

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable L. Casey Manning, Circuit Court Judge

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Jun 28 2022

S.C. SUPREME COURT

GARY A. WHITE,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2021-001270

APPENDIX

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1 DECEITFUL MEANS. KIDNAP IS TO REMOVE A PERSON
2 AGAINST HIS WILL BY UNLAWFUL FORCE OR BY FRAUD.

3 ABDUCT MEANS TO CARRY OFF SECRETLY OR BY FORCE
4 FOR AN ILLEGAL PURPOSE. CARRIED AWAY MEANS TO
5 REMOVE. THE STATE DOES NOT HAVE TO PROVE THAT THE
6 DEFENDANT DID ALL OF THESE THINGS. INSTEAD, IF YOU
7 FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT DID
8 ANY OF THESE THINGS, YOU MAY FIND THE DEFENDANT
9 GUILTY OF KIDNAPPING.

10 SOMETHING DONE WITHOUT AUTHORITY OF LAW IS
11 SOMETHING WHICH THE LAW DOES NOT SANCTION, PERMIT,
12 ALLOW, CONDONE, OR PROVIDE JUSTIFICATION FOR.

13 KIDNAPPING DOES NOT HAVE TO BE FOR ANY PERSONAL
14 OR MONETARY GAIN, FOR ANY ILLEGAL PURPOSE, BUT MAY BE
15 FOR ANY REASON WHATSOEVER.

16 NOW, IF THE CRIME IS COMMITTED BY TWO OR MORE
17 PEOPLE WHO ARE ACTING TOGETHER IN COMMITTING A CRIME,
18 THE ACT OF ONE IS THE ACT OF ALL. A PERSON WHO JOINS
19 ANOTHER TO ACCOMPLISH AN ILLEGAL PURPOSE IS
20 CRIMINALLY RESPONSIBLE FOR EVERYTHING DONE BY THE
21 OTHER PERSON WHICH OCCURS AS A NATURAL CONSEQUENCE OF
22 THE ACT DONE IN CARRYING OUT THE COMMON PLAN AND
23 PURPOSE.

24 FOR EXAMPLE, TWO PEOPLE CAN BE GUILTY OF KILLING
25 ANOTHER PERSON WHEN ONLY ONE OF THE TWO HAD A GUN.

1 THERE WAS ONLY ONE BULLET AND ONLY ONE OF THE TWO
2 FIRED THE GUN THAT CAUSED THE DEATH.

3 IF TWO OR MORE PEOPLE ARE TOGETHER, ACTING
4 TOGETHER, ASSISTING EACH OTHER IN COMMITTING THE
5 OFFENSE, THE ACT OF ONE IS THE ACT OF ALL OR AS
6 THE -- AS IS SOMETIMES SAID, THE HAND OF ONE IS THE
7 HAND OF ALL.

8 PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE
9 COMMITTED WITHOUT MORE IS NOT SUFFICIENT TO MAKE A
10 PERSON GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT
11 ANOTHER COURSE -- ANOTHER PERSON IS GOING TO COMMIT A
12 CRIME, EVEN IF THE DEFENDANT IS PRESENT WHEN THE
13 CRIME IS COMMITTED, IS NOT SUFFICIENT TO CONVICT THE
14 DEFENDANT AS A PRINCIPAL.

15 GUILT AS A PRINCIPAL IS SHOWN BY ACTUAL OR
16 CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF
17 PRIOR ARRANGEMENT; THEREFORE, A FINDING OF PRIOR
18 ARRANGED PLAN OR COMMON SCHEME IS NECESSARY FOR THE
19 FINDING OF GUILT.

20 A PRINCIPAL IN A CRIME IS ONE WHO EITHER
21 ACTUALLY COMMITS THE CRIME OR WHO IS PRESENT AIDING,
22 ABETTING, OR ASSISTING IN COMMITTING THE CRIME.

23 WHEN A PERSON DOES AN ACT IN THE PRESENCE OF AND
24 WITH THE ASSISTANCE OF ANOTHER, THE ACT IS DONE BY
25 BOTH. WHERE TWO OR MORE ACTING WITH A COMMON PLAN OR

1 INTENT ARE PRESENT AT THE COMMISSION OF THE CRIME, IT
2 DOES NOT MATTER WHO ACTUALLY COMMITS THE CRIME. ALL
3 ARE GUILTY, THE HAND OF ONE IS THE HAND OF ALL.

4 PRESENT AT THE COMMISSION OF A CRIME NEEDS TO BE
5 SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN THE
6 COMMISSION OF THE CRIME. HOWEVER, MERE PRESENCE AT
7 THE SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT --
8 TO CONVICT ONE ON AS A PRINCIPAL ON THE THEORY OF
9 AIDING AND ABETTING.

10 INTENT IS ALSO A NECESSARY ELEMENT, FOR THERE
11 MUST HAVE BEEN A COMMON DESIGN OR INTENT TO COMMIT
12 THE CRIME AND THE CRIME MUST HAVE BEEN COMMITTED
13 PURSUANT THERETO WITH THE PERSON AIDING AND ABETTING
14 BY SOME OVERT ACT.

15 INTENT MEANS INTENDING THE RESULT WHICH IS
16 ACTUALLY OCCURRING, NOT ACCIDENTALLY, NOT
17 INVOLUNTARY. INTENT MAY BE SHOWN BY ACTS AND CONDUCT
18 OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM WHICH
19 YOU MAY NATURALLY AND REASONABLY INFER INTENT. THE
20 STATE MUST PROVE THESE ELEMENTS BEYOND A REASONABLE
21 DOUBT.

