> A victim's advocate who tended to the child after she was found by Mr. Ray similarly testified that the child had no bruises, cuts, or scrapes. (R. p. 714, lines 12-24). Relevant to Applicant's version of events, the victim's stepmother testified at trial that she never witnessed the victim abuse or even so much as discipline her daughter. She described her stepdaughter as a wuss when it came to the child. (R. p. 793, line 15—p. 794, line 25).

from the home was Applicant, whose ID was located in the pocket of a male's pair of pants and collected from the same room where the victim was located. (R. p. 687, lines 3-9). Other male clothing was located in the dresser in that bedroom, and a pair of men's shoes in the laundry room. (R. p. 687, line 14 - p. 688, line 17). A man's wallet and a wallet belonging to the victim were located inside the vehicle parked on the premises. (R. p. 698, lines 6-14).

Determining that Applicant lived at the victim's residence, being unable to locate him, and learning from his family that he may have discontinued use of some mental health medication, law enforcement entered him into the nationwide NCIC database as a missing and/or endangered person. (R. p. 718, line 1 - p. 719, line 22).

The State presented testimony at trial tending to establish Applicant's whereabouts before and after the victim was discovered by Mr. Ray. Records of Applicant's cell phone data usage were consistent with use of the phone at Applicant's residence and at Lexington Medical Center from December 7, 2012, until 11:10 PM on December 10, when the phone was apparently turned off. (R. p. 726, lines 22-23; R. p. 735, line 19 - p. 743, line 25).

Also during this time frame, one of the victim's co-workers testified that for two consecutive days, she noticed the victim crying upon her arrival at work. This occurred on December 8 and 9. (R. p. 751, lines 8-20; R. p. 754, lines 6-12). On the eighth, the co-worker conversed with the victim, advising her that she didn't need to be with Applicant. (R. p. 751, line 24 - p. 752, line 3). In the early morning hours of December 9, Applicant was admitted to Lexington Medical Center at 12:06 AM. He was discharged just a couple of hours later at 2:47 AM. (R. p. 726, line 7 - p. 727, line 8).

Applicant resurfaced days later in Aiken County. Around 11:00 PM on December 17, 2012, a Sheriff's Deputy on road patrol noticed Applicant sitting underneath a metal awning at a small business across the street from a convenience store that was frequently targeted for

robberies during the holiday season. (R. p. 935, line 23 - p. 937, line 12). Having reason to believe Applicant may be casing the convenience store, the Deputy, James Kostyk, pulled into the parking lot of the business and approached Applicant. (R. p. 937, lines 10-23). Kostyk's body mic and in-car video captured the exchange which was played for the jury. (R. p. 938, line 3 - p. 930, line 18; State's Exhibit 45). Kostyk asked Applicant who he was. Instead of giving a verbal response, Applicant walked towards Kostyk and put his hands behind his back. (R. p. 941, line 24 - p. 942, line 7). Considering the response unusual, Kostyk patted down Applicant for safety. (R. p. 942, lines 7- 12). He asked Applicant for identifying information and then asked if he had any warrants. (R. p. 942, line 17 -p. 943, line 4). Applicant answered he did have a warrant and that it was for murder. (R. p. 943, lines 6-10).

As Kostyk testified to and as is exhibited in the video and audio recording of the exchange, Kostyk had Applicant lean against the hood of his patrol car in order to retain a position of bodily advantage if it became necessary to defend himself against Applicant. Kostyk did this after Applicant said he probably had a warrant. (State's Exhibit 45 at 1 :30 - 2:08; R. p. 945, lines 5- 11).

He then asked Applicant, "Whaddya think you got a warrant for, Bud?" Applicant answered, "Murder." (State's Exhibit 45 at 2:43 - 2:51). At that point, Kostyk handcuffed Applicant and had him sit inside the patrol car. (R. p. 945, lines 12-17; State's Exhibit 2 at 2:50 - 4:05<sup>5</sup>).

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<sup>5</sup> In an exercise of trial strategy and after an *in limine* discussion with the court, Applicant insisted on publishing the entirety of Kostyk's in-car video to the jury during his cross-examination of the witness. (R. p. 951, line 1 - p. 960, line 13; State's Exhibit 2). Originally, State's Exhibit 2 was offered during the Denno hearing as a pre-trial exhibit and the State did not intend to publish the entire video to the jury in its case-in-chief. (R. p. 951, lines 7-9; R. p. 364, lines 4-24; R. p. 513, line 9 - p. 515, line 15).



Kostyk contacted dispatch to corroborate the biographical information Applicant provided and learned that Applicant was listed as a missing and endangered person. (R. p. 943, line 1 - p. 944, line 2). Kostyk transported Applicant to Aiken Regional Medical Center for a mental evaluation. (R. p. 945, lines 18-25). The hospital did not admit him for psychiatric or medical treatment, and Kostyk offered Applicant a ride to Lexington County. (R. p. 946, lines 15-24). Kostyk took Applicant as far as he could into Lexington County, which was a 1-20 truck stop at Exit 44. They met an officer from Lexington County Sheriff's Office and Kostyk left. (R. p. 947, lines 1-24).

During this exchange and transport which began on December 17, 2012, and extended into the early morning hours of December 18, there were no warrants issued for Applicant's arrest. Applicant was not in custody. (R. p. 946, lines 11-17). He was not handcuffed when Kostyk left Applicant with a Lexington Deputy. (R. p. 947, line 23 - p. 948, line 1).

Law enforcement arrested Applicant for the murder of Carrie Banty on March 4, 2013. (R. p. 723, lines 20-21). At trial, a former cellmate of Applicant testified that Applicant told him he had killed the mother of his child. (R. p. 930, lines 9-21).

### **Applicant's Trial Presentation**

Applicant *pro se* delivered an opening statement informing the jury he planned to produce a defense of accident.<sup>6</sup> (R. p. 574, line 3 - p. 576, line 7). Also in his opening statement, Applicant narrated the events leading up to the victim's death, stating he periodically choked the victim five times on the night of her death as a result of a physical fight wherein Applicant felt the need to assert self-defense. (R. p. 576, line 8 - p. 582, line 5).

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<sup>6</sup> Inaccurately transcribed as "incident." (R. p. 575, line 19—p. 576, line 4); *State v. Goodson*, 312 S.C. 278, 280, 440 S.E.2d 370, 372 (1994) (elements of accident defense).

Applicant did not testify and did not present any witnesses at trial. (R. p. 1084, line 4 - p. 1094, line 25; R. p. 1099, lines 11-25). At the trial's conclusion, Applicant did not seek a jury instruction on self-defense.<sup>7</sup> He sought an instruction on involuntary manslaughter. (R. p. 1095, lines 5-22). The trial court denied the request to charge upon the basis that no evidence supported that instruction. (R. p. 1097, line 20 - p. 1099, line 9). In his closing argument, Applicant argued that the facts presented by the State at trial did not meet the elements of murder. (R. p. 1119, line 8 -p. 1142, line 12).

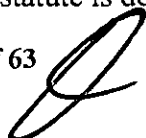
### CURRENT ACTION BEFORE THIS COURT

In his original application for post-conviction relief, Applicant alleged he is being held in custody unlawfully based on the following:

1. "Applicant was entitled to 'Immunity from Prosecution' under the 'Protection of Persons and Property Act', — (S.C. Code Ann. 16-11-440(A) and S.C. Code Ann. 16-11-440(C)."
2. "Applicant was entitled to 'Directed – Verdict' under 'Rule 50, Motion for a Directed Verdict and for Judgment[sic] notwithstanding the verdict.'"
3. "Applicant was entitled to 'Effective Assistance of Counsel' by ('stand-by counsel' Sarah Hahn (Mauldin) — Public-Defender to gain proper collection and/enseekment[sic] of evidence (prior to evidence being lost/terminated by — ) (holder), And — Investigation/SI — when/while Counsel for Applicant."
4. "Applicant was convicted and sentenced under — S.C. Code Ann. 16-3-10/murder — And, Insignificant of Evidence to convict (and sentence), occured[sic]/shown."
5. Applicant was entitled to be 'Competent to Stand-trial' Standard/s/ during trial."

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<sup>7</sup> Pre-trial, Applicant sought immunity under the Protections of Persons and Property Act, S.C. Code Ann. § 16-11-440. Applicant testified on his own behalf at his immunity hearing, delivering a detailed, line-by-line account of the events before, during, and after the murder. (R. pp. 18-168). In denying Applicant's request for immunity, the court stated "[ ] as far as the Stand Your Ground hearing, the defendant has the burden of proving that he's entitled to immunity by a preponderance of the evidence. I find that he has failed to meet that burden based on the totality of the evidence and the witnesses that have testified during that particular hearing, and that his motion for immunity under the Stand Your Ground statute is denied." (R. p. 545, lines 7-14).



6. **“Applicant was entitled to ‘Effective-Assistance of Counsel’ by (Appellate Counsel) David Alexander, SCCID — Appellate Division, to raise all significant and — obvious claim/s/ on ‘Direct-Appeal’ under Appellate-Duties/Duty to raise all significant/obvious claim/s/.”<sup>8</sup>**
7. “Applicant was convicted/sentenced under — S.C. Code Ann. 16-3-10/murder — And, no evidence of shown/brought evidence of malice (by applicant), and/or aforethought of malice (by applicant) E.g – Failure of showing attent[*sic*] to commit a crime, Especially murder and the aforethought of malice and/or malice in general.”
8. “Applicant was entitled to ‘fair-trial’ under the Safeguard-Standard/s/. Etc.”

On June 23, 2021, Applicant filed an amended application, raising the following additional grounds for relief (excerpted verbatim):<sup>9</sup>

9. “The jury and the court did not have sufficient – evidence to convict or/and – sentence. (Note: non collateral-attack on insufficient)(evidence to convict/sentence).”<sup>10</sup>
10. “Applicant was entitled to only the usage of evidence or/and testimony used within (at) the Ducan[*sic*]/Pretrial Hearing pursuant to case-law/s/ and/or pursuant to S.C. Code Ann. §§ 16-11-440(A); 16-11-440(C).”<sup>11</sup>
11. “Applicant was entitled to only relevant fact/s/ or/and Ground/s/ — relevant to immunity/from prosecution at the Ducan[*sic*]/Pretrial Hearing (—whereof, Eg – Heard irrelevant testimony, facts or grounds) at the Ducan[*sic*]/Pre-trial Hearing/pursuant to Supra.”<sup>12</sup>
12. “Applicant was entitled to Sufficient — evidence/s/ – to convict, i.e. — Insufficient–Evidence to convict. The State failed to produce adequate–evidence, to convict, and failed to produce evidence of shown intent, motive, etc.”

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<sup>8</sup> Allegations 2(b), (m), and (n) on the June 23, 2021, amended application have been consolidated into No. 6.

<sup>9</sup> Because the amended PCR application is stamped as received by the Perry Correctional Institution on June 16, 2021, the State included these allegations in its return because PCR counsel had not yet been appointed.

<sup>10</sup> Allegations 2(c), (a), (k), (l), and (f) on the June 23, 2021, amended application have been consolidated into No. 9.

<sup>11</sup> Allegations 2(d) and (e) on the June 23, 2021, amended application have been consolidated into No. 10.

<sup>12</sup> Allegation 2(e) on the June 23, 2021, amended application has been consolidated into No. 11.



13. “Applicant was entitled to effective — assistance of appellate-counsel, David Alexander — to file an[sic] ‘motion/petition for rehearing, at denial of direct appeal, and must of[sic] argued the Court overlooked and misapprehended his — argument.’”
14. “Applicant’s indictment (document) was — un-constitutional, due to trial court lack[sic] subject-matter jurisdiction when the indictment alleged two different means of death outside legislative.”<sup>13</sup>

### MOTIONS HEARING BEFORE JUDGE McINTOSH

On December 14, 2021, at the Lexington County Judicial Center, a motions hearing was held before the Honorable R. Lawton McIntosh. Assistant Attorney General Lillian L. Meadows appeared on behalf of the State. Applicant was present and initially represented by Ashley A. McMahan, Esquire.<sup>14</sup> The Applicants motions before the Court were as follows:

1. Motion to relieve Counsel, proceed *pro se*, and appoint standby counsel.
2. Motion to amend PCR Application
3. Motion to obtain trial exhibits
4. Motions for discovery and to obtain a private investigator

In an Order filed by the Court on February 7, 2022, Judge McIntosh granted Applicant’s motion to relieve counsel Ashley McMahan and proceed *pro se*, but denied Applicant’s request to appoint standby counsel. Applicant’s request to obtain all exhibits from trial was denied. Additionally, Applicant’s motions for discovery and to obtain a private investigator were denied. Respondent’s motions before the Court were as follows:

1. Motion to dismiss direct appeal issues<sup>15</sup>
2. Motion to dismiss claims of ineffective assistance of standby counsel<sup>16</sup>
3. Motion to dismiss claim of incompetency and claim regarding safeguard standards<sup>17</sup>

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<sup>13</sup> Allegation 2(o) on the June 23, 2021, amended application has been consolidated into No. 14.

<sup>14</sup> Counsel McMahan was relieved at the start of the hearing. Applicant appeared *pro se* for the remainder of the motions hearing.

