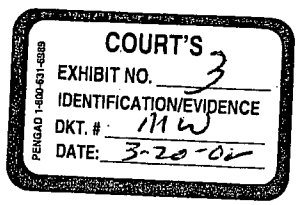
WITNESS SUMMARIES

Leonard Lee Foster

Leonard Lee Foster, a twenty-seven year old male, was the restrained driver of the 1990 Cadillac which was involved in this collision. Mr. Foster refused to give a statement on the night of the collision. Since MAIT was informed that he had retained an attorney, we have made several request for interview through his attorney's office. To this date, 12-21-00, those request have been ignored. The South Carolina Division of Motor Vehicles reports the following driving violations for Leonard L. Foster:

- 10-20-96.....CARELESS/NEGLIGENT DRIVING
- 06-01-97.....CARELESS/NEGLIGENT DRIVING
- 07-31-98.....CARELESS/NEGLIGENT DRIVING
- 11-18-98.....BAC OF .15 OR GREATER
- 11-18-98.....SUSPENSION FOR BAC OF .15 OR GREATER
- 11-18-98.....DRIVING UNDER THE INFLUENCE
- 11-18-98.....SUSPENSION FOR DRIVING UNDER THE INFLUENCE
- 11-18-98.....SPEEDING 60 MPH IN 35 MPH ZONE
- 09-22-99.....OPERATING/ALLOWING OPERATION OF UNINSURED VEHICLE
- 09-22-99.....SUSPENDED FOR OPERATING/ALLOWING UNINSURED
- 09-22-99.....DRIVING UNDER SUSPENSION
- 09-22-99.....SUSPENDED FOR DRIVING UNDER SUSPENSION
- 09-25-99.....DRIVING UNDER SUSPENSION
- 09-25-99.....SUSPENDED FOR DRIVING UNDER SUSPENSION
- 02-01-00.....HABITUAL OFFENDER ACT
- 11-11-00.....VIOLATION IMPLIED CONSENT LAW
- 11-11-00.....SUSPENSION FOR IMPLIED CONSENT LAW



test differently would the results of the trial have come out differently?

A Yes, it would have.

Q Do you believe that that information had been -- that evidence had been suppressed that you would have been found not guilty?

A That's right.

Q Either one of those facts independent of the other would have resulted in a not-guilty verdict in your opinion.

A It might have, it might have. Then, again, you know what I am saying, it probably would have made the jury, I mean, the judge grant direct verdict if he had moved to suppress the urine sample.

Q So in either way, whether it was a judge directing a verdict or a --

A It would benefit me either way.

Q Or a jury finding you not guilty, do you think the outcome would have been you were found not guilty?

A Yeah.

Q Now, those are the things that Mr. Boggs, you claim, did wrong during the trial.

You also set forth in the documentation you have provided to the Court and to the attorney general's office some legal arguments, is that correct?

A Yeah.
Q Can you give us a short summary of what it is you feel went wrong in the legal process, not the full-blown argument but just one, two, three, four and five what those issues are?
A Okay. As far as that, the urine sample, okay, that urine sample, like I said, the woman testified that they couldn't do nothing to show you that I was exposed to alcohol within the last, I mean, within 12 hours, the last 12 hours.

Okay. The video tape clearly showed you that I told the man I had two beers. You know what I am saying. So I think that the video tape should have been in evidence instead of that, that urine sample, you know what I am saying, because the only thing that urine sample is going today is to seize the jury, and then you got the police up there telling lies, and ain't nobody going to object to it. I think that's going to overweigh my defense.
Q Okay.
A And he should have moved to suppress the indictment because the indictment is a nullity.
Q What's wrong with the indictment?
A They didn't have no evidence.
Q So because of the lack of evidence the indictment should not have been true billed.

Exhibit "L"

A I can put the rest of this in there too, can't I?
Q Are there additional issues that you do not have listed in that version for the Court?
A Right.
Q How many other issues do you have?
A Well, it's basically what -- Mr. Boggs' failure to object to.
Q Okay. What were the things that he failed to object to?
A Okay. He failed to object to the prosecution stating that I was driving under the influence of alcohol, driving in open statement, page 78. My trial counsel failed to object to state witness, Mueler, lying on the witness stand, page 229; my trial counsel failed to object to Prosecutor Barry Barnette entertaining the lies throughout the duration of my trial, page 229, page 232, page 324, page 349, page 354.