22 AS I SAID, THE STATE MUST PROVE CRIMINAL INTENT.
23 CRIMINAL INTENT MUST BE PROVEN BY THE STATE BEYOND A
24 REASONABLE DOUBT. IT IS ALWAYS A MATTER THAT MUST BE
25 DETERMINED BY THE JURY FROM THE CIRCUMSTANCES

1 SURROUNDING THE SITUATION.

2 THERE IS NO WAY TO PROVE INTENT TO A
3 MATHEMATICAL CERTAINTY. THERE'S NO MEDICAL SCIENCE
4 WHICH CAN DISSECT A PERSON'S BRAIN AND DETERMINE WHAT
5 THE PERSON HAD IN MIND. SO THE LAW SAYS THAT
6 CRIMINAL INTENT MAY BE INFERRED FROM THE
7 CIRCUMSTANCES SHOWN TO HAVE EXISTED. THIS IS HOW YOU
8 MAKE A DETERMINATION OF WHETHER OR NOT THE ELEMENT
9 REQUIRING INTENT WAS PRESENT.

10 IT DID NOT -- NECESSARY TO ESTABLISH INTENT BY
11 DIRECT AND POSITIVE EVIDENCE, BUT INTENT MAY BE
12 ESTABLISHED BY INFERENCE FROM THE SAME WAY AS ANY
13 OTHER FACT BY TAKING INTO CONSIDERATION THE ACTS OF
14 THE PARTY AND ALL OF THE FACTS AND CIRCUMSTANCES OF
15 THE CASE.

16 CRIMINAL INTENT IS A MENTAL STATE, THAT
17 CONSCIOUS WRONGDOING. IT'S UP TO YOU TO DETERMINE
18 WHAT THE DEFENDANT INTENDED TO DO BASED ON THE
19 CIRCUMSTANCES SHOWN TO HAVE EXISTED AT THE TIME.

20 AND YOU HAVE BEEN SELECTED AS FAIR AND IMPARTIAL
21 JURORS SWORN TO IMPARTIALLY TRY AND DETERMINE THE
22 FACTS OF THIS CASE. AND WHEN YOU COMPLY WITH YOUR
23 OATH TO DO SO, THEN NO ONE WILL HAVE A RIGHT TO
24 CRITICIZE YOUR VERDICT AND YOU WILL HAVE FULLY
25 DISCHARGED YOUR DUTY AS JURORS.

1 YOU ARE TO DECIDE THIS CASE ACCORDING TO THE
2 TESTIMONY THAT YOU HAVE HEARD FROM THE LIPS OF THE
3 SWORN WITNESSES ALONG WITH OTHER EVIDENCE INTRODUCED.

4 I CHARGE YOU THAT AS JURORS YOU MUST DECIDE THE
5 ISSUES IN THIS PROCEEDING WITHOUT BIAS AND WITHOUT
6 PREJUDICE TO ANY PARTY. CANNOT ALLOW YOURSELF TO BE
7 GOVERNED BY SYMPATHY, BY PASSION, BY PUBLIC OPINION,
8 OR BY ANY OTHER ARBITRARY FACTOR.

9 BOTH THE STATE AND THE DEFENDANT HAVE A RIGHT TO
10 EXPECT THAT EACH OF YOU WILL CAREFULLY AND
11 IMPARTIALLY CONSIDER ALL OF THE EVIDENCE IN THIS CASE
12 AND THAT YOU WILL FOLLOW THE LAW AS I HAVE EXPLAINED
13 IT TO YOU.

14 AND MR. FOREMAN AND MEMBERS OF THE JURY, I HAVE
15 PREPARED THREE VERDICT FORMS, ONE FOR EACH OF THE
16 CHARGES. EACH VERDICT FORM CONTAINS TWO POSSIBLE
17 VERDICTS.

18 NOW, YOU ARE NOT TO INFER ANYTHING BY WHAT GOES
19 FIRST AND WHAT GOES SECOND ON THESE VERDICT FORMS
20 BECAUSE SOMETHING HAS TO GO FIRST AND SOMETHING HAS
21 TO GO SECOND.

22 EACH VERDICT FORM HAS TWO POSSIBLE VERDICTS AS I
23 HAVE TOLD YOU. THE FIRST IS, WE THE JURY UNANIMOUSLY
24 FIND THE DEFENDANT GUILTY OF THE CRIME OF KIDNAPPING
25 OR WE THE JURY UNANIMOUSLY FIND THE DEFENDANT NOT

1. GUILTY OF THE CRIME OF KIDNAPPING.

2 THE SECOND VERDICT FORM IS, WE THE JURY
3 UNANIMOUSLY FIND THE DEFENDANT GUILTY OF ARMED
4 ROBBERY, AND IT RELATES TO AT THE TOP THE ARMED
5 ROBBERY OF J GWEN ANTHONY, OR WE THE JURY UNANIMOUSLY
6 FIND THE DEFENDANT NOT GUILTY OF THE CRIME OF ARMED
7 ROBBERY.

8 THE THIRD VERDICT FORM SAYS, WE THE JURY
9 UNANIMOUSLY FIND THE DEFENDANT GUILTY OF ARMED
10 ROBBERY OR WE THE JURY UNANIMOUSLY FIND THE DEFENDANT
11 NOT GUILTY OF THE CRIME OF ARMED ROBBERY. UP AT THE
12 TOP IT RELATES TO THE CIRCLE K ALLEGATION.

13 NOW, AS THIS VERDICT FORM SAYS, YOUR VERDICT
14 MUST BE A UNANIMOUS VERDICT. IT'S GOT TO BE THE
15 VERDICT OF ALL 12 JURORS. CANNOT BE 11-ONE,
16 EIGHT-FOUR. IT HAS TO BE THE UNANIMOUS VERDICT OF
17 EACH JUROR.