<sup>15</sup> Allegations #1, 2, 4, 7, 9, 10, and 11 in Original PCR Application. Allegations 2(h), (i), (j), and (g) on the June 23, 2021, amended application were consolidated and dismissed pursuant to this motion.

<sup>16</sup> Allegation #3 in Original PCR Application

<sup>17</sup> Allegations #5 and 8 in Original PCR Application

4. Motion to dismiss claim of lack of subject matter jurisdiction<sup>18</sup>
5. Motion for Applicant to undergo a competency evaluation.

Judge McIntosh granted Respondent's motion to dismiss Applicant's claims 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 13<sup>19</sup>, and 14. Respondent's motion for a competency evaluation was denied. Additionally, Judge McIntosh ordered that an evidentiary hearing be convened solely on the matter of ineffective assistance of appellate counsel.

In the *pro se* first Amended Application filed June 23, 2021, the Applicant made the following allegations (verbatim):

- 2(a). "Applicant was sentence and convicted pursuant to S.C. Code Ann § 16-3-10/murder. No evidence or elements of that statute was not litigated/shown at the trial (and especially not at the Duncan Hearing/pretrial hearing, pursuant to §§ 16-11-440(A); 16-11-440 (C)
- 2(b). **Applicant was entitled to effective assistance of counsel by David Alexader, ACCID Appellate Counsel, to bring/argue/raise all significant/obvious issue claims, that were meritorious; and if argued and raised on direct appeal, the arguments and raised issues would have caused the appellate counsel to grant the direct appeal (of applicant). And, the failures caused prejudice—And, prejudiced the defenses. Further, David Alexander was notified by Applicant that the transcripts of the Applicant's trial and pretrial hearings showed massive errors [].**
- 2(c). The jury and the court did not have sufficient evidence to convince and/or sentence.
- 2(d). Applicant was entitled to only the usage of evidence or/and testimony used within the Duncan/pretrial hearing pursuant to case law and/or pursuant to S.C. Code Ann §§ 16-11-440(A); 16-11-440(C)
- 2(e). Applicant was entitled to only relevant facts or/and grounds—relevant to immunity from prosecution at the Duncan/pretrial hearing.
- 2(f). The judge didn't find that Applicant did established the relevant three elements of self-defense needed to establish the immunity from prosecution pursuant

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<sup>18</sup> Allegation #14 in Original PCR Application

<sup>19</sup> The Court ordered an evidentiary hearing to resolve Applicant's allegations regarding ineffective assistance of appellate counsel (Allegations #6 and 13)(**highlighted in bold above**). Judge McIntosh's dismissal of Allegation #13 was a typographical error.

to supra and therefore, prejudiced Applicant to entitled (to) immunity pursuant to the Protection of Persons and Property Act.

- 2(g). The appellant counsel, David Alexander—was informed by Applicant that transcripts were riddled with massive errors and—further, pervaded the truth, along with errors of captions and headings on pleadings. And he used those transcribes to conduct research/views for direct appeal and could not conduct/litigate proper direct appeal issues/arguments—due to the errors and false transcribes. He refused to bring/brief only one issue e.g.—violation of miranda rights. He refused to argue on direct appeal transcript errors, opening statements by Solicitor Davis, closing arguments by Solicitor Graham.
- 2(h). Transcript Errors—the denial to adequate and proper transcripts cause prejudice on direct appeal. Appellate counsel cannot litigate properly, etc. Any review of the transcript will cause prejudice to Applicant due to errors etc.
- 2(i). Opening Statement/Solicitor Davis—the denial to the evidences—only (presentation)—standard, set in laws, was unlawful, and denied Applicant of his rights to an adequate/proper trial, and prejudiced him. This violated Constitutional right to due process, liberty, freedom—and etc.
- 2(j). Closing Argument by Solicitor Graham—The denial to the argument/statement set priority within the trial/e.g.—record; In the record standard set in law was unlawful, and denied Applicant of his rights to an adequate proper trial and prejudiced him. This violated Constitutional right to due process, liberty, freedom—and etc. In both opening statement and closing argument, the State should have and was obligated to keep their statement/argument to the evidence, only standard, and the in the record standard, set in law, and—the reasonable—inference that may be drawn therefrom. Further, David Alexander refuse to get preserve or/and obtain the audio recordings made at the trial, and pretrial hearings. By contacting the adequate court reporter, to include Desiree Alan, Chief Court Reporter (South Carolina) to seek preservement of the audio or to review those recordings. After told of massive errors and omits by Applicant, etc. And—Appellate Counsel's ineffectiveness caused the Applicant extreme prejudice, to/at direct appeal. The Counsel's unprofessional errors caused the prejudice, where/when he refused to argue/brief/raise enough (and/obvious) meritorious-issues/claims, to include the massive transcript error and omits. And—the appellate court would have granted the direct appeal, and concluded the meritorious issues/claims, had he, litigated adequately and properly on the Applicant's direct-appeal.
- 2(k). Applicant was entitled to sufficient evidence to convict, i.e.—insufficient evidence to convict. The State failed to produce adequate evidence, to convict, and failed to produce evidence of shown intent, motive, etc.



- 2(l). Applicant was convicted/sentence under the statute of murder, and the State didn't show evidence sufficient to crime (alleged) thereof insufficient evidence to convict.
- 2(m). **Applicant was entitled to effective assistance of appellate counsel, David Alexander, to file on "motion/petition for rehearing, at denial of direct appeal, and must of argued the court 'overlooked and misapprehended his argument.'"**
- 2(n). Applicant was entitled to due process of the appeal, and attorney's refusal to due process the appeal caused a "block", from further due process and litigated and caused prejudice to Applicant.
- 2(o). Applicant's indictment was unconstitutional, due to trial court lack subject matter jurisdiction when the indictment alleged two different mean of death outside legislative. The indictment was unconstitutional, due to the indictment did not follow the statutory requirements when the manner of death was alleged alternative means. Subjecting the Applicant to a subsequent prosecution had it failed. The indictment did not allege sufficient certainly and particularly how the deceased died. Etc."

Applicant requested relief as follows (verbatim):

"Applicant seeks an attorney to refile/file an adequate PCR application, showing/litigating, all known (and/available), on this application (PCR), pursuant to law. Expect, granting/allowing Applicant to remain pro se on this ongoing application for post-conviction relief."

In the *pro se* second Amended Application filed December 30, 2021, the Applicant made the following allegations (summarized for brevity):

- 10(a). Applicant was entitled to immunity from prosecution via the Protections of Persons and Property Act.<sup>20</sup>
- 10(b). Applicant was entitled to a directed verdict because the State failed to produce evidence of the offense charged.<sup>21</sup>
- 10(c). Applicant was denied the right to present a complete defense because Sarah Mauldin<sup>22</sup> refused to gather exculpatory evidence of video footage of the Victim attacking her three-year old daughter. No evidence was presented at

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<sup>20</sup> Allegation 10(a) in the December 30, 2021, amended application was consolidated into Allegation #1. *See* p. 9

<sup>21</sup> Allegation 10(b) was consolidated into Allegation #2. *See* p. 9.

<sup>22</sup> Sarah Mauldin was a public defender who was appointed to represent Applicant prior to him proceeding *pro se*. Mrs. Mauldin acted as standby counsel during trial.

the evidentiary hearing in support of this claim, therefore the claim has been abandoned.<sup>23</sup>

10(d). Applicant is constitutionally entitled to an acquittal because the State failed to prove any elements of murder.<sup>24</sup>

10(e). Applicant was constitutionally entitled to effective assistance of appellate counsel and was denied this right because appellate counsel failed to raise arguments that were likely to succeed.<sup>25</sup>

10(f). Applicant was constitutionally entitled to a fair trial and was denied this right because the opening and closing statement by the State placed the solicitors into the Victim's shoes.<sup>26</sup>

10(g). Applicant was constitutionally entitled to due process of law and was denied this right when the court abused its discretion and denied Applicant's request for immunity from prosecution under the Protection of Persons and Property Act.<sup>27</sup>

10(h). Applicant was constitutionally entitled to due process of law and was denied this right when the court reporter made massive errors in the transcript.<sup>28</sup>

10(i). Applicant was constitutionally entitled to due process of law and was denied this right when appellate counsel failed to fully litigate the direct appeal.<sup>29</sup>

10(j). The State failed to prove beyond a reasonable doubt all the elements of murder, including malice. The State also failed to prove that Applicant was not acting in self-defense.<sup>30</sup>

**10(k). Applicant was constitutionally entitled to a direct appeal and was denied this right when appellate counsel failed and refused to litigate the claim that was stated on the notice of appeal.<sup>31</sup>**

Applicant requested relief as follows (summarized for brevity):

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<sup>23</sup> Allegation 10(c) was consolidated into Allegation #3. *See* p. 9.

<sup>24</sup> Allegation 10(d) was consolidated into Allegation #4. *See* p. 9.

<sup>25</sup> Allegation 10(e) was consolidated into Allegation #6. *See* p. 9.

<sup>26</sup> Allegation 10(f), being a direct appeal issue, is procedurally barred in the instant matter per the February 7, 2022 Order by Judge McIntosh.

<sup>27</sup> Allegation 10(g) was consolidated into Allegation #1. *See* p. 9.

<sup>28</sup> Allegation 10(h), being a direct appeal issue, is procedurally barred in the instant matter per the February 7, 2022 Order by Judge McIntosh.

<sup>29</sup> Allegation 10(i) was consolidated into Allegation #13. *See* p. 10.

<sup>30</sup> Allegation 10(j) was consolidated into Allegation #9. *See* p. 10.

<sup>31</sup> Allegation 10(k) was consolidated into Allegation #13. *See* p. 10.



Applicant seeks PCR counsel to file a PCR application while also remaining *pro se*, acquittal from murder conviction, remanding of the case for a new *Duncan* Hearing, vacation of conviction, vacation of *Duncan* Hearing findings, new trial, and any other relief deemed necessary.

#### STANDARD OF REVIEW

The Uniform Post-Conviction Procedure Act<sup>32</sup> (the Act) provides that any person who has been convicted of a crime may seek post-conviction relief based upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
2. That the court was without jurisdiction to impose sentence;
3. That the sentence exceeds the maximum authorized by law;
4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

#### **Ineffective Assistance of Appellate Counsel Standards**

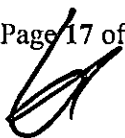
In his application, Applicant alleges ineffective assistance of appellate counsel. In a PCR action, the applicant bears the burden of proving his allegations by a preponderance of the evidence. Rule 71.1(e), SCRPC. On its own, a bare allegation of ineffective assistance of counsel that is void of any supporting evidence or factual assertions will not justify a new trial. *See Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974) (“[The] mere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-

<sup>32</sup> S.C. Code Ann. §§ 17-27-10 to -160.

Conviction Procedure Act. The bare assertion by the [applicant] that he was deprived of adequate and effective assistance of counsel is insufficient.”

Under the Sixth and Fourteenth Amendments, defendants have a constitutional right to “assistance by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668 (1984). Ordinarily, PCR allegations are centered upon an allegation that the applicant did not receive effective assistance of counsel guaranteed by the Sixth Amendment. *See generally* S.C. Code Ann. § 17-27-20(A) (enumerating allegations cognizable in PCR actions). The allegation of denial of such representation sets forth a *prima facie* violation of this constitutional right and raises a question of fact that can only be determined by an evidentiary hearing unless conclusively refuted by the record. *Rogers v. State*, 261 S.C. 288, 291, 199 S.E.2d 761, 762 (1973).

When an allegation of ineffective assistance of counsel is made, the court must determine “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (quoting *Strickland*, 466 U.S. at 686). In making this determination, courts look to the two-prong test outlined in *Strickland*. For an applicant to show ineffective assistance of counsel they must show (1) counsel’s performance fell below an objective standard of reasonableness (performance prong) and (2) counsel’s deficient performance was so prejudicial that the defendant was denied a fair trial (prejudice prong). *Id.* at 691-95. A PCR applicant’s burden for proving both is made difficult by reviewing courts strong presumption that trial counsel acted reasonably. *Id.* at 690. Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. *Id.* at 700.



The performance prong of the *Strickland* analysis requires that the defendant show that counsel's errors were so serious that they were not functioning as the "counsel" guaranteed by the Sixth Amendment. *Id.* at 687. Simply having someone who happens to be a lawyer present is not enough to satisfy the Sixth Amendment. *See id.* at 685. Additionally, "*Strickland* does not guarantee perfect representation, only a 'reasonably competent attorney.'" *Harrington v. Richter*, 562 U.S. 86, 110 (2011) (quoting *Strickland*, 466 U.S. at 687). Counsel's deficient performance violates the Sixth Amendment only if counsel's actions "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair trial. *Strickland*, 466 U.S. at 686.

The Court has cautioned against the "distorting effects of hindsight" when evaluating the reasonableness of counsel's performance. *Id.* at 689. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential, as it is all too tempting for a defendant to second-guess counsel's assistance after conviction or an adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. In evaluating the reasonableness of counsel's performance, the defendant must identify the specific acts that were *not* the result of reasonable professional judgment. *Id.* 690. Once identified, the defendant must show how counsel's deficient performance prejudiced the defense. *Id.* 693.