My trial counsel failed to object to the results of the test conducted by SLED; no test of alcohol was conducted through request by law enforcement officers, page 316, line two through 15. The chain of custody was broken, page 313, line 225 (sic) when what's her name, Alex, what's her name?
Q Ms. Gregory?
A Yeah. Ms. Gregory testified. They began to pick the

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Exhibit A

Q Has my office on your behalf tried to get them?
A Yeah, they tried to get them.
Q Where are those video tapes?
A They say they have been destroyed.
Q And that would have been the Cherokee County, has destroyed those video tapes.
A From my understanding.
Q And so because of the actions of Cherokee County we can't look at those video tapes today and see what was on them.
A Exactly.
Q So you are asking the Court to, because the state was the one that did it to, assume that what was on that tape would have benefited you.
A That's right.
Q And you specifically asked Mr. Boggs to play those tapes, is that correct?
A I asked him on page, I asked him on page 46, line 15. Then I brought it back to his attention right before it was time for me to take the witness stand. That's why I didn't take the witness stand, because he told me he still had those video tapes, so that's why I didn't take the witness stand. Okay. And then I brought it back to his attention right before he renewed that motion on -- right after he renewed that motion on that direct verdict.

Q Was it inaccurate because of the way it had been stored and transported?

MS. CRUM: Your Honor, I am going to object.

A It was inaccurate because they cannot --

Q Hold on. She's got an objection.

MS. CRUM: I am going to object to him leading the witness at this point.

THE COURT: Okay. Don't lead him.

Q Why was it inaccurate in your opinion?

A In my opinion it was inaccurate because that test cannot give affirmative reading.

Q Why was it not possible for it to have an affirmative reading, as you call it, or I'm assuming you mean an accurate result?

A Why it won't do it?

Q Why was that not an accurate result?

A Because that kind of test cannot give you an accurate result.

Q And did Mr. Boggs at the conclusion of her testimony move to suppress her testimony and the test results?

A No, he did not move to suppress.

Q Did Mr. Boggs at any point retain on your behalf an expert to contradict what she says or to explain the inaccuracies?

A No. But he brought it out.

Q And did that investigator or did that person from SLED talk about what her tests showed?
A Exactly.
Q What did she testify that those tests showed?
A She said the only thing that test right there can prove is that I was exposed to alcohol. Okay. Now the video tape --
Q That's the way you took it, right, that that's what -- basically she said that on cross-examination, is that correct?
A Yeah. She said that's all that can prove.
Q Okay. Did she at some point during her testimony give a number or a blood alcohol level?
A Yes, she did.
Q What was that blood alcohol level, do you remember?
A I think she said it was a 1.7 or something like that, I think.
Q Would it have been enough if it were an accurate number to have you determined to be driving under the influence, or at least create that presumption?
A If it was accurate, yes.
Q And that was Alex Gregory, right?
A That's right.
Q Now, were there problems with that urine test?
A That's right. It was inaccurate.

Ex. B

THE COURT: Any reply on behalf of the applicant?

MR. COLLINS: No, Your Honor.

THE COURT: All right. I will review the transcript and the exhibits which were introduced and issue an order.

MS. CRUM: Your Honor, may I just make a brief closing, about two minutes? I'm sorry.

THE COURT: Okay. If you think it will influence my decision, I will be happy for you to.

MS. CRUM: Your Honor, just for the record purposes, the state submits that the applicant failed to prove both deficiency and prejudice. With regards to the tape, I think Mr. Boggs articulated a reasonable strategy that he did not believe the tape would be helpful for several different reasons, and he also did not want to --

THE COURT: While you are on that topic, let me ask you this.

Mr. Collins, are you wanting me to reserve any decision until Mr. Boggs has an opportunity to determine whether or not he can find that tape?

MR. COLLINS: Yes, sir, Your Honor. We would ask the Court to leave open the record in order for us to submit a copy if it is found.

THE COURT: All right. Is there any objection to that?

MS. CRUM: No, Your Honor.

Ex. B

THE COURT: Well, how much time do you think is reasonable in order for that to be accomplished? I guess you need to talk to Mr. Boggs. I can't just leave it open-ended, but I'll be happy to give you some reasonable period of time for him to try to locate it.