18 EACH INDICTMENT MUST BE CONSIDERED SEPARATELY
19 AND YOU MUST REACH A VERDICT AS TO EACH INDICTMENT ON
20 THE EVIDENCE THAT HAS BEEN PRESENTED RELATED TO THAT
21 PARTICULAR INDICTMENT. AND WITH EACH INDICTMENT,
22 AGAIN, IT MUST BE THE UNANIMOUS VERDICT OF ALL 12
23 JURORS.

24 WHAT I'M GOING TO ASK YOU TO DO, MR. FOREMAN, IS
25 WHEN YOU HAVE REACHED A VERDICT WITH RESPECT TO EACH

1 CHARGE, IF YOU WILL CIRCLE THAT VERDICT COMPLETELY,
2 WHATEVER IT IS, WE FIND THE DEFENDANT GUILTY OR WE
3 FIND THE DEFENDANT NOT GUILTY. YOU WILL THEN SIGN IT
4 AS FOREPERSON AND DATE IT.

5 WHEN YOU HAVE REACHED A VERDICT AS TO ALL THREE
6 CHARGES AND ALL YOUR VERDICT FORMS ARE COMPLETED, IF
7 YOU OR SOMEONE WILL KNOCK ON THE DOOR, THERE WILL BE
8 A BAILIFF SEATED OUTSIDE YOUR DOOR. ADVISE THE
9 BAILIFF THAT YOU HAVE REACHED A VERDICT AS TO ALL THE
10 CHARGES. WE WILL THEN BRING YOU BACK INTO THE
11 COURTROOM SO THAT YOUR VERDICT CAN BE PUBLISHED.

12 NOW, I'M GOING TO ASK ALL OF YOU BUT THE
13 ALTERNATE IF YOU WOULD STEP BACK TO THE JURY ROOM,
14 BUT DO NOT BEGIN YOUR DELIBERATIONS. I MUST REVIEW
15 WITH THE ATTORNEYS TO DETERMINE WHETHER THEY BELIEVE
16 I EITHER FAILED TO INSTRUCT YOU SOMETHING THAT I
17 SHOULD HAVE INSTRUCTED YOU OR I INCORRECTLY
18 INSTRUCTED YOU SOMETHING AND THAT IT NEEDS TO BE
19 CORRECTED.

20 IF AN ADDITIONAL INSTRUCTION IS NECESSARY, I
21 WILL BRING YOU RIGHT BACK OUT AND GIVE THAT TO YOU.
22 IF NO ADDITIONAL INSTRUCTIONS ARE NECESSARY, I WILL
23 HAVE THE BAILIFF BRING ALL OF THE VERDICT FORMS ALONG
24 WITH ALL EXHIBITS THAT HAVE BEEN INTRODUCED INTO THIS
25 CASE TO THE JURY ROOM AND YOU CAN BEGIN YOUR

1 DELIBERATIONS AT THAT TIME.

2 STEP BACK TO THE JURY ROOM. DO NOT BEGIN YOUR
3 DELIBERATIONS. MR. ALTERNATE, YOU WILL REMAIN WITH
4 ME MOMENTARILY, I WOULD APPRECIATE IT.

5 (JURY LEFT THE COURTROOM AT 4:41 P.M.)

6 THE COURT: I NORMALLY WOULD TURN YOU LOOSE AT
7 THIS TIME, BUT MRS. LAIRD HAD INDICATED A LITTLE
8 WHILE AGO THAT SHE IS NOT FEELING WELL. AND I'M
9 GOING TO ASK IF YOU WILL STAY WITH US FOR A WHILE. I
10 WILL PUT YOU BACK IN ONE OF THE JURY ROOMS.

11 UNFORTUNATELY YOU HAVE TO BE BY YOURSELF, BUT --
12 AND LET ME SEE WHETHER SHE'S GOING TO BE ABLE TO
13 BEGIN THIS PROCESS OF DELIBERATING. IF SHE'S NOT
14 FEELING WELL, I TOLD HER THAT SHE DIDN'T HAVE TO FEEL
15 OBLIGATED TO STAY HERE BECAUSE I DON'T WANT HER HERE
16 SICK.

17 IF I HAVE TO LET HER GO, THEN I'M GOING TO NEED
18 YOU TO STEP BACK IN AND BEGIN -- BEGIN THE PROCESS OF
19 SERVING ON THAT JURY. I WILL CHECK WITH HER IN A
20 LITTLE WHILE AND SEE HOW SHE'S DOING.

21 IF SHE FEELS LIKE THAT SHE'S DOING OKAY AND
22 SHE'S GOING TO BE ALL RIGHT, THEN I WILL MAKE A
23 DECISION AT THAT TIME, MAYBE WE WILL BE ABLE TO LET
24 YOU GO AT THAT TIME. BUT I'M GOING TO ASK YOU TO
25 STAY A LITTLE BIT AND LET ME SEE HOW SHE DOES.

1 PLEASE DON'T DISCUSS THE CASE BACK WHERE WE PUT
2 YOU. THERE WON'T BE ANYBODY TO TALK TO, BUT IF YOU
3 TALK TO YOURSELF ABOUT IT, TALK QUIETLY. ALL RIGHT.
4 CAN Y'ALL -- SOMEBODY LET HIM GO BACK TO ONE OF THE
5 JURY ROOMS?

6 THE CLERK: YES, SIR.

7 THE COURT: I GUESS JUDGE LLOYD HAS A JURY, TOO,
8 SO HE NEEDS HIS JURY ROOM. IF YOU GO JUST RIGHT OUT
9 HERE, MR. TRUETT WILL MEET YOU.

10 (ALTERNATE OUT OF COURTROOM 4:43 P.M.)

11 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
12 WITH RESPECT TO THE CHARGE?