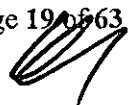
The prejudice prong of the *Strickland* analysis is rooted in the Sixth Amendment's guarantee of counsel – "to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." *Id.* at 691-92. The showing that a mistake, even if unreasonable, had an adverse effect on the defense is *not* enough to satisfy the prejudice prong of the *Strickland* analysis. *Id.* at 693. Accordingly, "[t]he defendant must show that there is a reasonable probability



that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *Cherry v. State*, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

Because the Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant effective assistance of appellate counsel, the *Strickland* analysis extends to claims of ineffective assistance of appellate counsel. *See Evitts v. Lucey*, 469 U.S. 387, 402 (1985); *see also Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 272, 276 (2009) (Explaining that the two-part *Strickland* analysis extends to claims of ineffective assistance of appellate counsel.) The two-part test set forth in *Strickland* for analyzing a claim of ineffective assistance of trial counsel remains largely unchanged when analyzing a claim of ineffective assistance of appellate counsel. *See Southerland v. State*, 337 S.C. 610, 616, 337 S.E.2d 833, 836 (1999) (quoting *Strickland*, 466 U.S. at 685). When evaluating a claim of ineffective of assistance of appellate counsel, a reviewing court must ask "1) whether appellate counsel's performance was deficient, and 2) whether [Applicant] was prejudiced by appellate counsel's deficient performance." *See Bennett*, 383 S.C. at 309, 680 S.E.2d at 276. "The burden of proof is on [the Applicant] to show that [appellate] counsel's performance was deficient as measured by prevailing professional norms, and that [Applicant] was prejudiced by this deficiency." *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004).

Appellate counsel is not required to raise every nonfrivolous issue on appeal. *See Tisdale*, 357 S.C. at 476, 594 S.E.2d at 167. (Rejecting the notion that effective appellate counsel has an obligation to raise all meritorious issues on appeal.). *See also Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("For judges to second-guess reasonable professional judgements and impose on . . . counsel a duty to raise every 'colorable' claim suggested by a client would dissuade the very goal of vigorous and effective advocacy . . ."). *See Smith v. Robbins*, 528 U.S. 259, 288 (2000)



("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." (*quoting Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986)).

Additionally, appellate counsel cannot be found ineffective for failing to raise an issue that was not preserved for appeal. *Legge v. State*, 349 S.C. 222, 225, 349 S.E.2d 618, 620 (2002).

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Applicant has alleged and elected to pursue various claims of ineffective assistance of appellate counsel through the post-conviction relief action presently before this Court. In analyzing these claims, this Court has considered the legal arguments by the Applicant and the State and thoroughly reviewed the record in its entirety. This Court additionally heard the testimony presented at the evidentiary hearing and was able to observe the witnesses, which allowed the Court to evaluate and scrutinize their credibility. *See, e.g., State v. Mercer*, 381 S.C. 149, 166, 672 S.E.2d 556, 565 (2009) ("In this post-trial setting, our jurisprudence recognizes the gatekeeping role of the trial court in making a credibility assessment."). This Court also has before it the transcript of the PCR evidentiary hearing on October 12, 2022 and the three volume record on appeal.

Upon conducting and completing its analysis, this Court finds that Applicant has failed to establish any constitutional violations or deprivations that would require this Court to grant Applicant's request for post-conviction relief. *See* Rule 71.1(e), SCRPC (stating that in a post-conviction relief action, "[t]he applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."); *Lucero v. State*, 414 S.C. 238, 244, 777 S.E.2d 409, 412 (Ct. App. 2015) ("In a PCR proceeding, the applicant bears the burden of establishing that he or she is entitled to relief."); *Butler v. State*, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) ("The burden



of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application.").

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

### **Preliminary Determinations**

In the Court's initial ruling memorandum of November 28, 2022, I wrote the following related to the prior employment of Respondent's counsel Assistant Attorney General Lillian Meadows as his law clerk in 2018-2019 :

When the case was called, Ms. Meadows and Petitioner were present I informed Petitioner that Ms. Meadows was employed as my law clerk from August 2018 until fall of 2019. I stated that I had and have no social or friendship relationship with Ms. Meadows. I have seen Ms. Meadows only a few times in court since her clerkship ended in 2019. Although I do not and did not deem Ms. Meadow's clerkship a conflict or cause of bias against Petitioner, I nevertheless disclosed in detail the clerkship to Petitioner. I allowed Petitioner time, if he wanted that, to consider the clerkship factor. I told him, as I recall, that if he desired I would remove myself from his hearing. Petitioner replied that he wanted to go forward. Petitioner stated that he believed I would be fair. Thusly, I did not recuse or disqualify myself.

A review of the PCR transcript supports these initial findings. PCR Tr.p. 4-6.

This Court also wrote in that memorandum of this Court initially addressed the Applicant's decision to represent himself. This Court initially concluded:

Additionally, at the outset of the hearing, I am reasonably certain I questioned Petitioner about his desire to represent himself. Petitioner was very responsive and engaged in the questioning process. Petitioner stated he was versed in the applicable law and had prior criminal law proceedings . Petitioner made it clear he wished to represent himself. I am satisfied that I complied with the Faretta requirements vis-a-vis self -representation.

A review of the PCR hearing transcript supports these factual findings as noted below. PCR Tr.p. 7-10 .

**Faretta<sup>33</sup> Requirement and Waiver of the Statutory Right to PCR Counsel.**

In a PCR proceeding the Applicant has a statutory right to be represented by appointed (or retained counsel). S.C. Code Ann. § 17-27-60. SCRPC Rule 71.1 (d). See *Hilton v. State*, 422 S.C. 204, 810 S.E.2d 852 (2018) (PCR court obtained a valid waiver from defendant of his right to counsel before allowing him to represent himself). In *Whitehead v. State*, 310 S.C. 532, 426 S.E.2d 315 (1992), the Supreme Court recognized that Rule 71.1(d) of the South Carolina Rules of Civil Procedure “mandates the appointment of counsel for indigent PCR applicants whenever 54 a PCR hearing is held to determine questions of law or fact.” 310 S.C. at 535, 426 S.E.2d at 316. Rule 71.1(d) provides:

If, after the State has filed its return, the application presents questions of law or fact which will require a hearing, the court shall promptly appoint counsel to assist the applicant if he is indigent.... Counsel shall insure that all available grounds for relief are included in the application and shall amend the application if necessary.

Rule 71.1(d), SCRPC. See also S.C. Code Ann. § 17-27-60 (2014) (“If the applicant is unable to pay court costs and expenses of representation ... these costs and expenses shall be made available to the applicant....”). The Court went on to hold in *Whitehead* that “when a PCR application is not dismissed before a hearing is held, the PCR judge must appoint counsel or obtain a knowing and intelligent waiver of that right by the applicant.” 310 S.C. at 535, 426 S.E.2d at 316. As to what constitutes a valid waiver, the Court stated “the PCR applicant must be made aware of the right to counsel and the dangers of self-representation.” 310 S.C. at 535, 426 S.E.2d at 316-17 (citing *Prince v. State*, 301 S.C. 422, 423-24, 392 S.E.2d 462, 463 (1990) ). Thus, there are two requirements the PCR court must meet before allowing a PCR applicant to proceed without an

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<sup>33</sup> *Faretta v. California*, 422 U.S. 806 (1975)

attorney. First, the court should make sure the applicant is aware of his right to counsel; second, the court should ensure the applicant understands the dangers and disadvantages of self-representation. See *Richardson v. State*, 377 S.C. 103, 105-06, 659 S.E.2d 493, 494-95 (2008) (discussing the two requirements for a valid waiver of counsel in a PCR proceeding); *Whitehead*, 310 S.C. at 535, 426 S.E.2d at 316-17 (same); *Prince*, 301 S.C. at 423-24, 392 S.E.2d at 463 (same in a criminal proceeding). *Hilton v. State*, 422 S.C. 204, 208, 810 S.E.2d 852, 854 (2018).

This Court specifically addressed the Applicant related to this issues at the outset of the hearing after being advised by the State of the intent to proceed *pro se* without counsel. PCR Tr.p. 7-15. The Applicant initially advised this Court that Judge Russo and Judge McMahon had addressed the Applicant about the *Faretta* inquiry in prior proceedings. The Court initially advised the Applicant that neither the Court nor Assistant Attorney General Meadows would be acting as his lawyer and that the Applicant would be held to the same standards as a lawyer in terms of evidence and procedure. PCR Tr.p. 7-8. This Court advised the Applicant that if he succeeds and his conviction gets vacated that he could be retried and possibly receive a higher sentence. The Applicant stated that he understood. He stated that he was 40 years old and had received a GED. PCR Tr.p. 8. The Applicant admitted that he had been in Court before. PCR Tr.p. 8-9. The following colloquy occurred:

THE COURT: Would you agree that if you're not – tell me that you are familiar with at least how the Courtroom works in terms of trials, questioning and so forth?

MR. WALKER: Yes sir. I'm familiar with the [conduct].

THE COURT: You've been there, right?

MR. WALKER: Yes, sir.



THE COURT: All right. Do you feel like that you can represent yourself in terms of making proper objections and kept telling me the proper legal grasp of that objection?

MR. WALKER: Yes, sir. I'm familiar with.

THE COURT: Okay. Ms. Meadows, do you have anything else I -- I should ask him today?

MS. MEADOWS: No, Your Honor.

THE COURT: Mr. Walker has been in the system before as I say, you know what I mean by the system. District court system. By the way, do you have any prior [convictions]?

MR. WALKER: Yes, sir. I got a -- I got a few -- well, I got a B&E in North Carolina a carjacking and I don't know what else.

THE COURT: The point of it is -- is aside from this charge, you are in here now for or led to this hearing today. You have been exposed to the Court system in the prior [incident], right?

MR. WALKER: Yes, sir.

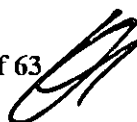
THE COURT: Now, you -- is it your choice to represent yourself today?

MR. WALKER: Yes, sir.

THE COURT: I find that based on Mr. Walker's prior experience with the Court system, which goes beyond just this case, based upon his response and engaged answers to my questions, that he's familiar with what he's doing, he's aware of the risk involved, the risk of getting a new trial with a greater sense possible and I will accept his request to represent himself, I find he's done that freely and openly and voluntarily and I'll allow him to go forward. Okay.

PCR Tr.p. 9, l. 3 – p. 10, l. 12 [corrections in brackets].

This Court was aware that in an earlier proceeding on this PCR application Judge McIntosh had removed appointed counsel Ashley A. McMahan, granting appointed counsel's request to be relieved based upon the Applicant's pro se document objecting to the appointment of PCR counsel and denied the request for standby counsel. See *Walker v. State*, Order, 2021-CP-32-1726 (Judge Lawton McIntosh) (Feb 7, 2022, filed Feb. February 17, 2022). An order denying a *pro se* motion



to alter or amend motion was denied in an order filed June 6, 2022 by Judge McIntosh. These orders are incorporated herein by reference.

In *Faretta*, the United States Supreme Court held that criminal defendants have a fundamental right to self-representation under the Sixth Amendment. *Faretta v. California*, 422 U.S. 806, 807 (1975). In making the decision to proceed *pro se* in a criminal proceeding, a defendant must knowingly and intelligently waive the right to counsel. *See id.* at 835. “Although a defendant need not himself have the skills and experience of a lawyer in order to competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.* (quoting *Adams v United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). Additionally, a request to proceed *pro se* must be clear and unequivocal. *See U.S. v. Lorick*, 753 F.2d 1295, 1299 (4th Cir. 1985).

This Court finds Applicant demonstrated an adequate understanding of the proceedings before him. Applicant stated that he was versed in the applicable law and was familiar with criminal law proceedings. Applicant further made it clear that he understood he would be held to the same evidentiary and procedural standards as a practicing attorney. For the aforementioned reasons, this Court is confident that it satisfied the *Faretta* requirements as they relate to self-representation.

#### **Applicant’s Allegation of “Adverse” Rulings**

Prior to the *Faretta* questions, this Court informed Applicant of the prior employment relationship between AAG Meadows and this Court. Specifically, Applicant was made aware that AAG Meadows was this Court’s judicial law clerk. PCR Tr.p. 5-6. Applicant was given the



opportunity to request a different judge. Applicant waived any conflict proceeded forward with the evidentiary hearing before this Court. PCR Tr.p. 6.

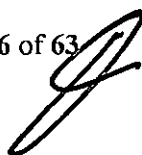
During the evidentiary hearing, Applicant quickly became frustrated when this Court sustained several objections made by Ms. Meadows. PCR Tr.p. 18, 19, 25-30. Applicant asserted that he wanted another judge, to which this Court declined Applicant's request. PCR Tr.p. 28-29. *See Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 217, 321 S.E.2d 179, 183 (1984) ("When no evidence is presented other than prior appearances by a party which resulted in 'adverse' rulings by the judge, the judge is not required to recuse himself."); *see also State v. Cabiness*, 273 S.C. 56, 58, 254 S.E.2d 291, 292 (1979) (Explaining that defendant's three previous appearances in General Sessions before same judge not a basis for disqualification, absent other evidence of bias). This Court finds that the objections he complained about were to allegations that had already been dismissed by Judge McIntosh related to free-standing claims not proper in the PCR setting which were not ineffective assistance of appellate counsel. The Applicant requested this Court to tell the Respondent's counsel to tell her to stop objecting. PCR Tr.p. 29. The Court denied the request stating "if an objection is valid, I'll address it." Id.