MR. COLLINS: I would think 30 days would be a sufficient amount of time to locate it and make a copy for the Court.

THE COURT: Okay. Any objection to that?

MS. CRUM: No, Your Honor.

And, Your Honor, the state would also submit that his strategy was reasonable, that the applicant -- despite the applicant saying that he was not intoxicated, three officers testified that he smelled of alcohol. So anything on the tape is really cumulative to those officers' testimony.

In addition, it's really cumulative. The results of the urine test are really cumulative to the officers' testimony.

We submit that the applicant has not presented any medical experts here today indicating that that would have made a difference. This was during the winter months. It was in an overnight period in the car. He has not proven his case that, excuse me. He has not proven that there would have been any affect on the urine test.

Exhibit "M"

THE COURT: Any reply on behalf of the applicant?

MR. COLLINS: No, Your Honor.

THE COURT: All right. I will review the transcript and the exhibits which were introduced and issue an order.

MS. CRUM: Your Honor, may I just make a brief closing, about two minutes? I'm sorry.

THE COURT: Okay. If you think it will influence my decision, I will be happy for you to.

MS. CRUM: Your Honor, just for the record purposes, the state submits that the applicant failed to prove both deficiency and prejudice. With regards to the tape, I think Mr. Boggs articulated a reasonable strategy that he did not believe the tape would be helpful for several different reasons, and he also did not want to ---

THE COURT: While you are on that topic, let me ask you this.

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MR. COLLINS: Yes, sir, Your Honor. We would ask the Court to leave open the record in order for us to submit a copy if it is found.

THE COURT: All right. Is there any objection to that?

MS. CRUM: No, Your Honor.

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Exhibit "J" 2

MR. BARNETTE: Yes, sir.

BY MR. BARNETTE:

Q Corporal Mueller, when he was speaking to you, did he said that he had drank any beers or any liquor at that time?

A No, when I asked him specifically that question, he indicated to me that he had consumed alcoholic beverages.

Q How many beers did he say that he had consumed?

A He indicated to me that he had been drinking three to four beers.

Q Did he say that he had any liquor or anything?

A Also he said that he had some liquor shots that evening.

Q Did he say anything about -- did he say anything about the other vehicle?

A Yes, sir, initially when I was asking him what had happened --

THE COURT: Excuse me just a minute. Let me see the lawyers over here just a minute, please.

(Lawyers approached the bench)

THE COURT: All right.

BY MR. BARNETTE:

Q Based on your observations of him, Corporal Mueller, do you have an opinion if he was under the

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he discussed the advantages and disadvantages of playing the tape and Applicant was in agreement with his advice and did not insist on him playing the videotape is more credible. Moreover, trial counsel's testimony that he had strategic reasons for not playing the videotape at trial is credible. Trial counsel explained the videotape was not particularly helpful to Applicant, Applicant looked "ragged" and in a "catatonic state," he had concerns regarding some of the content, and he did not want to lose the right to last argument. This Court also notes trial counsel's limited memory on his specific concerns is understandable since it has been over four years since Applicant's trial.

Furthermore, both the trial transcript and the videotape of the breathalyzer test itself support the reasonableness of trial counsel's decision not to enter it. The trial transcript reflects trial counsel argued pre-trial to redact the portion of the videotape where Applicant admitted to police officers he had taken the test previously and knew that portion would have been redacted when he chose not to enter the videotape. See Trial Tran. p. 46-48; p. 334. This Court finds there are other admissible portions of the videotape of the breathalyzer test that a reasonable defense attorney would not want to put before the jury. For example, Applicant appeared to stare on the videotape. Applicant also admitted on the videotape to drinking that night. Although Applicant told a state trooper at the scene he had three to four beers and some liquor shots, Applicant altered his story and told the officers administering the breathalyzer he only had a "couple of beers," which could also have a negative connotation. Moreover, Applicant's testimony at the PCR hearing that "the breathalzyer did not indicate that I was up under the influence of alcohol," is misleading. In fact, the videotape reveals the test could not be completed, and the lack of a reading was caused by Applicant's own actions.