13 MS. COOPER: NO, SIR, YOUR HONOR.

14 THE COURT: ANYTHING FROM THE DEFENDANT?

15 MRS. DURANT: NO, YOUR HONOR.

16 THE COURT: ALL RIGHT. IF Y'ALL WILL GET WITH
17 MRS. RICHARDSON AND LET'S MAKE SURE WE HAVE ALL THE
18 VERDICT -- I MEAN ALL THE EXHIBITS. AND HERE ARE THE
19 VERDICT FORMS. WE CAN SEND THAT BACK AND WE WILL LET
20 THEM BEGIN THEIR DELIBERATIONS AND SEE HOW THEY DO.

21 (JURY BEGAN DELIBERATIONS AT 4:50 P.M.)

22 THE COURT: THE JURY WANTS TO KNOW, ARE WE ON A
23 CERTAIN TIME SCHEDULE FOR THE REST OF THE AFTERNOON.
24 THE TIME SCHEDULE IS UNTIL THEY REACH A VERDICT
25 BASICALLY, BUT I'M GOING TO BRING THEM IN -- I'M

1 GOING BRING THE JURY IN AND SORT OF SEE WHAT THEY
2 WANT TO DO AND I -- ALL RIGHT. LET'S BRING THE JURY
3 IN.

4 BAILIFF: ALL RIGHT, SIR.

5 (JURY ENTERED THE COURTROOM AT 5:16 P.M.)

6 THE COURT: OKAY. MR. FOREMAN, I GOT YOUR NOTE
7 WHERE I GUESS BASICALLY YOU'RE ASKING WHAT THE
8 TIMEFRAME IS. YOU KNOW, OUR TIMEFRAME IS WE'RE HERE
9 UNTIL Y'ALL REACH A VERDICT WHICH -- HOWEVER LONG IT
10 TAKES.

11 NOW, IT'S 5:15. I DON'T KNOW WHETHER, YOU KNOW,
12 WE'LL TRY TO ACCOMMODATE YOU IN ANY WAY WE POSSIBLY
13 CAN. AND YOU KNOW, ONE OF THE THINGS WE CAN DO IS
14 DELIBERATE A CERTAIN PERIOD OF TIME.

15 AND WE CERTAINLY DON'T WANT TO RUSH THE JURY TO
16 JUDGMENT. WE WANT YOU TO HAVE AN ADEQUATE AMOUNT OF
17 TIME, YOU BEING THE JURY COLLECTIVELY, TO CONSIDER
18 AND DELIBERATE ALL YOU NEED TO CONSIDER AND
19 DELIBERATE BEFORE YOU REACH A VERDICT.

20 WE HAVE THE OPTION AT SOME POINT IN TIME YOU CAN
21 RECESS FOR THE EVENING AND COME BACK TOMORROW AND --
22 UNDER THE CONDITION THAT YOU MAKE SURE YOU -- NO ONE
23 TALKS ABOUT THIS CASE WHILE YOU'RE GONE.

24 BUT IF -- THERE IS NO SET SCHEDULE. I HAVE SAT
25 IN COURTHOUSES TILL THE WEE HOURS OF THE MORNING

1 WAITING ON JURIES TO REACH VERDICTS. I WAS A LITTLE
2 YOUNGER AND MORE ENERGETIC IN THOSE DAYS, BUT WE'LL
3 ACCOMMODATE YOU WITHIN REASON ANY WAY WE POSSIBLY
4 CAN.

5 Y'ALL WANT TO DELIBERATE FOR A WHILE AND THEN
6 SEE HOW IT GOES AND -- AT SOME POINT IN TIME I MAY
7 TAKE INITIATIVE AND TELL YOU WE'RE GOING TO BREAK FOR
8 THE EVENING OR YOU CAN COME BACK AND LET THE BAILIFFS
9 KNOW AND WE CAN CONSIDER WHAT YOU WANT TO DO. ALL
10 RIGHT.

11 WE DON'T HAVE A TIME, YOU KNOW, AT 5:30 WE ARE
12 OUT OF HERE. I THINK I TOLD ONE OR MORE OF THE
13 JURORS YESTERDAY, I GUESS MRS. WILLIAMS, DON'T LOOK
14 FOR 5:30 TODAY. ALL RIGHT. Y'ALL STEP BACK. OH,
15 MS. LAIRD, HOW YOU DOING?

16 JUROR: I'M FEELING LOTS BETTER. THANK YOU.

17 THE COURT: SHOULD I LET THE ALTERNATE GO OR YOU
18 THINK...

19 JUROR: I'M FINE.

20 THE COURT: YOU SURE?

21 JUROR: YES, SIR.

22 THE COURT: ALL RIGHT. THANK YOU. Y'ALL STEP
23 BACK AND RESUME YOUR DELIBERATIONS.

24 (JURY LEFT COURTROOM AT 5:18.)

25 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE

1 WITH RESPECT TO THE RESPONSE TO THE FOREMAN'S NOTE?

2 MS. COOPER: NO EXCEPTION, YOUR HONOR.

3 THE COURT: ANY EXCEPTION FROM THE DEFENDANT?

4 MRS. DURANT: NO, YOUR HONOR.

5 THE COURT: ALL RIGHT. WITHOUT -- ANYBODY HAVE
6 ANY OBJECTION TO MY LETTING MR. LONG ADJOURN FOR THE
7 WEEK?

8 MS. COOPER: NO OBJECTION FROM THE STATE.

9 MRS. DURANT: NO.

10 THE COURT: ALL RIGHT. MR. HOLLACE, CAN YOU
11 BRING MR. LONG BACK IN?

12 BAILIFF: BE GLAD TO, YOUR HONOR.

13 THE COURT: MAKE THIS COURT EXHIBIT NUMBER 1.

14 (ALTERNATE JUROR ENTERED THE COURTROOM.)