#### **Initial Findings Concerning Appellate Counsel**

This Court further finds applicable the strong presumption that at all stages of Appellate Counsel's representation of Applicant, he rendered adequate assistance and exercised reasonable professional judgment in his representation. *Ard v. Catoe*, 372 S.C. 318, 331, 642 S.E.2d 590, 596 (2007) (citing *Strickland, supra*).

#### ***INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL ON THE MERITS***

**Allegation 6: "Applicant was entitled to 'Effective-Assistance of Counsel' by (Appellate Counsel) David Alexander, SCCID — Appellate Division, to raise all significant and — obvious claim/s/ on 'Direct-Appeal' under Appellate-Duties/Duty to raise all significant/obvious claim/s/."**



Applicant alleges that Appellate Counsel's representation was constitutionally ineffective for failing to raise all meritorious issues on appeal. Applicant further alleges that appellate counsel failed to raise "obvious" issues on appeal. This Court finds this allegation to be wholly without merit.

**PCR Evidentiary Hearing**

**Testimony of Appellate Counsel David Alexander**

***Terry Stop Issue***

On direct examination, Appellate Counsel, David Alexander, testified that he did not raise an issue regarding a potentially unlawful *Terry* stop between law enforcement and Applicant because the argument did not hold any merit. (PCR Tr. p. 23). Appellate counsel stated, relying upon his brief, that Walker encountered the police at a convenience store or car dealership. When he was asked to put his armes behind his back instead, he put his hands on the hood of a car. Alexander opined that he was in custody at that point and that they were interrogating him. He stated that they did not give Miranda at that point but Walker gave incriminating statements that the state introduced against him. Counsel Alexander stated that he was not sure the State even needed reasonable suspicion at that point to interact with him and that if he did need it, it was certainly within the standard of review for the judge to say it. Alexander stated that it was a public place. Alexander stated that the police can talk to you in a public place, but that they cannot seize you. PCR Tr.p. 22-23.

Appellate Counsel explained that under *Terry*, law enforcement needs only reasonable suspicion to conduct a *Terry* stop. Appellate Counsel explained that he did not see any issue that would support an unlawful *Terry* stop. (PCR Tr. p. 43).

***Directed Verdict Issue***



Appellate Counsel testified that he could have raised that Applicant was entitled to a directed verdict, but after Appellate Counsel reviewed the record, he did not see any grounds to appeal that decision on. (PCR Tr. p. 26). Appellate Counsel further testified that the testimony placing Applicant at the scene, the pathologist's testimony about the victim's death, and Applicant's flight from the scene all supported the trial court's denial of a directed verdict. (PCR Tr. p. 24). Counsel thought the strongest evidence related to malice was the pathologist testimony related to strangulation. PCR Tr.p. 24-25. Counsel stated that if you strangle someone you mean to kill them. PCR Tr.p. 25. Appellate counsel responded to the question as to whether there was enough evidence to convict him of murder, that as an appellate he would be reviewing the record to determine whether there was no evidence from which a jury could infer guilt. Counsel stated that he did not see any grounds here. PCR Tr.p. 26.

#### *Stand Your Ground Immunity Issue*

Appellate Counsel testified that he did not appeal the trial court's denial of immunity after the Castle Doctrine hearing because an appellate court gives great deference to a trial judge's ruling. (PCR Tr. p. 31; p. 42 l. 15-21<sup>34</sup>). Appellate counsel stated that there was evidence to support the judge's denial of immunity. The judge had made credibility findings in the pretrial ruling.. Counsel opined that appealing such a decision would be "extremely difficult." (PCR Tr. p. 31 l. 5-6). Counsel stated that he saw no merit to raising it on appeal. PCR Tr.p. 31.

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<sup>34</sup> AAG Meadows: Okay. And then back to the immunity hearing, is that you stated that's something that you considered raising that you did not raise?

Appellate Counsel: Correct

AAG Meadows: And that's because you believe the – the judge had my discretion on that and that his ruling was correct?

Appellate Counsel: It's – it's very difficult to challenge –

Appellate Counsel testified that he did not file separate briefs related to the immunity hearing because after *State v. Isaac*<sup>35</sup> a separate appeal is not available. (PCR Tr. p. 37). Alexander testified that he considered the immunity hearing issues when he considered the trial and it was encompassed in the appeal from the judgment. Counsel stated that he considered it and could have raised it, but did not. Appellate Counsel testified that he would not have changed anything in regard to his actions in relation to Applicant's appeal. (PCR Tr. p. 37-8).

***Cross-examination of Alexander***

On cross examination, Alexander testified that he had been an appellate defender for about 10 years. He stated that Chief Appellate Defender Robert Dudek assigned this case to him. Counsel stated that he spoke with the Applicant a number of times. Counsel stated that Appellate Counsel testified that because an issue is preserved, does not mean that the issue has merit. (PCR Tr. p. 40). Counsel stated that he initially reviews the record to determine if a judge made an error, then he seeks to determine if the arguable error had an effect on the case. He explained that just because a question may be leading and an error subject to an objection, he would not raise it if it's not going to have any real effect. PCR Tr.p. 40

Appellate Counsel testified that, in addition to the *Miranda* issue, he considered raising an issue based on competency [of Applicant to represent himself *pro se* at trial]. (PCR Tr. p. 40). However, due to the extensive expert testimony regarding Applicant's competency to stand trial, Appellate Counsel saw no basis to raise the competency to represent himself ruling on appeal where there was no evidence to support an argument against it. (PCR Tr. p. 40-41).

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<sup>35</sup> *State v. Isaac*, 405 S.C. 117, 747 S.E.2d 677 (2013) (Holding that an appeal of the denial of a request for immunity under the Protections of Persons and Property Act is not subject to immediate appeal by the defendant).

Appellate counsel testified that the claim of insufficient evidence was a trial issue that could only be raised as a directed verdict issue. He clarified that you cannot raise a freestanding claim that the jury just got it wrong. PCR Tr.p. 42.

Appellate counsel also stated that he did not see any [viable] issue to raise with the *Terry* stop. Counsel also asserted that he considered filing a petition for rehearing after the Court of Appeals decision. He noted that this is a discretionary appeal at that point. PCR Tr.p. 43. However, counsel did not recall anything to raise related to the state's closing argument. PCR Tr.p. 44.

Concerning the immunity hearing, counsel stated he considered raising the claim, but it would have been difficult to present because the judge had discretion

The Applicant sought to address further with appellate counsel the fact that the Court of Appeals denied his request to represent himself in the appeal as to why did he refused to terminate his representation and withdraw from representing him. This court advised the Applicant that that issue was decided by the Court of Appeals and is not before the Court. PCR Tr.p. 44-45.

#### ***Testimony of Standby Counsel Sarah Mauldin***

In addition to Appellate Counsel's testimony, the Court also heard from Applicant's Standby Counsel Sarah Mauldin who was present during the initial trial only as standby counsel. Standby Counsel testified that she represented Applicant early in the case and did not represent Applicant during trial. (PCR Tr. p. 49). Standby Counsel testified that she assisted Applicant with paperwork while Applicant proceeded *pro se. Id.* She stated that she assisted him with paperwork which may have included the notice of appeal. During direct examination, Applicant attempted to elicit testimony in the form of hearsay. This Court sustained hearsay objections by AAG Meadows and Applicant, unable to elicit the desired testimony, concluded his direct examination of Standby Counsel.



### **Findings on the Merits**

This Court finds the combination of the record and Appellate Counsel's credible testimony that Applicant has failed to meet his burden of proving Appellate Counsel was deficient and that the alleged deficiency prejudiced him. Appellate Counsel credibly testified to his strategy on appeal, and this Court finds that strategy reasonable under prevailing professional norms. The record reflects that Appellate Counsel's decision to pursue the *Miranda* issue on appeal was one of professional judgment. Given that counsel is not required to raise every potentially meritorious issue on appeal, Appellate Counsel's decision to choose one issue over another was reasonable. *See Robbins*, 528 U.S. at 288; *see also Thrift v. State*, 302 S.C. 535, 540, 397 S.E.2d 523, 525 (1990) ("The testimony of petitioner's appellate attorney that she reviewed the requested charge and the charge as given and consciously decided not to brief the issue, clearly supports the PCR judge's finding that appellate counsel was not ineffective.").

### **Directed Verdict Issue**

The Applicant contends that appellate counsel David Alexander was ineffective in failing to raise an argument on appeal that the trial judge erred in failing to grant Applicant's motion for a directed verdict of acquittal. Appellate Counsel credibly testified that they did not appeal the trial court's denial of a directed verdict due to the strength of the evidence adduced at trial. (PCR Tr. p. 26). *See Factual Summary, supra*. This Court finds that the Applicant failed in his burden of proof to show either deficient performance or prejudice.

When reviewing an appeal from the denial of a directed verdict, the reviewing court views the evidence and all reasonable inferences in the light most favorable to the State. *See State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014). A reviewing court may only consider the existence or nonexistence of evidence, not the weight of said evidence. *See State v. Cherry*, 361

S.C. 588, 593, 606 S.E.2d 475, 479-79 (2004). “When the evidence submitted raises a mere suspicion that the accused is guilty, a directed verdict should be granted because suspicion implies a belief of guilt on facts or circumstances which do not amount to proof.” *State v. Bennett*, 415 S.C. 232, 235, 781 S.E.2d 352, 354 (2016) (citing *State v. Hepburn*, 406 S.C. 416, 429, 753 S.E.2d 402, 409 (2013)).

### ***How the Directed Verdict Issue was raised at trial***

During the trial, the Applicant made a motion for a directed verdict at the close of the state’s case in chief. R. pp. 1048-1084. In his motion, he initially contended that the state had only produced a suspicion of guilt. R. pp. 1048-1049. He relied upon *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). He contended that there was no factual evidence that he committed the crime and that there was no evidence of murder, or malice aforethought and a wicked heart. He further argued that there was little circumstantial evidence. R. pp. 1048-1049. After a recess, the next morning, he continued to argue that the summary of the state’s case based upon the indictment and warrant was not sufficient. R. pp. 1055-1056. He claimed that there was a variance from the charge because the state produced cell phone maps, phone records, autopsy photos, ID card, a blood toxicologist, a 911 call and interview with him. R. pp. 1055-1056. ( Court corrected the Applicant that the video was not in evidence R. pp. 1056-1058). Walker asserted that the autopsy was not sufficient evidence because it tended to prove homicide, but did not prove murder, He claimed it failed to prove corpus delicti or that he was associated with the corpus delicti. R.p. 1059 – 1060. He also alleged that there was no men rea show. He further alleged that there was no showing that the strangulation was not in self-defense. R. pp. 1061-62. He claimed that the state showed only an inference and suspicion, but not murder.



The State, through Deputy Solicitor Graham, asserted the directed verdict motion should be dismissed applying the standard of viewing the evidence in the light most favorable to the State. R.p. 1063. He initially asserted the evidence from Nikki Inabinet was that the victim was initially nervous and excited that the Applicant was going to move in with her, but that her demeanor changed after it happened. The victim described to Nikki that the Applicant was mean and she was seen crying and upset 2 days before her death. R.p. 1064. The Solicitor relied upon the phone records suggesting that the Applicant was at the home at 11pm on the evening of the death. He asserted further that the next morning the neighbor, Eugene Ray was alerted to the victim's child wandering down the street in her pajamas crying. The Solicitor focused on the Applicant's absence wondering where he was. The Solicitor noted the evidence from the victim's stepmother and the hospital noted the victim's home was his address. He urged that flight was evidence of guilt and he was not located until 8 days later. R.p. 1064. When he was stopped during the Terry stop, the Applicant learned from the Applicant that he indicated that he was wanted for murder and admitted that he murdered someone. R.p. 1065. As Solicitor stated, he told Joseph Darby that he "killed the baby's mama." R.p. 1065-66. See R.p. 930, l. 20-21.

The Solicitor urged that there was evidence of malice presented in the State's case. He stated that this included not only the fact of his flight, but also that way he left the scene which suggested that it was staged. He pointed out there was the belt and tourniquet, needle marks in her arm, evidence that there was no drugs in her system, a syringe with cocaine found outside, bruises associated with the belt. He also urged that there was substantial bruising and other injuries suggesting that she was fighting for her life. Also in support of malice, the Solicitor pointed out that strangulation takes between 4 to 5 minutes and well beyond the time it takes to only pass out, suggesting Walker continued to strangle her. R.p. 1065-66. Additionally, the post-mortem

additional injuries on the victim's ankle suggested that something happened after death which could not have come from the neighbor turning her over. R. p. 1066. The Solicitor asserted the motion should be denied and this was a jury question. Id.

The Applicant responded that the testimony of Inabinet came from a hostile witness and was not relevant and should be excluded. R.p. 1066. As to cell phone records, he contended they should be discounted. As to the pathologist's testimony, he declared that there was no denying that it was strangulation but asserted that it could have occurred in self-defense. R. p. 1006.

At that point, the trial judge indicated that there was no evidence of self-defense in the record. R. pp. 1066-1067.