Therefore, this Court finds trial counsel had valid, strategic reasons for not entering the videotape of the breathalyzer test. Caprood v. State, 338 S.C. 103, 525 S.E.2d 514 (2000)(stating a defense counsel is not ineffective where he has a valid reason for his choice of tactics). Therefore, Applicant failed to carry his burden to prove trial counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. This Court further finds Applicant failed to show a reasonable probability that the outcome of the trial would have been different but for trial counsel's alleged deficient representation. Johnson v. State. Accordingly, this allegation of ineffective assistance of trial counsel is denied and dismissed with prejudice.

Allegation of ineffective assistance of trial counsel for failure to retain an expert witness regarding the urinalysis

The allegation that trial counsel was ineffective for failing to hire an expert witness to challenge the urine test results based on the sample being in the trooper's trunk overnight at the end of November is without merit. Applicant claims an expert might have concluded this had some effect on the sample.

This Court finds Applicant failed to carry his burden to show that trial counsel's representation fell below the standard of professional reasonableness for a criminal defense attorney in this regard. Strickland v. Washington; Cherry v. State. In addition, the trial transcript reflects trial counsel cross-examined the trooper about the sample being in his trunk overnight and the SLED forensic toxicology expert concerning a possibility of bacteria growth under certain conditions, and he argued both points during his closing. See Trial Tran. pp. 194-195; pp. 311-319; pp. 364-366. This Court also finds Applicant failed to prove prejudice because he failed to show a reasonable probability that the outcome of the trial would have been

STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Leonard L. Foster, #179576, Petitioner, v. State of South Carolina, Respondent.	Case No.: 2019-CP-11-00535 **ORDER DENYING PETITIONER'S MOTION FOR DEFAULT JUDGMENT AND SUMMARILY DISMISSING PETITION FOR HABEAS CORPUS**

This matter comes before the Court by way of a petition for writ of habeas corpus filed by Petitioner Leonard L. Foster on July 29, 2019. Respondent made its return, requesting that the petition be summarily dismissed. After reviewing all records and evidence before this Court, this Court finds the petition shall be summarily dismissed for lack of subject matter jurisdiction. Findings of fact and conclusions of law are set forth below.

I. PROCEDURAL HISTORY

Petitioner is presently confined in the South Carolina Department of Corrections. Petitioner was indicted for driving a vehicle while under the influence of alcohol, driving under suspension, habitual traffic offender by the Cherokee County Grand Jury at its December, 2000 term. (00-GS-11-1350). Petitioner was subsequently indicted for felony DUI resulting in death and reckless homicide by the Cherokee County Grand Jury at its February, 2002 term. (02-GS-11-0142). Petitioner was represented by Thomas A. Boggs, Esq., and Solicitors Barry Barnette and Robert Bruce, of the Seventh Circuit Solicitor's Office, prosecuted the case. Petitioner proceeded to a jury trial on March 18, 2002, before the Honorable Gary E. Clary. Just prior to trial Petitioner entered a guilty plea to the charge of habitual traffic offender. The jury convicted Petitioner of felony DUI resulting in death and reckless homicide. Judge Clary then sentenced Petitioner to five years'

imprisonment on the habitual traffic offender plea, ten years' imprisonment on the reckless homicide, and twenty-five years' imprisonment on the felony DUI resulting in death. All sentences were set to be served consecutively.

Direct Appeal

Petitioner filed a notice of appeal and the appeal was perfected by Eleanor Duffy Cleary, Esq. Petitioner's counsel filed an *Anders* brief and presented the following issue:[1]

1. Did the trial court err in refusing appellant's motion to strike evidence of prior convictions from the indictment for Felony DUI where the prior convictions were not necessary to prove the offense and where any probative value was significantly outweighed by the prejudicial effect and where no limiting instruction was given?

The South Carolina Court of Appeals affirmed the conviction and dismissed the application. *State v. Foster*, Op. No. 2004-UP-024 (Filed January 15, 2004). The remittitur was sent on June 1, 2004.

***First PCR Application*: 2004-CP-11-0599**

Petitioner filed his first application for post-conviction relief on October 12, 2004, and alleged he was being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel
   a. Counsel failed to enter the breathalyzer video into evidence at trial,
   b. Counsel failed to retain an expert regarding the urinalysis,
   c. Counsel failed to object to the Solicitor's opening remarks,
   d. Counsel failed to object to the chain of custody regarding the urine sample,
   e. Counsel failed to request a jury instruction of involuntary manslaughter, and
   f. Counsel failed to effectively argue mitigation at sentencing.