15 THE COURT: MR. LONG, I TALKED TO MRS. LAIRD.
16 SHE SAID SHE'S DOING MUCH BETTER AND SHE BELIEVES
17 THAT SHE'S IN A POSITION THAT WOULD ALLOW HER TO
18 CONTINUE TO DELIBERATE INTO THE EVENING AND MAYBE
19 INTO TOMORROW IF THEY ARE -- FEEL THAT WAY.

20 SO AS A RESULT, I'M GOING TO GO AHEAD AND TURN
21 YOU LOOSE AND YOU ACTUALLY WILL BE TURNED LOOSE FOR
22 THE WEEK. YOU DON'T HAVE TO RETURN TOMORROW. I DO
23 APPRECIATE YOUR WILLINGNESS TO SERVE.

24 I KNOW SOME ALTERNATES LIKE TO BE ABLE TO
25 DELIBERATE AFTER THEY SPENT ALL THE TIME IN THE CASE,

1 AND SOME ALTERNATES ARE GLAD THAT THEY DON'T HAVE TO
2 STICK AROUND AND PARTICIPATE IN THAT PROCESS.

3 BUT I DO APPRECIATE YOUR WILLINGNESS TO DO IT
4 AND YOUR ATTENTIVENESS IN THIS CASE AND I KNOW THE
5 LAWYERS AND PARTIES DO AS WELL, AND HOPE IT WASN'T
6 TOO DIFFICULT FOR YOU, AND NEXT TIME YOU HAVE AN
7 OPPORTUNITY TO COME BACK AND WORK WITH US, IF YOU
8 WILL DO SO.

9 JUROR: WILL DO.

10 THE COURT: YOU HAVE A NICE REMAINING PORTION OF
11 THE WEEK AND YOU'RE FREE TO GO. AND IF YOU NEED AN
12 EXCUSE FROM WORK, MR. TRUETT HERE WILL HANDLE THAT
13 AND--

14 JUROR: NO, I'M GOOD. THANK YOU.

15 THE COURT: THEY WILL GET YOU A CHECK SOMETIME
16 IN THE NEAR FUTURE, AND SPEND IT ON YOUR VACATION.

17 JUROR: THANK YOU, SIR.

18 (ALTERNATE OUT OF COURTROOM).

19 THE COURT: ALL RIGHT. WE WILL CONTINUE TO
20 WAIT.

21 (COURT IN RECESS.)

22 (JURY ENTERED THE COURTROOM AT 6:41 P.M.)

23 THE COURT: ALL RIGHT. THANK YOU. MR. FOREMAN,
24 Y'ALL HAVE INDICATED THAT THE FIRST THING, THAT Y'ALL
25 NEED SOME -- SOME ARTICLES TOMORROW MORNING AND YOU

1 WANT THEM IN THE JURY ROOM AT THE TIME THAT Y'ALL
2 BEGIN YOUR DELIBERATIONS.

3 IF YOU COULD TELL ME WHAT IT IS YOU NEED,
4 MR. TRUETT, OUR CLERK, WILL MAKE SURE THAT THEY ARE
5 AVAILABLE IF WE'VE GOT THEM. SO IF YOU CAN GIVE ME
6 SOME IDEA WHAT THAT IS.

7 FOREMAN: TELEVISION AND A VCR; PLEASE, SIR.

8 THE COURT: OKAY. YOU WANT THE TV AND THE VCR?

9 FOREMAN: YES.

10 THE COURT: MR. TRUETT, I ASSUME YOU KNOW HOW TO
11 WORK THAT THING?

12 THE CLERK: OURS IS THE MOST SIMPLE, YOUR HONOR.

13 THE COURT: OH, YOU GOT A DIFFERENT ONE THAN
14 THIS? ALL RIGHT. IF YOU WOULD MAKE THAT AVAILABLE
15 FOR THEM AND THEN IF YOU CAN LET THE FOREMAN OR
16 SOMEBODY IN THE JURY ROOM KNOW HOW TO OPERATE IT SO
17 THAT THEY CAN DO WHATEVER IT IS THEY NEED TO DO WITH
18 IT.

19 THE CLERK: YES, SIR, YOUR HONOR.

20 THE COURT: NOW MR. FOREMAN, YOU ALSO
21 INDICATED -- WE HAD TALKED EARLIER -- THAT Y'ALL ARE
22 AT A POINT WHERE YOU'D LIKE TO GO AHEAD AND RECESS
23 FOR THE EVENING AND RESUME TOMORROW MORNING; IS THAT
24 CORRECT?

25 FOREMAN: YES, SIR.

1 THE COURT: ALL RIGHT. WHAT TIME DO Y'ALL WANT
2 TO START, NINE OR 9:30? ALL RIGHT. NOW, WE'RE GOING
3 TO -- WHEN YOU FINISH THIS CASE, YOUR SERVICE FOR THE
4 WEEK WILL BE OVER. SO NOT -- YOU WANT TO START AT
5 9:30 .

6 FOREMAN: YES, SIR.

7 THE COURT: ALL RIGHT. Y'ALL BE HERE TOMORROW
8 MORNING AT 9:30. MR. FOREMAN, DO NOT BEGIN ANY OF
9 YOUR DELIBERATIONS UNTIL YOU HAVE ALL 12 JURORS IN
10 THE JURY ROOM. SO WHEN YOU GET 11, NOBODY TALK ABOUT
11 THE CASE UNTIL YOU HAVE EVERYBODY THERE, OKAY?

12 THE OTHER THING IS YOU'VE SPENT TWO HARD DAYS
13 WORKING ON THIS CASE. THE INSTRUCTIONS THAT I GAVE
14 YOU ABOUT DISCUSSING IT WITH EACH OTHER OR ANYONE
15 ELSE, THAT STILL STANDS.