The Applicant then try to limit of the impact of the State's assertion about the Applicant's flight, citing *State v. Pagan*, 369 S.C. 201, 209, 631 S.E.2d 262, 266 (2006). He contended because there was no nexus between the crime and the flight. He asserted that the alleged failure to stop for a blue light did not create an inference of a motive for his belief that the police were seeking him for the pending murder charge because he claims he was not at the residence. R. p. 1070. He asserted that the fact he gave a statement to Sgt. Kostyk should not be significant to base a conviction on unless the corpus delicti can be proved. R.p. 1070-1074.

### ***The Order Denying the Motion***

Judge McMahon denied the motion for directed verdict. R. p. 1075 – 1084. In his decision, he discussed *State v. Bostick*, 392 S.C. 134, 708 S.E.2d 774 (2011). In viewing the evidence in this case, the trial court noted the evidence of the child wandering the street and being found by Mr. Fay about midday on the date of the homicide. With police being called to the residence, the body was found by Mr. Ray. The body was cold to the touch at that time giving the inference that

she had been dead for a period of time, but without visible deterioration. R. pp. 1077-78. Evidence from the stepmother and the Lexington hospital put three people at the residence – the victim, the child and the Applicant. However, the Applicant was not at the scene at that time when the police arrived. The evidence reflected no forced entry, no disarray at the residence to suggest an intruder or a burglary. However a missing person report was made with respect to the Applicant being a possible endangered person. R. p. 1078. Within the residence, items of clothing belonging to a male are found, as well as the Applicant’s ID card with a Walterboro residence on it.

Judge McMahon noted a difference with *Bostick* was that *Bostick* was not a resident and no one ever saw him at the crime scene,

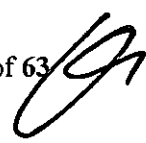
... but we have the other resident of the ...crime scene where the homicide occurred and it's clear from the autopsy, the testimony of Dr. Ross, ...that this I ...homicide manual strangulation, bruises, uh, injuries, ...from basically the top from her head all the way down, ...all the way down to her feet bilaterally on her arms, ...on her shoulder blades, on her knees, throughout her body, it's clear that it is a, uh, malicious whether expressed or implied, ...homicide, i.e., it's murder..

... [The] police begin, uh, looking for ...defendant, there are cell phone records, uh, in looking at the charts on both State's Exhibit 42 and 43...is the diagrams, by Mr. Hines, Agent Hines concerning the cellphone records and on State's Exhibit 42 it indicates Alexander Street, West Columbia within the tower that was hit and on State's Exhibit 43 although it is not marked the same, when you come down, ...number 1 right before right after number 1 splits off a 12th street, actually is a green mark there where it's A-L-E-X-A-R, Mr. Walker's cell phone was hitting that tower and there records from that cell phone, State's Exhibits No. 41 and 42 where that cell phone was used at various times on ...

R. pp. 1079, l. 11-1080, l. 8.<sup>36</sup>

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<sup>36</sup> This Court in its quotes from the order is removing material from the transcript, such a “uh” and similar material for clarity



Judge McMahon then found evidence to support his denial of the directed verdict finding the existence of circumstantial evidence in being a resident there, having a cellphone hit the towers including the location of the crime scene.

Mr. Sullivan the crime scene officer from ... West Columbia... photographs the ... outside the garbage containers and then searches the ... container itself and finds in the trash a syringe, syringe later on, ... tested for toxicology, ... testing positive for cocaine and veterinarian heartworm medicine, ... found to be a cutting agent in that; also, you have the ... belt, it appears to be a male's belt, a photograph of that belt State's Exhibit No. ... 32 in the bedroom where ... the victim's body was found ... what appeared to be ... a needle, entry that was testified to or needle mark by Dr. Ross and the pattern injury of the belt is consistent with that belt having been used and perhaps having been used as a ... tourniquet and the drug that was used to cut the cocaine is [Levamisole] testified to by Lieutenant Smith. He further testifies as to the lack of any legal or illegal drug in the ... system of the victim with the exception of 0.016 which just is above the threshold as to be positive for ethanol.

... Then we come to ... the encounter with a Sergeant [Kostyk] in Aiken County on ... 17 December. ... Mr. Walker had not been seen, heard from that we're aware of for six days and he's found a number of miles away in Aiken County acting ... as the officer's observations indicate with his training and experience in law enforcement, as a suspicious individual. He is approached under valid Terry stop, he's searched. Officers ... in getting information, ... asked him his name which he gives him and asked him if he's wanted for anything, warrants or anything, he said yes. [He] indicates, there's a warrant for him for murder. That is the State's case-in-chief evidence from Sergeant Kostyk.

Thereafter under the rule of completeness which I will consider the remainder of, uh, the full and complete ... video and audio of the encounter between Sergeant Kostyk ... the Aiken sergeant and Mr. Walker where he says ... yes, he killed someone and

... it goes from there and thereafter we get to the issue ... [of] Mr. Darby. It appears from the testimony that unsolicited, Mr. Darby writes a letter to the solicitor about a time when he's a cellmate of Mr. Walker indicating that he had some information as I understand it that he thought the solicitor should know indicating that Mr. Darby [sic] confessed to murder his baby's mama. The only testimony in the record as to that is that his baby's mama is ... Catherine Banty, he's the ... father, Catherine was the mother.

In neither *Bostick*, *Arnold*, *Schrock*, or any of those cases are there any ... statements as to ... [the] guilt by the ... defendant. ... [W]hen I further looked at ...,, *State vs., Pearson* ... opinion number 27612, South Carolina Supreme Court 2016, ... a case ... that was, the trial judge denied motion for directed verdict, Court of

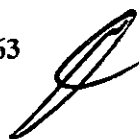
Appeals reversed, Supreme Court granted cert, Supreme Court reversed trial, that the Court, Supreme Court reversed the Court of Appeals. The trial court when ruling on a directed verdict motion views the evidence in the light most favorable to the [state] and must submit the case to the jury if there's any substantial evidence which reasonably tends to prove the guilt of the accused or from which his guilt may be fairly and logically deduced. . . . Although the jury must consider alternate hypothesis, the Court must concern itself solely with the existence or nonexistence of evidence from which a jury could reasonably infer guilt, the object – if this objective test is founded upon reasonableness, accordingly ruling on a directed verdict motion where the State relies on circumstantial evidence, the Court must determine whether the evidence presented is sufficient to allow a reasonable jury to find the defendant guilty beyond a reasonable doubt. . . . *Pearson* cites *Bostick*, *Arnold* and *Mitchell* as examples where the Court found circumstantial evidence was . . . insufficient. Court indicated while we have certainly considered these other cases *Bostick*, *Schrock*, *Bostick*, *Arnold* and *Mitchell*; however, involving jurisprudence or inquiries or inquiries necessarily fact-intensive and the holdings in these cases are limited to their particular facts, so we have the facts . . . in this case . . . as they are of both . . . he being a resident, if not a resident, . . . left his ID there but he clearly was a resident of the home . . . of the location of the homicide, we have all the other . . . totality of the facts and circumstances . . . based on the standard that I must apply in the light most favorable to the State, I would, uh respectfully . . . deny the motion for directed verdict.

R. p. 1080, l. 19 – 1084, l.3

***Appellate Counsel Deficiency not Found as to Directed Verdict Issue***

This Court finds that appellate counsel did not perform deficiently under *Strickland* in failing to present an appellate issue related to directed verdict. Counsel Alexander credibly testified that he had reviewed the record and found that a directed verdict motion was made by the Applicant. However, he recognized that he did not see the directed verdict grounds to be successful in the appeal based upon the record of evidence before the trial judge. Alexander particularly noted evidence placing the Applicant at the scene, his flight from the scene while leaving the child at the scene, as well as the evidence related to the strangulation addressing any assertion of innocence. Based upon the credible testimony this Court must conclude that deficiency was not proven.

***Strickland Prejudice not Proven.***



This Court further finds that Sixth Amendment prejudice was not proven. This Court finds that the Applicant has failed to prove that there was a reasonable probability that had appellate counsel raised the directed verdict on appeal, the result of the proceeding would have been different. *See State v. Butler*, 407 S.C. 376, 381, 755 S.E.2d 457, 460 (2014) (“On appeal from the denial of a directed verdict, this [c]ourt views the evidence and all reasonable inferences in the light most favorable to the State.”); *State v. Rogers*, 405 S.C. 554, 563, 748 S.E.2d 265, 270 (Ct. App. 2013) (“If there is any direct evidence, or if there is substantial circumstantial evidence, that reasonably tends to prove the defendant's guilt, we must find the trial court properly submitted the case to the jury.”). Here, also viewing the evidence in the light most favorable to the State, any rational trier of fact could have found evidence of guilt beyond a reasonable doubt of murder. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (the relevant question as to the sufficiency of evidence is “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”). First, there was the inculpatory statement upon the *Terry* stop about his flight and his incorrect assumption that he was already charged with murder. R. p. 943-944, 946. He had also given an inculpatory statement to Joseph Darby that he had murdered his baby’s mother. R. p. 930-931. There was also circumstantial evidence as noted above that he was a resident of the home where the victim had died, (R. p. 687-688, 698) and his cellphone was located within the area near the residence up to around 11 pm on December 10 when the phone was turned off. R. p. 726, 735-743. In addition, there was the evidence of consciousness of guilt shown by the evidence of flight.

This Court finds that Appellate Counsel acted reasonably in his decision to not appeal the trial court’s denial of a directed verdict. Testimony elicited before this Court indicated that

Appellate Counsel considered at least three pieces of evidence that weighed against the existence of a meritorious appellate argument regarding the denial of the directed verdict<sup>37</sup>. *See Strickland*, 466 U.S. at 681 (“Because advocacy is an art and not a science, and because the adversary system requires deference to counsel’s informed decisions, strategic choices must be respected in these circumstances if they are based on professional judgment.”); *see also Stone v. State*, 419 S.C. 370, 384, 789 S.E.2d 561, 569 (2017) (“As we have often stated, counsel’s strategic decisions will not be found to be deficient performance if he articulates a valid reason for employing a strategy.”). This Court finds Appellate Counsel’s testimony regarding his strategic decision to not appeal the directed verdict to be reasonable given the reasons articulated in support of said decision.

This Court further finds that the Applicant failed to prove Sixth Amendment prejudice. There is no reasonable probability that the result of the appeal would have been different had appellate counsel raised the directed verdict issue on appeal. Judge McMahon’s order was reasonably grounded in the evidence presented to him in the light most favorable to the State. The allegation must be denied.

### *Terry Stop Issue*

***Appellate Counsel was not Ineffective in Failing to Specifically Raise a Terry Stop Issue on Appeal where Officer Kostyk articulated particularized facts in support of reasonable suspicion justifying a Terry stop of Applicant and Kostyk’s testimony is corroborated by his in-car video such that the record supports the trial court’s admission of Applicant’s statements made at the time Kostyk came upon Applicant.***

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<sup>37</sup> Mr. Walker: Okay. In your personal opinion and professional opinion, how—how do you believe that the state proved them—them elements for murder?

[Appellate Counsel]: Well, probably the testimony placing you at the scene and the pathologist’s testimony about the manner of the victim’s death and your flight from the scene would get the state pass the directed verdict.

(PCR Tr. p. 23-4 l. 24-5; 1-5).



“The Fourth Amendment applies to all seizures of a person, including only a brief detention.” *State v. Anderson*, 415 S.C. 441, 447, 783 S.E.2d 51, 54 (2016). A person “can be seized under the Fourth Amendment without being arrested under state law,” and not all seizures constitute unlawful detention under the Fourth Amendment to the United States Constitution. *State v. Brannon*, 388 S.C. 498, 503, 697 S.E.2d 593, 596 (2010) (citing *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877 (1968)). A Fourth Amendment seizure not amounting to an arrest may occur “when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave.” *Id.* (citing *Michigan v. Chesternut*, 486 U.S. 567, 573, 108 S.Ct. 1975, 1979 (1988)). These brief detentions by a deputy are justified and proper within the boundaries of the Fourth Amendment under certain circumstances.

In the direct appeal in this case, the Court of Appeals addressed whether a challenge to the *Terry* stop was raised before the appellate court (or at trial):

Walker does not challenge the validity of the initial *Terry* stop by Officer Kostyk. ft. 4 However, an examination of the encounter after the initial stop may help clarify whether the *Terry* stop evolved into a custodial interrogation, which would implicate Walker's Fifth Amendment rights and *Miranda*.

Ft. 4. Officer Kostyk testified he observed Walker sitting suspiciously outside a closed convenience store known to be a popular target for robberies during the latter months of the year. Officer Kostyk stated that, based on his twenty-two years of experience in law enforcement, he believed Walker was casing the convenience store for a robbery. **This may have provided reasonable suspicion to justify Kostyk's initial interaction with Walker but as that point is not appealed, we need not address it.**

*State v. Walker*, 430 S.C. 411, 418, 844 S.E.2d 405, 409 (Ct. App. 2020).