An evidentiary hearing was convened on June 19, 2006, before the Honorable J. Derham Cole. Petitioner was represented by David M. Collins, Esq., and Assistant Attorney General Molly

[1] *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

R. Crum represented the State. The hearing saw testimony from Petitioner and his trial counsel, Thomas A. Boggs. On August 30, 2006, Judge Cole signed an order of dismissal, denying Petitioner's claims and dismissing them with prejudice.

Petitioner appealed the dismissal, and the appeal was perfected by Elizabeth Franklin-Best, Esq., of the South Carolina Commission on Indigent Defense. Petitioner's counsel filed a *Johnson* petition for writ of certiorari in the Supreme Court of South Carolina, raising the following issue:[2]

> 1. Did the PCR judge err in finding that trial counsel rendered effective assistance of counsel when counsel failed to secure a critical expert who would have discredited the sole piece of physical evidence proving the element of intoxication in his Felony DUI and Reckless Homicide trial? Counsel admitted at PCR that he should have retained an expert in this field, and that doing so would likely have changed the outcome of Petitioner's trial.

On January 22, 2009, the South Carolina Supreme Court denied Petitioner's appeal. The remittitur was sent on February 10, 2009.

Petitioner filed a petition for writ of mandamus with the Supreme Court of South Carolina on August 22, 2013, under case number 2004-CP-11-0599, requesting that he be provided access to videotapes of the "breathalyzer scene where Mr. Foster tells the officer he only drank two beers." The Supreme Court of South Carolina dismissed the petition on September 18, 2013, pursuant to *Key v. Currie*, 305 S.C. 115, 406 S.E.2d 356 (1991).

***Federal Habeas Corpus Petition*: 2:09-cv-00645-HMH-RSC**

Petitioner filed a *pro se* petition for habeas corpus with the United States District Court for the District of South Carolina on March 19, 2009. In his petition for habeas corpus, Petitioner alleged he was being held in custody unlawfully for the following reasons:

Ground One: Lacked Subject Matter Jurisdiction

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[2] *Johnson v. State*, 294 S.C. 310, 364 S.E.2d (1988)

a. When the name Cody Keeler was Amcndcd to the indictment after the jury was sworn and there is no written notices Granting or Denying my Post Trial motion, and the Grand Jury who Forthwith my Indictment was selected in a Racially Discriminary manner and my indictment was not Filed with thc clerk of court, and there is no written order to continue my case beyond 180 days from the date of my arrest and when the circuit court error by not suppressing the results from my urinalysis when there was No evidence adduced at trial to comport with statutory Law.

Ground Two: Brady Violation

a. Failure to surrender impanelment documents
b. Failure to surrender videotape's Breathalyzer tape and tape from Mueller's patrol car
c. Failer to surrender a written report indication the time of arrest the time of the test and the result of the test to comport with statutory Law
d. Perjury

Ground Three: Judicial Misconduct

a. Because the appellant was not informed of his right under the S.C. Code Ann. Sc-5-2950, it was an error of law for the trial court not to suppress the evidence of the results to the appellants urinalysis

Ground Four: Charge Enhancement

a. I plead guilty to HTO on March 18, 2002 and on March 18-20, 2002 I proceeded to trial on Felony DUI resulting in death and reckless homicide and was found guilty and receive 40 years subsequently my charge has been enhance to murder. See computer

Respondent made its return and moved for summary judgment on July 10, 2009. On September 29, 2009, United States Magistrate Judge Robert S. Carr issued a report and recommendation that Respondent's motion for summary judgment be granted on grounds one, two, and three, and that ground four be dismissed for failure to state a claim upon which relief may be granted. On October 16, 2009, the federal court adopted the report and recommendation, over Petitioner's objection, and dismissed the petition in a written order signed by the Honorable Senior United States District Judge Henry M. Herlong, Jr.

Petitioner filed a notice of appeal on November 4, 2009. On March 4, 2010, the United States Court of Appeals denied the Petitioner's certificate of appealability and dismissed the petition.