16 DO NOT DISCUSS THIS CASE WITH EACH OTHER IN ANY
17 MANNER UNTIL YOU GET ALL OF YOUR JURORS IN THERE AND
18 THE FOREPERSON THAT -- TELLS YOU YOU CAN BEGIN YOUR
19 DELIBERATIONS AGAIN.

20 DO NOT DISCUSS THE CASE WITH ANYBODY THAT YOU
21 COME IN CONTACT WITH. I KNOW YOU HAVE FAMILY MEMBERS
22 OR FRIENDS AND THEY MAY WANT TO KNOW WHAT IT IS THAT
23 YOU'RE DOING, BUT PLEASE DON'T DO THAT.

24 Y'ALL HAVE WORKED HARD FOR THE LAST COUPLE OF
25 HOURS AND DON'T WANT TO DO ANYTHING TO JEOPARDIZE IT.

1 I DON'T WANT TO JEOPARDIZE THE DEFENDANT OR THE STATE
2 IN THEIR CASE, SO PLEASE DON'T DISCUSS THE CASE.

3 I DOUBT SERIOUSLY WHETHER THERE'S GOING TO BE
4 ANYTHING ON THE TELEVISION OR ON THE RADIO OR IN THE
5 NEWSPAPER. IF THERE IS, DON'T READ IT, LISTEN TO IT
6 OR WATCH IT.

7 AND Y'ALL HAVE A NICE EVENING. WE WILL SEE YOU
8 TOMORROW MORNING. WHENEVER YOU GET YOUR 12, YOU CAN
9 BEGIN YOUR DELIBERATIONS, BUT DON'T ANYBODY BE LATER
10 THAN 9:30. THANK YOU VERY MUCH AND WE WILL SEE YOU
11 TOMORROW MORNING. NOW MR, FOREMAN IF EVERYBODY GETS
12 THERE AT 9:25, YOU CAN START THEN.

13 FOREMAN: MYSELF INCLUDED.

14 THE COURT: YOU DON'T NEED -- IT'S UP TO YOU.
15 YOU DON'T NEED ME TO COME IN AND GIVE YOU ANY
16 INSTRUCTIONS. JUST WHEN YOU GET YOUR 12, YOU GO
17 AHEAD AND BEGIN. AND IF YOU'LL BE HERE A FEW MINUTES
18 EARLY, I WILL HAVE MR. TRUETT GET THAT VCR FOR YOU.

19 FOREMAN: OKAY.

20 (JURY LEFT COURTROOM AT 6:45 P.M.)

21 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE?

22 MS. COOPER: NO, SIR, YOUR HONOR.

23 THE COURT: WITH RESPECT TO THE INSTRUCTIONS?
24 ANYTHING FROM THE DEFENDANT?

25 MRS. DURANT: NO, SIR, YOUR HONOR.

1 THE COURT: ALL RIGHT. MR. TRUETT, IF YOU WILL
2 GET THAT FOR THEM, I WILL APPRECIATE IT. Y'ALL HAVE
3 A NICE EVENING AND WE WILL SEE YOU TOMORROW MORNING.

4 (COURT IN RECESS FOR EVENING.)

5 ***** MAY 16TH, 2005 *****

6 (JURY RESUMED DELIBERATIONS AT 9:30 AM WHILE THE
7 COURT WENT ABOUT OTHER BUSINESS OF THE COURT IN THE
8 COURTROOM.)

9 (WHEREUPON WORD CAME TO THE COURT THAT AT 10:43
10 A.M. A VERDICT HAD BEEN REACHED.)

11 (DEFENDANT IN COURTROOM AT 10:48 A.M.)

12 THE COURT: ANYBODY ELSE DOWN THERE? Y'ALL JUST
13 LOCKED THE DOOR? ALL RIGHT. SENT WORD THE JURY HAS
14 REACHED A VERDICT. THE STATE READY TO RECEIVE THE
15 WORD?

16 MS. COOPER: YES, YOUR HONOR.

17 THE COURT: DEFENSE READY?

18 MRS. DURANT: YES, YOUR HONOR.

19 THE COURT: GOOD. MR. LEWIS, BRING IN THE JURY..

20 (WHEREUPON THE JURY ENTERED THE COURTROOM AT
21 10:51 A.M.)

22 VERDICT

23 THE COURT: ALL RIGHT. THANK YOU. GOOD
24 MORNING, LADIES AND GENTLEMEN, AND I APPRECIATE YOU
25 COMING IN THIS MORNING AND BEGINNING YOUR WORK.

1 BEFORE I GET INTO YOUR VERDICT I NEED TO ASK YOU A
2 COUPLE OF QUESTIONS.

3 DID ANYBODY DISCUSS THIS CASE LAST NIGHT WITH
4 ANYONE WHILE YOU WERE GONE? WERE YOU APPROACHED BY
5 ANYBODY TO DISCUSS THIS CASE WHILE YOU WERE GONE?
6 ALL RIGHT. GOOD. THANK YOU. MR. FOREMAN, IT'S BEEN
7 REPORTED THAT Y'ALL HAVE REACHED A VERDICT?

8 FOREMAN: YES, SIR.

9 THE COURT: AND YOU'VE -- AND THIS IS A
10 UNANIMOUS VERDICT WITH RESPECT TO ALL THREE
11 INDICTMENTS?

12 FOREMAN: YES, YOUR HONOR.

13 THE COURT: ALL RIGHT. IF YOU WOULD HAND THE
14 VERDICT FORMS TO THE CLERK.

15 (CLERK APPROACHED THE FOREMAN THEN APPROACHED
16 THE COURT.)

17 THE CLERK: THE STATE OF SOUTH CAROLINA, COUNTY
18 OF RICHLAND, IN THE COUNT OF GENERAL SESSIONS. THE
19 STATE OF SOUTH CAROLINA VERSUS GARY WHITE, JUNIOR,
20 DEFENDANT.