“A police officer may stop and briefly detain and question a person for investigative purposes, without treading upon his Fourth Amendment rights, when the officer has a reasonable suspicion supported by articulable facts, short of probable cause for arrest, that the person is

involved in criminal activity.” *State v. Woodruff*, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001). An officer’s determination of the existence of reasonable suspicion requires consideration of the “whole picture” upon which the detainment is based. *Id.* “And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry v. Ohio*, *supra* at 21, 88 S. Ct. at 1880; *State v. Woodruff*, *supra* (reasonable suspicion “requires a particularized and objective basis that would lead one to suspect another of criminal activity”). The analysis considers the totality of the circumstances. *State v. Culbreath*, 300 S.C. 232, 236, 387 S.E.2d 255, 257 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128, 110 S.Ct. 2301 (1990).

If during the stop “the officer’s suspicions are confirmed or further aroused, the stop then may be prolonged and the scope enlarged.” *Id.*; *State v. Corley*, 383 S.C. 232, 240, 679 S.E.2d 187, 191 (Ct. App. 2009), *aff’d as modified*, 392 S.C. 125, 708 S.E.2d 217 (2011) (modified to determination that the vehicle stop was justified based on presence of reasonable suspicion, not probable cause). An officer may question the individual engaged in the investigative detention so long as the scope and duration of the stop remains “strictly tied to and justified by the circumstances that rendered its initiation proper.” *State v. Corley*, *supra* at 241, 679 S.E.2d at 192; *Cf. State v. Woodruff*, *supra* at 546, 544 S.E.2d 290 (“Generally, the decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred.”).

Since the officer is investigating whether criminal activity is afoot, the officer may take steps during the brief detainment to investigate the circumstances provoking suspicion. “Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer’s



suspicious.” *Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S. Ct. 3138, 3150 (1984). Additionally, “the taking of standard identification information does not violate *Miranda*” when done during a Terry stop. *United States v. Taylor*, 799 F.2d 126, 128 (4th Cir. 1986). If, during the Terry stop, the suspect gives incriminating information in response to a ministerial question, suppression is not required because “the officers had no reasonable expectation that their questions would be likely to elicit such information.” *Id.*

When engaged in a *Terry* stop based upon articulable facts supporting reasonable suspicion, the suspect is not considered to be “in custody” or to have unwittingly subscribed to “custodial interrogation” for Fourth Amendment purposes—even if few persons would feel free to either depart from the situation or disobey the officer. *State v. Corley*, *supra* at 243, 679 S.E.2d at 187 (citing *United States v. Sullivan*, 138 F.3d 126, 130 (4th Cir. 1998)). *Miranda* is not required by this situation. *Id.* “The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that Terry stops are subject to the dictates of *Miranda*.” *Berkemer v. McCarty*, *supra* at 440, 104 S. Ct. at 3150.

Particular attention to the facts justifying the stop in *Terry v. Ohio* aids in the disposition of the case at bar. In *Terry*, the United States Supreme Court defined the parameters of an investigative detention, thereafter, dubbed a *Terry* stop. 392 U.S. 1, 88 S.Ct. 1868. An officer in plainclothes was on mid-afternoon patrol when he noticed Terry, Chilton, and Katz in a manner that tipped his suspicions. *Id.* at 5, 88 S.Ct. at 1871. For 30 years the officer had been assigned to the vicinity, patrolling for shoplifters and pickpockets. *Id.* The officer observed Terry, Chilton, and Katz casing a store on the block where they stood: they were “pacing, peering and conferring” near a store window in a repetitive series of actions that aroused the officer’s suspicions and made him fear they may have a gun. *Id.* at 6, 88 S.Ct. 1872. The officer, intending to investigate their

intentions, approached the three men, identified his occupation, and asked their names. *Id.* He conducted a frisk of Terry and felt a pistol in an overcoat pocket. Upon this discovery, the officer ordered all three men into the storefront next to which they stood, had each turn and place his hands on the wall, and frisked each of the three men. *Id.* at 7, 88 S.Ct. at 1872. Seizing each of two guns located between the three men, the officer called for the men to be taken to the station for formal charges. *Id.* The Court held the investigative detention permissible on these facts, “justified in part upon the notion that a ‘stop’ and a ‘frisk’ amount to a mere ‘minor inconvenience and petty indignity,’ which can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.” *Id.* at 10111, 88 S. Ct. at 1874.

***The Applicant Failed to Prove Counsel was Deficient in Failing to Raise a Free-Standing Claim that the Officer did not have Reasonable Suspicion to Support the Terry Stop***

The issue before this Court is whether appellate counsel was deficient in failing to raise on appeal a *free-standing* challenge to the *Terry* Stop. This Court finds that counsel was not deficient. Kostyk conducted a valid investigatory stop within the parameters of *Terry v. Ohio* when he approached Applicant and engaged him in a brief series of biographical and investigatory questions. Unlike many cases after *Terry*, the case at bar does not analyze a traffic stop. Rather, Applicant was engaged in an investigative detention because, like *Terry*, *Chilton*, and *Katz*, it appeared he could be casing a convenience store in an area known for elevated crime during the winter holiday season. Turning to the facts before this Court, Kostyk’s *Denno* testimony supports the trial court’s admission of Applicant’s initial statements from the *Terry* stop, as does his in-car video. *State v. Evans*, 354 S.C. at 583, 582 S.E.2d at 409 (2003) (“Appellate review of whether a person is in custody is confined to a determination of whether the ruling by the trial judge is

supported by the record.”). Applicant’s pre-trial assertions are simply not corroborated by the video evidence.

### *The Trial Testimony*

While testifying in furtherance of his immunity hearing, Applicant represented that Kostyk “did some unlawful tactics” and apprehended him that night in Aiken County. (R. p. 53, lines 12-14; R. p. 129, lines 2-4). He testified at that hearing that Kostyk came upon him “very aggressively and very hostile . . .” and questioned him prior to “issuing [his] rights.” (R. p. 130, line 6 – p. 131, line 13). Applicant testified that Kostyk forced him to remain in the patrol car and interrogated him for the duration of their interaction, even after Applicant stated he wanted a lawyer. Applicant expressed he was never free to leave the custody of this officer. (R. p. 133, line 14 – p. 139, line 18). Applicant testified that Kostyk arrested him for murder. (R. p. 135, lines 18-20). Applicant claimed that Kostyk’s in-car video of this interaction had been tampered with. (R. p. 131, line 21 – p. 133, line 5).

Applicant called Kostyk to testify during his immunity hearing, but elicited testimony concerning the validity of the *Terry* stop. (R. p. 273, line 9 – p. 280, line 21). Kostyk disagreed with Applicant’s characterization of their interaction, with Kostyk testifying that Applicant was not under arrest and in fact had no outstanding warrants at the time of the *Terry* stop. (R. p. 279, line 18 – p. 280, line 14).

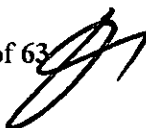
The State called Kostyk to testify at the inception of the *Denno* hearing and Kostyk articulated the circumstances pertaining to his investigative detention of Applicant. (R. p. 346). Kostyk, a Staff Sergeant with the Aiken County Sheriff’s Office, was on road patrol in the Western end of Aiken County on December 17, 2012. He was road patrol supervisor. (R. p. 346, lines 9-

22). Kostyk was aware that Aiken County experienced an uptick in armed robberies and other crime during this time of year. (R. p. 347, lines 4-7). That night, Kostyk was specifically surveilling a convenience store in the event of a robbery. (R. p. 347, lines 8-10). It was during this time Kostyk noticed Applicant. He sat across the street at a grocery store adjacent to a 24-hour convenience store. (R. p. 348, lines 3-4). Applicant “was concealing himself under an awning and he appeared to be watching the convenience store.” (R. p. 347, lines 11-15). It was almost 11:00 PM. (R. p. 347, lines 17-21). Because the store at which he sat was closed, Applicant had no reason to be there. (R. p. 347, lines 22-25). These observations drew Kostyk’s attention. (R. p. 347, line 12).

Kostyk “watched him for awhile.” (R. p. 348, line 10). When the circumstances aroused Kostyk’s suspicions enough he notified another deputy that he was going to make contact and approached Applicant. (R. p. 348, lines 11-13). Kostyk, in his patrol car, approached Applicant and asked him what he was doing. (R. p. 348, lines 14-17). “He didn’t really respond, other than he walked toward me.” (R. p. 351, lines 24-25). “He was putting his arms behind his back before I even asked him to do anything.” (R. p. 352, lines 1-2).

As a result Applicant’s approaching him, which Kostyk characterized as odd, Kostyk “motioned for him to turn around to see if he had any weapon on him that I could see from a distance.” (R. p. 348, lines 19-21). According to Kostyk, this would be a normal request based upon Applicant’s response, or lack thereof. (R. p. 348, lines 22-25). Kostyk “had him spin around” so Kostyk could physically pat him down to check for a weapon. Kostyk found none. (R. p. 352, lines 2-5). Applicant was not in custody and the maneuver was for officer safety. (R. p. 349, lines 1-4).

Kostyk still believed Applicant was behaving oddly, so he “asked him if he had a warrant or something and [Applicant] responded that he did.” (R. p. 352, lines 5-7). Kostyk testified this



would be a routine question to ask in a situation where the suspect's behavior was concerning him. (R. p. 352, lines 8-10). As a result of Applicant answering "yes," Kostyk asked Applicant to put his hands on the hood of the patrol car and directed Applicant to shift his feet backwards to put him "off balance for [Kostyk's] safety." (R. p. 352, lines 16-20). Applicant complied. (R. p. 352, lines 12-17).

At this time, Applicant not in custody, but "was being detained to . . . verify what he had told" Kostyk. (R. p. 352, lines 21-23). The purpose of the detention at that point was to see "if he had a warrant." R. p. 352, lines 23-24). Kostyk also asked Applicant his name and date of birth in order to relay that additional information to dispatch. (R. p. 353, lines 1-2). "While [Kostyk] was waiting for the response to come back, [Kostyk] asked him what he thought he had a warrant for and he responded for murder." (R. p. 353, lines 3-5). This exchange took place within the first two minutes of coming into contact with Applicant. (R. p. 355, lines 18-20; State's Exhibit 45)

Applicant appeared to comprehend Kostyk and did not smell as if he had been drinking. (R. p. 349, lines 16-21). Applicant briefly, curtly, responded to Kostyk's questions. (R. p. 349, lines 19-23). Kostyk issued no threats or promises and Applicant's responses were voluntary. (R. p. 350, lines 2-8). Kostyk disagreed with Applicant's interpretation that Kostyk acted in an aggressive and threatening manner. (R. p. 357, lines 4-16).

Kostyk's interaction with Applicant was caught on his in-car camera from the inception of the approach. (R. p. 350, lines 14-21). The in-car video reportedly demonstrated no aggressive or threatening behavior on the part of either Kostyk or Applicant. (State's Exhibits 2 and 45). At no point did Applicant ask Kostyk to let him go, and at no point was Applicant taken under arrest or informed he was in fact in custody. (R. p. 359, line 22 – p. 360, line 1). Kostyk did not place Applicant under arrest. (R. p. 360, lines 2-3). The in-car video corroborates the events as testified

to by Kostyk as relevant to the *Denno* hearing.<sup>38</sup> (R. p. 361, lines 11-25; State's Exhibit 45; State's Exhibit 2 at 0:00-2:51).

Similar testimony was admitted by Officer Kostyk in the trial. R.p. 936-938 ( unusual circumstances at the convenience store); The redacted in car video, State Exhibit 45 was played to the jury. <sup>39</sup>The Applicant's objection to its introduction on "same rules, relevance and others" was denied. R. p. 939, l. 1-12. After the video was played to the jury, the officer clarified that he

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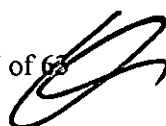
<sup>38</sup> State's Exhibit 2 at trial reportedly contained the entirety of the in-car video, also free of threats or aggression; however, as previously denoted, the State sought only to introduce the portion of the video as shown in State's Exhibit 45 at trial. (R. p. 363, line 14 – p. 364, line 24). Thus, in its Final Brief of Respondent in the direct appeal, Respondent limited its analysis to the portion of the video sought to be introduced in its case-in-chief, which is the same portion of the video that was in fact published and accompanied by trial testimony from Kostyk. (R. p. 940, line 12 – p. 945, line 17).

<sup>39</sup> In the opinion of the Court of Appeals, the video was summarized as follows:

The video depicts Walker standing and walking toward Officer Kostyk's car as it pulls up to the front of the store. Officer Kostyk exited his car and asked Walker what he was doing. Walker placed his hands behind his back, in a manner consistent with expecting to be handcuffed, as he continued to walk toward Officer Kostyk. Officer Kostyk approached Walker and patted him down. Officer Kostyk testified he patted Walker down for safety reasons and that he would have patted down anyone in those circumstances. While patting down Walker, Officer Kostyk paused at Walker's back right pocket and asked whether the object in that pocket was a knife. Walker's answer was unintelligible on the video. Officer Kostyk continued to pat down Walker and asked him for his name and birthdate and if he had any identification. Walker complied.

Officer Kostyk asked Walker if he had any warrants, and Walker indicated he did. Officer Kostyk directed Walker to the hood of his patrol car where he ordered him to place his hands on the hood of the car and move his feet back to place him "at a position of disadvantage" for officer safety. Officer Kostyk radioed Walker's name and date of birth to dispatch. While he waited for dispatch to respond with information regarding Walker's warrants, Officer Kostyk asked Walker, "What do you think you've got a warrant for, bud?" Walker responded, "Murder." Officer Kostyk asked Walker to repeat himself, and Walker again responded, "Murder."