II. FACTUAL HISTORY

Brandi Coleman testified at trial that on November 10, 2000, she borrowed her neighbor's 1995 Ford Thunderbird to run errands. (Tr. 83, 1 – Tr. 85, 21). She picked her six-year-old son, Cody, up from a neighbor's house and began travelling down South Green River Road, in Spartanburg. (Tr. 85, 18 – Tr. 86, 4). At that point a Cadillac driven by Petitioner failed to yield to oncoming traffic, pulled out into an intersection in front of Ms. Coleman's vehicle, and caused a collision. (Tr. 86, 13 – Tr. 87, 17). Ms. Coleman was able to pull Cody's body out of the vehicle, but he was unresponsive at the scene. (Tr. 87, 18 – Tr. 88, 14). He was rushed to the Upstate Carolina Medical Center where he was pronounced dead due to multiple traumas consistent with a vehicle accident. (Tr. 88, 15 – Tr. 89, 13; Tr. 279, 1-25).

South Carolina Highway Patrolman A.R. Jordan testified that he arrived to the scene of the collision and, after tending to the victims, interacted with Petitioner and his passengers. (Tr. 136, 1-14). Patrolman Jordan testified that he determined Petitioner to be the driver of the Cadillac, smelled alcohol on his person, and noted that his eyes were glassy. (Tr. 136, 15 – Tr. 137, 2). Suspecting that Petitioner was intoxicated, Patrolman Jordan read him his *Miranda* rights, checked his license, determined it to be suspended, placed him under arrest, and transported him to the Cherokee County Detention Center for a blood alcohol test. (Tr. 139, 7 – Tr. 140, 8). Petitioner refused to submit to a blood test and instead gave a urine specimen. (Tr. 147, 18 – Tr. 149, 17; Tr. 207, 22 – Tr. 208, 4). SLED tested the specimen and determined that it contained .172% weight

per volume ethanol, indicating that Petitioner had consumed a significant amount of alcohol on the night of the collision. (Tr. 304, 21 – Tr. 310, 17).

III. CURRENT PETITION

In his current petition for habeas corpus, Petitioner presents the following issues:

1. Did officer have probable cause to arrest Petitioner for DUI?
   a. Petitioner contend November 10, 2000 arrest were unlawful wherefore, no probable cause existed to want his detention for DUI. The fundamental question in determing whether an arrest is lawful is whether there was probable cause to make the arrest, as the record reflect officer failed to administer field sobriety test. When a person is suspected of causing a motor vehicle accident resulting in death of another person by investigating law inforcement officer on the scene of the incident the driver must submit to field sobriety test if he is physically able to do so, as the record reflect Petitioner were able. (Citations omitted)

      Furthermore office failed to file an affidavit pursuant to SCRCrimP. Rule (1) which says, the sheriff or law inforcement officer shall file with the appropriate magistrate the affidavit and proof of service on which the arrest is made within five days after the arrest, as the record reflect magistrate violated Petitioner's due process whereas all judicial proceeding were abandon.

      Pursuant to SCRCrimP. Rule 2(c) magistrate should have discharged Petitioner but the dischargement shall not prevented the State from instituting another prosecution upon probable cause. Wherefore Petitioner's rights were violated under U.S. 4 Amendment as well as S.C. Const. Art. 1 section 10 whereas magistrate allowed Cherokee county to continue seize him.

2. Did the Court deprive Petitioner of procedural due process?
   a. Moreover, pursuant SCRCrimP. Rule 2(a) magistrate deprived Petitioner of procedural due process wherefore Petitioner requested for preliminary hearing on or about November 13, 2000 by completing S.C. 17-23-160 form. Once the accused properly requested a preliminary hearing the magistrate court retains jurisdiction until such hearing is held, as the record reflect Petitioner requested for hearing pursuant S.C. Code Ann 22-5-320. Where the demand for a preliminary hearing is timely made the court of General Session has no jurisdiction of the case until after the preliminary hearing and indictment return before the hearing is a nullity. (Citations omitted).

March 21, 2001 bond hearing constitute a deniel of due process whereas no charges were filed prior of hearing.

3. Did General Session lack subject matter jurisdiction to impose March 20, 2002 judgment?

a. Pursuant S.C. Code Ann. 17-19-10 General Session lacked subject matter jurisdiction wherefore Petitioner were directly indicted for felony dui and reckless homicide on February 28, 2002. It's promulgated by U.S. 5 Amendment as well as S.C. Const. Art. 1 section 11 No person shall be held to answer for any crime the jurisdiction over which is not within the magistrate court unless on a presentment or indictment of a grand jury, As the record reflect Petitioner were before the court by way of a traffic citation.