21 THE VERDICTS ARE: ON INDICTMENT 04-GS-40-3017,
22 INDICTMENT FOR KIDNAPPING, THE VERDICT IS, WE THE
23 JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY OF THE
24 CRIME OF KIDNAPPING. SIGNED DANIEL MCNIFF ON THIS
25 16th DAY OF JUNE, 2005.

1 ON INDICTMENT 04-GS-40-3016, AN INDICTMENT FOR.
2 ARMED ROBBERY, VICTIM J GWEN ANTHONY, THE VERDICT IS,
3 WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY OF
4 THE CRIME OF ARMED ROBBERY. SIGNED DANIEL MCNIFF ON
5 THIS 16th DAY OF JUNE, 2005.

6 ON THE INDICTMENT 04GS-40-3018, INDICTMENT FOR
7 ARMED ROBBERY AT CIRCLE K, THE VICTIM, THE VERDICT
8 IS, WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY
9 OF THE CRIME OF ARMED ROBBERY, SIGNED DANIEL MCNIFF
10 ON THIS 16th DAY OF JUNE, 2005.

11 MR. FOREMAN, IS THIS YOUR VERDICT AND THE
12 VERDICT OF THE ENTIRE JURY?

13 FOREMAN: YES, SIR.

14 THE CLERK: THANK YOU.

15 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
16 WITH RESPECT TO THE JURY?

17 MS. COOPER: NO, SIR, YOUR HONOR.

18 THE COURT: ANYTHING FROM THE DEFENDANT?

19 MRS. DURANT: NO, YOUR HONOR.

20 THE COURT: ALL RIGHT. MR. FOREMAN, LADIES AND
21 GENTLEMEN OF THE JURY, I THANK YOU VERY MUCH FOR YOUR
22 SERVICE. I KNOW YOU'VE WORKED HARD BOTH DURING THE
23 COURSE OF THE TRIAL AND YESTERDAY AFTERNOON AND TODAY
24 YOU HAVE DELIBERATED, AND AS YOU CAN SEE OUR SYSTEM
25 DOESN'T OPERATE WITHOUT THAT PARTICIPATION WITH

1 MEMBERS OF THE COMMUNITY SUCH AS YOURSELF.

2 (JURY DISMISSED.)

3 SENTENCING

4 THE COURT: ALL RIGHT. ANYTHING FROM THE STATE
5 WITH RESPECT TO THE VERDICT?

6 MS. COOPER: NO, SIR, YOUR HONOR.

7 THE COURT: ANYTHING FROM THE DEFENDANT?

8 MRS. DURANT: YOUR HONOR, WE DO MOVE FOR A NEW
9 TRIAL BASED ON OUR PRIOR OBJECTIONS INCLUDING BUT NOT
10 LIMITED TO THE OBJECTIONS OF NOT BEING ALLOWED TO
11 QUESTION THE WITNESS CONCERNING HIS SENTENCE HE MAY
12 BE FACING, THE RELIABILITY OF THE DOG TRACKING
13 ISSUES, AND ALL OUR OTHER OBJECTIONS, YOUR HONOR.

14 THE COURT: ALL RIGHT. ANYTHING THE STATE WANTS
15 TO SAY?

16 MS. COOPER: YOUR HONOR, JUST PURSUANT TO THE
17 CASE LAW THAT WAS PRESENTED BY THE DEFENSE, IT'S THE
18 STATE'S POSITION THAT THE WHATEVER ERROR THAT DID
19 EXIST IS HARMLESS BECAUSE BOTH CO-DEFENDANTS
20 TESTIFIED IN THIS CASE ARE CHARGED WITH EXACT SAME
21 CRIMES THAT THIS DEFENDANT IS CHARGED WITH, AND IT
22 DID COME OUT THROUGH THE TESTIMONY OF ANTHONY MORRIS
23 THAT HE WAS LOOKING AT 90 YEARS.

24 THE COURT: ALL RIGHT. AGAIN, I AM GOING TO
25 DENY THE MOTION. I MEAN, I DETERMINED NOT TO GO INTO

1 A PARTICULAR SENTENCE ON AN INDIVIDUAL BASIS, BUT
2 EACH SENTENCE WAS MORE PREJUDICIAL TO YOUR CLIENT
3 THAN PROBATIVE AND YOUR -- SO FOR THOSE REASONS I
4 MUST DENY IT.

5 I THINK THE ADMISSION OF THE DOG HANDLER AS AN
6 EXPERT WAS APPROPRIATE BASED UPON THE TESTIMONY THAT
7 HE OFFERED. ALL RIGHT. Y'ALL READY TO ENTER THIS --
8 I MEAN, DO THE SENTENCING? YOU NEED A FEW MINUTES,
9 MADAM SOLICITOR?

10 MS. COOPER: YES, SIR. IF WE COULD JUST GET A
11 MOMENT TO FINISH THE PAPERWORK, YOUR HONOR.

12 THE COURT: ALL RIGHT.

13 MRS. DURANT: YOUR HONOR, WE DO HAVE A MOTION.

14 THE COURT: OH, I'M SORRY. GO AHEAD.

15 MRS. DURANT: OKAY. OPPOSING THE LIFE WITHOUT
16 POSSIBILITY OF PAROLE SENTENCE, IF YOU'D LIKE A COPY
17 OF THAT AT THIS POINT.

18 THE COURT: SURE.

19 (PAUSE.)