*State v. Walker*, 430 S.C. 411, 415, 844 S.E.2d 405, 407 (Ct. App. 2020)



asked the Applicant what he was doing there and he was not responsive, but instead approached him putting his hands behind his back. R. p. 942. Based upon his suspicions, the officer patted him down for his own safety and asked him the questions he asked the Applicant related to his name and birthdate which he gave. When he asked him if there were any warrants, the Applicant responded “for murder.” R. p. 943 - 946. However, when he ran an NCIC report, no warrant was indicated, but it did show that he was a missing endangered person. R. p. 943.

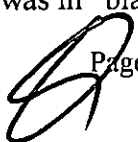
*The Applicant failed to prove deficient performance or prejudice*

In the Court of Appeals opinion, the Court of Appeals acknowledged that the issue on whether there was reasonable suspicion to support the Terry stop was not specifically raised before the appellate court by the Applicant. *State v. Walker*, 430 S.C. 411, 418 n. 4, 844 S.E.2d 405, 409 n. 4 (Ct. App. 2020). The trial judge found in the pretrial hearing that it was a valid *Terry* stop. R. p. 538, l. 6-22.

Counsel Alexander testified as noted above that he did not raised the *Terry* stop issue because he felt the argument did not have merit. PCR Tr.p. 23-24.<sup>40</sup> He noted in his review that the initial encounter with law enforcement supported a reasonable suspicion and was within the standard of review for a *Terry* stop. PCR Tr.p. 43. Differing from the Court of Appeals, counsel Alexander thought the real issue in the case was whether the *Terry* stop turned into a custodial interrogation which he raised in the appeal. This Court is constrained to conclude that the *Terry* stop had significant evidence of reasonable suspicion and the Court cannot conclude that a

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<sup>40</sup> In the pretrial proceeding, the Applicant *pro se* argued that he strongly argued that the Terry stop was invalid. R. p. 528. He claimed that the officer could have come close to him rather than doing what he did. He claimed that the officer was aggressive and claimed that he was placed under arrest and claimed he was in “blackout.” R. p. 528-529.



reasonable appellate attorney would have concluded otherwise and asserted that there was no reasonable suspicion. Deficient performance has not been shown.

Further Sixth Amendment prejudice has not been shown. Assuming the general objection was sufficient to challenge the *Terry* stop, the trial court properly admitted the *Terry* stop and Applicant's statements to Kostyk as demonstrated in State's Exhibit 45 set forth above in footnote 39. Kostyk at no point engaged Applicant in any communication amounting to custodial interrogation. Kostyk conducted a textbook *Terry* stop. As in *Terry*, Kostyk was examining an area which was, at this time of year, known to have an uptick of criminal activity. Applicant sat underneath an awning on the site of a closed mom-and-pop store. It was dark outside. Applicant was alone. It was nearly 11:00 PM. The store was dark. There was no reason for Applicant to be sitting out underneath the awning of the closed retail store. The facts and circumstances make it reasonable that Kostyk would approach Applicant to investigate whether criminal activity was indeed afoot. *Terry v. Ohio*, 392 U.S. at 21-22, 88 S.Ct. at 1880.

The fact that Kostyk was in a darkened patrol car across the way observing Applicant, and the remaining surroundings, is of no consequence. His actions in this regard are no different than that of the plainclothes officer in *Terry*. 392 U.S. at 5-6, 88 S.Ct. at 1871-72. As a result, the initiation of the *Terry* stop was justified by the circumstances: based upon his experience as a road patrol supervisor with the Aiken County Sheriff's Department, Kostyk had reasonable, articulable suspicion enough to address with Applicant whether he may be casing the convenience store across the street. *Id.* at 21, 88 S. Ct. at 1880; *State v. Woodruff*, 344 S.C. at 546, 544 S.E.2d at 295.

Kostyk's encounter with Applicant evolved in a manner justifying the inquiries made. Kostyk can be heard asking Applicant for information on six discrete points: (1) What are you doing, guy? (2) Do you have any ID on you? (3) What's your name? (4) What's your birthdate?

(5) You got any warrants? (6) What do you think you got a warrant for, bud? (State's Exhibit 45). The record bears out that each of these questions either fall into the purely ministerial category or constitute investigatory questions whose reasonableness is borne out by Kostyk's articulation of reasonable suspicion. Both categories are permissible during a Terry stop as questions meant to confirm or dispel Kostyk's suspicions. *Berkemer v. McCarty*, 468 U.S. at 439, 104 S. Ct. at 3150.

Kostyk had no reason to believe the suspect would put his hands behind his back in response to Kostyk's asking him what he was doing. This gesture by Applicant was in and of itself an incriminating physical response. It signaled that he was potentially a wanted man. It was then reasonable to then ask Applicant if he had any warrants, particularly when he had not verbally responded to Kostyk at this point. *United States v. Taylor*, 799 F.2d at 128. Kostyk's questions serviced the particular circumstances giving rise to the continuation of the investigative detention. *State v. Corley*, 383 S.C. at 240, 679 S.E.2d at 191. Suppression is not required in this circumstance, where the scope of Kostyk's questioning was tailored to the circumstances arousing his suspicion. *State v. Culbreath*, 300 S.C. at 236, 387 S.E.2d at 257. Further, Kostyk did not prolong the encounter or exceed the scope of the investigative detention when he asked Applicant what his warrant may be for. Rather, this was a reasonable follow-up question meant to garner information that Kostyk could compare with information he may receive from dispatch. Kostyk needed this information for the purpose of confirming or corroborating Applicant's announcement and for the purpose of determining whether the Terry stop should cease or shift gears. *Berkemer v. McCarty*, 468 U.S. at 439-40, 104 S.Ct. at 3150.

Kostyk also applied no physical or psychological force which would drag the investigative detention into the realm of a custodial interrogation. *United States v. Sullivan*, 138 F.3d at 132. Only when a person "is detained 'to a degree associated with formal arrest' will he be entitled to



the *Miranda* protections for in-custody interrogations.” *Id.* at 130 (quoting *Berkemer v. McCarty*, *supra* at 440, 104 S.Ct. at 3150). The exchange did not occur in secret but rather in an open parking lot. Applicant was never placed under arrest, nor informed of any charges or ongoing investigations. Applicant did not actually have any pending charges or warrants at the time. The fact that Kostyk conducted a pat-down of Applicant and placed him in a secure position on the hood of the car is not dispositive of whether Applicant was in custody in this particular case. In conjunction with a valid investigative detention, an officer may conduct a Terry frisk of the individual to ascertain whether they may harbor a weapon that may be used against them, regardless of whether the officer is “absolutely certain that the individual is armed.” *Milledge v. State*, 422 S.C. 366, 375-76, 811 S.E.2d 796, 801 (2018) (quoting *Terry v. Ohio*, *supra* at 27, 88 S.Ct. at 1883).

“[T]he prevailing justification for conducting a *Terry* frisk is not simply crime prevention, but the more immediate need of assuring officer safety.” *Milledge v. State*, 422 S.C. at 376, 811 S.E.2d at 801 (2018) (finding an order for a driver to exit the vehicle during a lawful Terry stop a de minimis intrusion). Of import, Applicant had already answered that he believed he had an outstanding warrant when Kostyk sought to position his hands on the hood of the car. Kostyk positioned Applicant in this manner at this time purely to maintain his safety while he contacted dispatch to confirm or deny whether Applicant was in fact subject to arrest. On this point, one could observe Kostyk to have followed Applicant’s own lead based on the information Applicant gave him.

At no time were the conditions of this Applicant’s detainment sufficient for the court to determine Kostyk placed Applicant custody, acted in an overtly aggressive or threatening manner, interrogated Applicant, or that the circumstances leading to the Terry stop were insufficient to

warrant the continuation of the investigative detention. *Miranda* was not required as Applicant contends.

In addition to his decision not to appeal the directed verdict, Appellate Counsel chose not to appeal the issue regarding an allegedly unlawful *Terry* stop. This Court finds Applicant's argument to be without merit.

This Court finds Appellate Counsel acted appropriately in light of the circumstances in failing to appeal the issue of an alleged unconstitutional *Terry* stop. This Court further finds Appellate Counsel acted reasonably in light of prevailing professional norms, therefore, Appellate Counsel did not engage in deficient performance in failing to brief on appeal the issue of the *Terry* stop. During the *Jackson v. Denno*<sup>41</sup> hearing, the Trial Court ruled that based on the officer's testimony and other witnesses on the scene, law enforcement conducted a valid *Terry* stop<sup>42</sup>.

### Competency Issue

***The Applicant has failed to show Appellate Counsel was ineffective in failing to appeal the Applicant competency.***

This Court finds Appellate Counsel acted reasonably in deciding not to appeal the issue of competency. At the start of trial, a *Blair*<sup>43</sup> Hearing was held with Dr. Donna Maddox, a forensic psychiatrist that evaluated Applicant several times prior to trial. Dr. Maddox testified as to

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<sup>41</sup> *Jackson v. Denno*, 378 U.S. 368 (1964)

<sup>42</sup> Much like the facts in *Terry v. Ohio*, at trial, similar testimony was elicited by law enforcement whereby, prior to the *Terry* stop, officers observed Applicant engaging in behavior that indicated he was surveying the location for a potential robbery. *See R. p. 935-937.*

<sup>43</sup> *State v. Blair*, 275 S.C. 529 (1981)

Applicant's competency to stand trial. R. pp. 5-7. Dr. Maddox observed that Applicant "clearly has rational and factual understanding of these proceedings." R. pp. 71. 5-7.

During trial, Applicant brought his own competency into issue after stating "I'm having trouble with thoughts." R. p. 830, l. 6-7. He declared that he was having trouble with a lot of issues, including depression which he opined was getting worse. He claimed he had been hearing voices and having trouble sleeping. He claimed that much of this had been discussed with Dr. Maddox before the trial. R.p. 830-832.

Judge McMahon issued an order for Dr. Maddox to evaluate Applicant for any competency issues. Judge McMahon additionally expressed his own perception of Applicant's competency prior to Dr. Maddox's evaluation of Applicant<sup>44</sup>.

After evaluating Applicant, Dr. Maddox testified that Applicant was competent to stand trial and that he had a rational and factual understanding of the proceedings before him. R. p. 858, l. 13-24. She opined that the symptoms that the Applicant had described to her was two episodes where he felt he had difficulty concentrating during opening statement and a later incident when he felt he had difficulty organizing his thoughts. She stated that he reported that he felt his cognitive ability improved during the later part of the week. She stated that his second symptom was that he was complaining about auditory hallucinations of someone saying his name similar to the judge which were not command in nature, although he denied that these were while they were in the courtroom, but after he return to his cell to prepare for the next day in court. She described a third

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<sup>44</sup> Judge McMahon: "[A]s I've observed him and listed to him, it appears to me that his demeanor has gotten better and calmer once the trial started. I noted he, in his conversation or cross-examination of both experts, both Mr. Hines and particularly Lieutenant Smith, Dustin Smith I believe his name is, that he was tracking very well. He was citing research that he had obviously done or others had done perhaps and provided it to him." R. p. 835, l. 24-25; p. 836, l. 1-6.

set of a bizarre somatic delusions that his body is infested with worms. R.p. 856-857. She reported that when he had an ultrasound that a tapeworm was reported and a radiologist made a similar report. He reported that he feared that these still exists and he thinks they digest his medicine so he crushes his medicine. He reported to her certain locations on the body where he thought they were and that sometimes he feels uncomfortable where he thinks they are located. She stated that the circumstances have changed for the better over the weekend. He had been administered Tylenol 3 and he had more comfort and calming. R.p. 856-857. She reported that the Applicant was not exaggerating his symptoms at this time. She stated that she took all the symptoms at face value and considered them active symptoms but it was her opinion that they do not affect his ability and his rational and factual understanding of the proceedings. She stated that she also observed Dr. Frierson's mental status examination which showed no decline in cognitive function. She noted that Dr. Frierson opined that he was competent and reported some recommendations, including a quiet time for the Applicant after the state rests and recommend that the prosecution table write notes rather than whisper which Applicant reported to Dr. Frierson was distracting to him. R.p. 860. Dr. Frierson's memorandum was submitted as Court Exhibit 9. R.p. 861. The Applicant then cross-examined Dr. Maddox. R.p. 861-879. Judge McMahon the examined Dr. Maddox opined that the Applicant, in her opinion, was competent to stand trial. She stated that his delusions and episodes that she had described still allowed for his competence. R.p. 880 – 887.