Pursuant South Carolina's jurisprudence magistrate and municipalities vest all jurisdiction of uniform traffic ticket.

Furthermore Petitioner were deprived of procedural due process whereas he never received legitimate bond hearing before March 20, 2002 conviction it's well established S.C. Const. Art. 1 section 15 mandate all person shall be before conviction bailable by sufficient sureties but bail may be denied to a person charged with capital offenses or offense punishable by life imprisonment or with violent offense define by the General Assembly given due weight to the evidence and the nature and circumstances of the event.

Excessive bail shall not be required, nor shall excessive fines be imposed, nor shall cruel, nor corporal, nor unusual punishment be inflected.

Therefore S.C. Const. Art. 1 section 15 command deprive the court of General Session of jurisdiction over the subject matter jurisdiction because the jurisdiction of the court over the subject matter of a proceeding is determinded by the Constitution and the laws of this State and is fundamental. Lack of subject matter jurisdiction can not be waived not even by consent of parties and should be taken notice of by this Court. The jurisdiction of a court over the subject matter of a proceeding is determined by the Constitution laws of this State and is fundamental lack of subject matter jurisdiction may not be waived even by consent of parties and should be taken notice of by this court.

As a threshold matter, sentence imposed on March 20, 2002 is void.

On October 12, 2020, Petitioner filed a document titled "SCRcivP. Rule 55" and requested that this Court enter a judgment of default against Respondent for failure to respond to the petition within thirty days of its service. Petitioner further requested that he be awarded $10,000 in attorney fees.[3]

Before this Court are the Cherokee County Clerk of Court's records regarding the subject convictions, Petitioner's records from the South Carolina Department of Corrections, records from the prior PCR and federal habeas corpus proceedings, and the subject petition for habeas corpus.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

Motion for Default Judgment

Petitioner's Rule 55 motion for default judgment is improper and shall be denied. Rule 55(e), SCRCP, states the following:

> No Judgment by default shall be entered **against the State of South Carolina** or an officer or agency thereof, against minors, incompetents, or parties to a suit for divorce or annulment of marriage or against a party upon whom service of summons was made by publication, and who did not subsequently make appearance in the action, or in any in rem action, unless the claimant establishes his claim to relief by evidence satisfactory to the Court.

(Emphasis added).

Additionally, for a petitioner challenging a prior conviction to prevail on his claim that the State did not timely answer his petition, he must show prejudice from the State's delay. *Kneece v. State*, 269 S.C. 177, 236 S.E.2d 745 (1977); *Herring v. State*, 260 S.C. 220, 195 S.E.2d 392 (1973).

[3] Applicant also submitted directly to this Court his Opposition To Respondent Summary Dismissal and a Motion and Order for Transport. These documents were also considered as part of the present ruling.

Furthermore, compliance with the statutory time limits is discretionary with the circuit court. *Guinyard*, 260 S.C. at 225, 195 S.E.2d at 393.

Respondent's delayed response has not extended the term of Petitioner's confinement, changed the conditions thereof, or otherwise prejudiced Petitioner in any way. Furthermore, Respondent submits that Petitioner cannot establish prejudice as the claims presented in his petition are without merit. These allegations are his third collateral attack on his convictions. All previous attacks have failed, both before the courts of the State of South Carolina, as well as those of the United States, and have been dismissed with prejudice. As discussed in *Guinyard*, the time period for which to file a response to petitions are discretionary. Therefore, this Court finds that the motion for default judgment is improper and shall be denied.

Subject Matter Jurisdiction

This Court shall summarily dismiss this application because of lack of subject matter jurisdiction. Petitioner has filed a writ of habeas corpus in the Court of Common Pleas. However, a state habeas petition must be filed in the original jurisdiction of the South Carolina Supreme Court. *See Keeler v. Mauney*, 330 S.C. 568, 500 S.E.2d 123 (Ct. App. 1998).[4] Lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court. *State v. Guthrie*, 352 S.C. 103, 107, 572 S.E.2d 309, 311-12 (Ct. App. 2002) (citing *State v. Brown*, 351 S.C. 522, 570 S.E.2d 559 (Ct. App. 2002)). Furthermore, lack of subject matter jurisdiction may not be waived, even by consent of the parties. *Id.* (citing

