

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

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Ernest Toney, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2017-000063

Appeal From Lee County
The Honorable George C. James, Jr., Trial Judge
The Honorable Jocelyn Newman, Post-Conviction Relief
Judge

Memorandum Opinion No. 2019-MO-006
Submitted January 10, 2019 – Filed February 6, 2019

**AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED**

Tristan Michael Shaffer, of Chapin, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney
General Julie Amanda Coleman, both of Columbia, for
Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the denial of his application for post-conviction relief (PCR).

Because there is sufficient evidence to support the PCR judge's finding that Petitioner did not knowingly and intelligently waive his right to a direct appeal, we grant the petition for a writ of certiorari on Petitioner's Question II, dispense with further briefing, and proceed with a review of the direct appeal issue pursuant to *Davis v. State*, 288 S.C. 290, 342 S.E.2d 60 (1986).

Petitioner's conviction and sentence are affirmed pursuant to Rule 220(b)(1), SCACR, and the following authorities: *Mize v. Blue Ridge Ry. Co.*, 219 S.C. 119, 129-30, 64 S.E.2d 253, 258 (1951); *State v. Taylor*, 399 S.C. 51, 64, 731 S.E.2d 596, 603 (Ct. App. 2012); *Duncan v. Hampton Cty. Sch. Dist. No. 2*, 335 S.C. 535, 545 n.6, 517 S.E.2d 449, 454 n.6 (Ct. App. 1999) (all holding a matter not raised by one of the parties to be unpreserved for appeal even if the trial court raises it *sua sponte*); *State v. Duncan*, 392 S.C. 404, 410, 709 S.E.2d 662, 665 (2011) (holding immunity from criminal prosecution under S.C. Code Ann. §16-11-440 (2015) is to be decided prior to trial); *State v. Curry*, 406 S.C. 364, 370, 752 S.E.2d 263, 266 (2013) (holding a defendant is entitled to either a pre-trial immunity hearing under the Protection of Persons and Property Act or a self-defense jury charge but not both).

We grant the petition for a writ of certiorari on Petitioner's Question I, dispense with further briefing, and reverse the decision of the PCR court summarily dismissing Petitioner's ineffective assistance of counsel claims under S.C. Code Ann. § 17-27-45(a) (2014). *Wilson v. State*, 348 S.C. 215, 559 S.E.2d 581 (2002) (holding an applicant who was denied his right to a direct appeal due to ineffective assistance of counsel should not be denied his right to a PCR application because of the one-year statute of limitations). This matter is remanded to the PCR court for an evidentiary hearing on the merits of Petitioner's PCR application.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

BEATTY, C.J., KITTREDGE, HEARN and FEW, JJ., concur; JAMES, J., not participating.