Judge McMahon found Applicant to be competent to stand trial. R. pp. 891-92. In his oral order, Judge McMahon concluded as follows:

. . . based upon the record before this Court, I find that Mr. Walker is competent to stand trial therefore he is competent to represent himself. He has a rational and factual understanding . . . of the charges against him, has, looking at Court 9, Dr. Frierson's "he demonstrates an above-average understanding of the legal system, possible defenses, lesser included defenses and gave rational reasons behind some

of his trial strategy,” Further and addressing some issues factually as far as his... opening statement, I thought it was,... clear, coherent, rational, tracking the factual . . . setting as he said it was and it was consistent with all of his with his pretrial testimony as to the events that occurred both opening statements both the states Mr. Walker’s were least of an average if not a greater length than many I found, and opening statement is supposed to be a brief opening as to, the issues that the parties think exist in the case, a road map, if you will, and not the full and complete factual rendition of the case at that point as I told the jury they’re not evidence what the attorneys tell you what the pro so defendant tells you if he’s not on the witness stand under oath is not evidence in the case it cannot be considered as evidence in the case. Throughout the trial of the case I thought his direct questioning of the witnesses that he called pretrial, cross examination, during the course of the pretrial hearings and cross examination of the witnesses have been presented, that have been presented has been, clear, rational, I thought he did an outstanding job with Lieutenant Dustin Smith. He referred to some research and such of the deterioration of drugs in the body, postmortem, such as that I think he’s competent to stand trial and to present his defense.

R.p. 891, l. 1 – p. 892, l. 10.

At the PCR proceeding, Counsel Alexander testified that he considered raising an issue based on competency [of Applicant to represent himself pro se at trial]. (PCR Tr. p. 40). However, due to the extensive expert testimony regarding Applicant’s competency to stand trial, Appellate Counsel saw no basis to raise the competency to represent himself ruling on appeal where there was no evidence to support an argument against it. (PCR Tr. p. 40-41).

This Court finds Appellate Counsel’s decision to not appeal the issue of competency was a reasonable decision under prevailing professional norms. Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. *Pruett v. Thompson*, 996 F.2d 1560, 1568 (4th Cir.1993), cert. denied, 510 U.S. 984, 114 S.Ct. 487, 126 L.Ed.2d 437 (1993). Counsel’s opinion was that based upon the expert testimony presented related to his mental illness supported the ruling by Judge McMahon.

Section 44-23-410(A)(1) of the South Carolina Code (2018) states in relevant part:

Whenever a judge of the circuit court ... has reason to believe that a person on trial before him ... is not fit to stand trial because the person lacks the capacity

to understand the proceedings against him or to assist in his own defense as a result of a lack of mental capacity, the judge shall:

(1) order examination of the person by two examiners designated by the Department of Mental Health if the person is suspected of having a mental illness or designated by the Department of Disabilities and Special Needs if the person is suspected of having intellectual disability or having a related disability or by both sets of examiners if the person is suspected of having both mental illness and intellectual disability or a related disability...

The decision whether to order a mental health evaluation to assess a defendant's competency to stand trial is within the discretion of the circuit court. *Monahan v. State*, 365 S.C. 130, 133, 616 S.E.2d 422, 424 (2005); *State v. Colden*, 372 S.C. 428, 435, 641 S.E.2d 912, 916 (Ct. App. 2007). Likewise, the admission of evidence is within the discretion of the circuit court and will not be reversed on appeal absent an abuse of that discretion. *State v. Foster*, 354 S.C. 614, 620–21, 582 S.E.2d 426, 429 (2003). “An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law.” *Colden*, 372 S.C. at 435, 641 S.E.2d at 917.

“Thus, if the [circuit court] believes the person may be unfit to stand trial, a competency evaluation is compulsory.” *Colden*, 372 S.C. at 441, 641 S.E.2d at 920. Courts consider three factors in determining whether further inquiry into a defendant's fitness to stand trial is warranted: “(1) evidence of irrational behavior; (2) demeanor at trial; and (3) prior medical opinion regarding ability to stand trial.” *Id.*; *State v. Burgess*, 356 S.C. 572, 575, 590 S.E.2d 42, 44 (Ct. App. 2003). “In some instances, the presence of just one of the factors may justify further inquiry requiring a mental evaluation.” *Colden*, 372 at 441, 641 S.E.2d at 920.

Here, there is evidence in the record to support the circuit court's findings. See *State v. Wilson*, 345 S.C. 1, 6, 545 S.E.2d 827, 829 (2001) (“[The appellate court] does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether

the [circuit court]'s ruling is supported by any evidence.”). See *Colden*, 372 S.C. at 441, 641 S.E.2d at 920 (setting forth relevant factors to consider when deciding whether further inquiry into a defendant's fitness to stand trial is warranted). The cautious trial judge authorized the re-evaluation after the Applicant indicated that he was having some issues. After the examinations by two examiners, who each opined his competency, as well as the trial court’s own assessment of his interactions with the court and witnesses, the trial court found the Applicant to still possess the competency to stand trial.

This Court further finds that the Applicant has failed to show prejudice. One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. *Miller v. Keeney*, 882 F.2d 1428, 1434 and n. 9 (9th Cir.1989).” This Court finds that the Applicant has failed in his burden of proof to show a reasonable probability that he would have prevailed in the appeal had he raised the issue.

There is no showing that had appellate counsel raised this issue that there is a reasonable probability that the result of the appeal would have been different. The record revealed that he had a rational and factual basis to support his competency to stand trial. This allegation must be dismissed.

### STAND YOUR GROUND

***The Applicant failed to prove deficient performance or prejudice under Strickland in appellate counsel’s decision and failure to present an issue in the direct appeal concerning the denial of immunity under the Protection of Persons and Property Act.***

The Applicant contends that appellate counsel should have raised a challenge to the trial court’s denial of immunity under the Protection of Persons and Property Act. During the immunity

hearing, a number of witnesses testified, including the Applicant. At the conclusion, Judge McMahan denied relief:

Court: I then go to the Stand Your Ground under 16-11-440. There were a number of witnesses presented in that case. That motion — Mr. Walker, Mr. Banty, Lieutenant Smith to Officer Wharton, Doctor Maddox, Deputy Kostyk, although he didn't testify in full, Mr. Walker, senior, Mr. Kyle Walker, for the State, Ms. Banty, Mr. Hines, and Doctor Ross.

I listened very closely, intently to the testimony of the defendant. There is no corroboration by a single witness called as to any aspect of the defendant's testimony. Says she came home drinking, using drugs. She was a drug addict.

Her toxicology was 0.016. She had no marijuana, no cocaine, no amphetamines, or no other unlawful drugs in her system. The prior call is not positive based on both — not positive for the defendant based on Wharton, Officer Wharton's testimony and Kyle Walker's testimony. Carrie's afraid he's gonna burn the house down.

Mr. Banty, the father, testified. Saw no abuse as far as his daughter towards his granddaughter whatsoever as did Mr. Walker, Senior and Kyle walker. They, they identified Carrie as a good mother, a good mom. No, no, no physical abuse or otherwise towards Cassidy. Ms. Banty also testified to that. The testimony of Mr. Hines is — certainly tracks cell phone wise inconsistent with the statements of Mr., Mr. Walker.

And, further, if two people are involved in a fight in which the victim, the ultimate deceased I should say, strikes the named defendant or the other participant in the fight for four or five times over a period of hours, she's not gonna have what Doctor Ross described as clean hands, no bruises on her hands, no cuts, no scrapes, no knuckles swollen. It's all on her forearms and otherwise collarbone, which indicated to Doctor Ross that those were defensive wounds, defensive wounds.

And, of course, as far as the Stand Your Ground hearing, the defendant has the burden of proving that he's entitled to immunity by a preponderance of the evidence. I find that he has failed to meet that burden based on the totality of all of the evidence and the witnesses that have testified during that particular hearing, and that his motion for immunity under the Stand Your Ground statute is denied.

R. pp. 543-545.

During the stand your ground hearing, the Applicant initially testified on February 21, 2017. R. p. 19-167. The Applicant claimed on that date he saw the victim in her car strike the child in the face, on her side, on her hands and on her arms asserting “ that f---ing bitch” when asked



what was going on. He claimed the child looked dazed and confused. He stated that the victim then stormed inside the house, while the child claimed to Applicant she did not do anything to cause the victim to strike her. The Applicant testified that after they got inside the house the argument continued. At one point, he claims that the victim spit on him and tried to strike him with a closed fist towards his eye , head, face and neck. He also asserted that she was scratching towards his eyes, nose and face. R. p. 38. He claimed she then swung again with a fist towards his face, eyes, nose and throat. He asserted that he tried to block the strikes and her hostile words. He claimed to use his hands in a protective fashion trying to cover up from her violence and threatening screams that she was trying to kill or harm him and the child.

Walker stated that he began wrestling with her, fearing that she will try to kill him or the child. He contended that she violently move and started to grab his throat, gouge for his face and eyes and his testicles. He then claimed to be able to move behind her and wrapped his armes around her and got her on the ground. R. p. 38-39.

He asserted that he considered running at that point running toward a room, but feared if he left that there would be more violence toward the child. He claimed he engaged in self-defense,“ and continued to force the attack and engage to keep safe“ and put his arm around her upper body to face her. R. p. 40. He claimed at that appoint she began to kick violently into the walls and furniture, He claimed that the only way to calm her was “to apply pressure to her neck so I did so.. I applied pressure adjusted to the throat, basically compression to her carotid artery and jugular veins but not her larynx or trachea. R. p. 41. He claim that he made presentable and slight pressure until she ceased being hostile.

He claimed at that time they had a conversation about stopping fighting. He claimed after being cussed at, that he told the victim that he was going to leave She told him that he was not

calling the police after he asked where with the child because of the hostilities and child abuse and threats to kill the child. R. pp. 41-43. He claimed after indicated that she needed to check herself in somewhere and get some help that she attacked him again. R. p. 43. He claimed he feared she would choke him, he wrestled her to her knees and again applied pressure to her throat for about 10 seconds and she ceased the attack. R. p. 44 He stated he urged her to go to the car with him to get the phone and money to leave and call help. In that conversation Carrie claimed that she was going to get high, find her boyfriend and screw him and then try to kill all of you. R. p. 45. He contended that they then walked to the car to get the phone and the money and he claims that she attacked him again and threatened to kill them again. R. pp. 46-47. \* \*\*

This Court further finds Appellate Counsel acted reasonably in deciding not to appeal the denial of immunity under the Protections of Persons and Property Act (“the Act”)<sup>45</sup>. A claim of immunity under the Act requires a pretrial determination using a preponderance of the evidence standard, which an appellate court reviews under an abuse of discretion standard of review. *See State v. Duncan*, 392 S.C. 404, 411, 709 S.E.2d 662, 665 (2011). “An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions.” *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008). This Court finds Appellate Counsel, in combination with the Trial Record evidentiary hearing, properly articulated his strategy for not appealing the denial of immunity<sup>46</sup>. This Court finds Appellate Counsel’s conclusion that appealing the denial of immunity, which would be evaluated under an abuse of

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<sup>45</sup> S.C. Code Ann. § 16-11-45-(A)

<sup>46</sup> This Court finds that additional testimony at the Stand Your Ground Hearing, including Applicant’s refusal to answer and later denial of the question of “Are you responsible for [the victim’s] death, yes or no?” to be supportive of Appellate Counsel’s decision not to appeal the denial of immunity under the Act to be proper under prevailing professional norms. *See* Trial Tr. p. 141-43; p. 143 l. 1-12.

discretion standard, lacked merit, a proper decision under prevailing professional norms. *See Strickland, supra.*

This Court finds Appellate Counsel acted reasonably considering all the circumstances. *See Strickland*, 466 U.S. at 689 (“In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.”). This Court further finds that Applicant has failed to overcome the presumption that Appellate Counsel’s actions might be considered sound appellate strategy. *See id.* at 690 (Explaining that Counsel’s actions are presumed, absent evidence to the contrary, to “fall within the wide range of reasonable professional assistance . . .”); *see also Southerland*, 337 S.C. at 616 (Explaining that a PCR Applicant has the burden of proving appellate counsel’s performance was deficient.).

This Court finds Standby Counsel’s testimony irrelevant based on (1) Judge McIntosh’s February 7, 2022, Order, and (2) the lack of substantive testimony pertaining to the claim of ineffective assistance of counsel elicited from Standby Counsel. *See* PCR Tr. p. 49-50. This Court finds Standby Counsel’s testimony to be irrelevant in the context of a claim for ineffective assistance of appellate counsel.

Based on the foregoing, this Court finds the Applicant has failed to present sufficient evidence to prove the first prong of the *Strickland* test – that [Appellate] Counsel failed to render reasonably effective assistance under prevailing professional norms. Furthermore, Applicant has failed to present specific and compelling evidence that [Appellate] Counsel committed either errors or omissions to prove the second prong of *Strickland* – that he was prejudiced by [Appellate] Counsel’s performance. *See Southerland v. State*, 337 S.C. 610, 616, 524 S.E.2d 833, 836 (1999) (Explaining how the applicability of the *Strickland* standard as it relates to trial counsel remains unchanged when applied to claims of ineffective assistance of appellate counsel).

Accordingly, this Court finds Applicant has failed to establish any deficiency by Appellate Counsel, or any prejudice flowing therefrom. Thus, this allegation must be **DENIED** and **DISMISSED WITH PREJUDICE**.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be **DENIED** and **DISMISSED WITH PREJUDICE**.

This Court notifies the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf if the Applicant wishes to seek appellate review. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

**IT IS THEREFORE ORDERED:**

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

**AND IT IS SO ORDERED** this 12<sup>th</sup> day of September, 2025.

  
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THE HONORABLE GEORGE MCFADDIN, JR.  
Presiding Judge

Sunter, South Carolina