[4] Before a petitioner may proceed in the original jurisdiction of the Supreme Court, the petition must set out a constitutional claim that meets the standard delineated in *Butler v. State*, 302 S.C. 466, 397 S.E.2d 87, cert. denied, 498 U.S. 972 (1990). In Butler, the South Carolina Supreme Court held that the writ of habeas corpus will only be issued when there has been a constitutional violation "which, in the setting, constitutes a denial of fundamental fairness shocking to the universal sense of justice." *Butler*, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990) (citing *State v. Miller*, 84 A.2d 459 (N.J. Super. Ct. App. Div. 1951)).

State v. Brown, 343 S.C. 342, 346, 540 S.E.2d 846, 848 (2001)). "The acts of a court with respect to a matter as to which it has no jurisdiction are void." *Id.*

Moreover, "[a] person is procedurally barred from petitioning the circuit court for a writ of habeas corpus where the matter alleged is one which could have been raised in a [post-conviction relief] action." *Keeler*, 330 S.C. 568, 500 S.E.2d 123. In fact, *any* matter that is cognizable under the Uniform Post-Conviction Procedure Act may not be raised by a petition for a writ of habeas corpus before the circuit or lower courts of this State. *Simpson v. State*, 329 S.C. 43, 495 S.E.2d 429 (1998); *Gibson v. State*, 329 S.C. 37, 495 S.E.2d 426 (1998); *Keeler*, 330 S.C. 568, 500 S.E.2d 123. The Uniform Post-Conviction Procedure Act is broadly inclusive and will rarely be inadequate or unavailable to test the legality of the detention. *Gibson*, 329 S.C. 37, 495 S.E.2d 426. A petitioner may allege constitutional violations in post-conviction relief proceedings, unless the issue could have been raised on direct appeal. *Id.; Keeler*, 330 S.C. 568, 500 S.E.2d 123.

A habeas corpus petition must support the requested relief. *Gibson*, 329 S.C. 37, 495 S.E.2d 426; *Hunter v. State*, 316 S.C. 104, 447 S.E.2d 203 (1994). Although the allegations in the petition are to be treated as true, a petitioner must make out a prima facie case showing he is entitled to relief, and he must present sufficient factual allegations to support the petition before he is entitled to a hearing. *Gibson*, 329 S.C. 37, 495 S.E.2d 426.

To warrant a hearing, the petition must include two specific allegations. First, the petition must allege the petitioner has exhausted all available post-conviction relief remedies. *Gibson*, 329 S.C. 37, 495 S.E.2d 426; *Hunter*, 316 S.C. 104, 447 S.E.2d 203; *Pennington v. State*, 312 S.C. 436, 441 S.E.2d 315 (1994). Exhaustion includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waving, appellate review. *Gibson*, 329 S.C. 37, 495 S.E.2d 426. Second, the petition must allege sufficient facts to show why other

remedies, such as post-conviction relief, are unavailable or inadequate. *Gibson*, 329 S.C. 37, 495 S.E2d 426.

Here, the Petition must be dismissed because it is procedurally barred, leaving this Court without jurisdiction. Relief must be sought in the original jurisdiction of the South Carolina Supreme Court or in an application for post-conviction relief. The Petition wholly fails to meet the standards required for the issuance of this extraordinary writ. Petitioner provides no reason as to why his allegations could not have been raised in an application for post-conviction relief. Because the Petition is procedurally barred, the only remaining form of relief is left to the South Carolina Supreme Court under its original jurisdiction, leaving this Court without jurisdiction. The failure to file this action in the proper venue requires dismissal of the action for lack of subject matter jurisdiction. Thus, these claims cannot be raised in a petition for habeas corpus in the Circuit Courts of South Carolina. Accordingly, the Petition shall be summarily dismissed.

IV. CONCLUSION

IT IS THEREFORE ORDERED that, based on all the foregoing, this Court finds that the Petitioner's motion for default judgment is improper and must be denied. Furthermore, the petition for writ of habeas corpus must also be summarily dismissed for lack of subject matter jurisdiction.

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

AND IT IS SO ORDERED this 8th **day of** April, **2021.**

J. MARK HAYES, II
Chief Administrative Judge
Fifteenth Judicial Circuit

Cherokee, South Carolina