20 THE COURT: ALL RIGHT. IS THERE ANYTHING THAT
21 YOU WISH TO SAY IN ADDITION TO THE MEMORANDUM?

22 MRS. DURANT: JUST THAT IT BE MADE A PART OF THE
23 RECORD AND MARKED AS A COURT EXHIBIT, YOUR HONOR.

24 THE COURT: I'M SORRY. MADE A PART OF THE
25 RECORD?

1 MRS. DURANT: YES, SIR. MARKED AS A COURT
2 EXHIBIT.

3 THE COURT: ALL RIGHT. ANYTHING Y'ALL WANT TO
4 SAY IN RESPONSE? I DON'T KNOW IF YOU READ THEIR
5 MEMORANDUM OR SOMETHING YOU WANT TO SAY IN RESPONSE
6 TO IT.

7 MS. COOPER: NO, YOUR HONOR. WE ARE JUST
8 PURSUING THE STATUTE SECTION 17-25-45 WHICH IS
9 EXPLICIT THAT ANYONE CONVICTED TWICE OF A CRIME, MOST
10 SERIOUS VIOLENT CRIMES, IS SUBJECT TO LIFE WITHOUT
11 PAROLE.

12 THE COURT: ALL RIGHT. I HAVE READ YOUR MEMO,
13 MRS. DURANT, AND I'M -- WELL, I MAY HAVE A PERSONAL
14 OPINION AS TO THIS STATUTE. I DO THINK THAT THE
15 COURT IS OBLIGATED TO FOLLOW THE STATUTE, THAT...

16 MRS. DURANT: YOUR HONOR, IF I MAY JUST READ IF
17 HEADLINE, I WON'T READ THE ENTIRE--

18 THE COURT: WELL, WE ARE GOING TO MAKE IT A PART
19 OF THE RECORD, SO...

20 MRS. DURANT: YES, SIR.

21 THE COURT: I BELIEVE MANDATORY SENTENCES ARE
22 APPROPRIATE AND THAT'S -- AT LEAST IT'S BEEN HELD TO
23 BE APPROPRIATE AND CLEARLY TO EFFECTIVE DISCRETION OF
24 THE COURT, BUT THE COURT'S DETERMINED THAT THAT IS
25 SOMETHING THAT CAN BE DONE, MANDATORY LIFE SENTENCES

1 ARE NOT DETERMINED TO BE CRUEL AND UNUSUAL
2 PUNISHMENT, I DON'T THINK IT DOES SHIFT BURDEN.

3 I MEAN, THE BURDEN STILL IS UPON THE STATE TO
4 PROVE THE DEFENDANT GUILTY BEYOND A REASONABLE DOUBT.
5 ON THIS INSTANCE I WISH THERE HAD BEEN SOME WAY THAT
6 YOUR CLIENT MIGHT HAVE BEEN ABLE TO COME TO GRIPS
7 WITH HIS CHARGE WITHOUT HAVING TO LOOK AT GOING TO
8 JAIL FOR THE REST OF HIS NATURAL LIFE, ESPECIALLY IN
9 LIGHT OF HIS BEING 23 YEARS OF AGE, AND IT HAS BEEN
10 POINTED OUT BY THE CORRECTION OFFICIALS, IMPOSES
11 THEIR OWN PROBLEM BY VIRTUE OF THESE MANDATORY LIFE
12 SENTENCES.

13 BUT I DO THINK THAT THEY ARE WITHIN THE
14 DISCRETION OF THE GENERAL ASSEMBLY AND THEY HAVE --
15 THE LAW AND COMPELLED AND BOUND TO COMPLY WITH IT.
16 SO IF YOU WILL BRING YOUR CLIENT UP HERE. ANYTHING
17 Y'ALL WANT TO TELL ME?

18 MRS. DURANT: WELL, YOUR HONOR--

19 THE COURT: I DON'T KNOW THERE IS ANYTHING I CAN
20 DO, BUT STILL...

21 MRS. DURANT: JUST FOR THE RECORD, YOUR HONOR,
22 IN RESPONSE TO YOUR SAYING THAT YOU WISH THERE HAD
23 BEEN SOMETHING ELSE, THERE WAS NEVER AN OPPORTUNITY
24 FOR--

25 THE COURT: AND I UNDERSTAND THE SOLICITOR'S

1 POSITION.

2 MRS. DURANT: YES, SIR.

3 THE COURT: IT'S MANDATORY. IT'S NOT
4 DISCRETIONARY ON THEIR PART. IT'S JUST A VERY
5 DIFFICULT SITUATION. AND HOPEFULLY PEOPLE WILL
6 REALIZE THAT WHEN THEY DO SOMETHING BAD ONCE, THAT
7 THEY WON'T DO SOMETHING BAD TWICE AND YOU KNOW WHAT
8 THE RAMIFICATIONS ARE. ANYTHING YOU WANT TO SAY,
9 MR. WHITE?

10 THE DEFENDANT: STILL MAINTAIN MY INNOCENCE.

11 THE COURT: WELL, THE JURY SPOKE TO THAT AND
12 THAT WAS THEIR FUNCTION, AND I UNDERSTAND THAT.

13 MS. COOPER: YOUR HONOR, MAY I PUT ONE MATTER ON
14 THE RECORD?

15 THE COURT: ALL RIGHT.

16 MS. COOPER: THANK YOU, YOUR HONOR. I JUST
17 WANTED TO PUT ON THE RECORD THAT THE DEFENDANT WAS
18 SERVED WITH NOTICE BY THE STATE OF ITS INTENTION TO
19 SEEK A SENTENCE OF LIFE WITHOUT PAROLE PURSUANT TO
20 SECTION 17-25-45 AND THAT WAS SERVED ON THE DEFENDANT
21 AND HIS ATTORNEY, MRS. DURANT, ON MAY 25th OF 2005.

22 HE HAS SEVEN PRIOR CONVICTIONS FOR ARMED ROBBERY
23 STEMMING FROM A TWO MONTH ARMED ROBBERY SPREE IN
24 JEFFERSON COUNTY, KENTUCKY, WHERE HE WAS CONVICTED OF
25 ALL SEVEN COUNTS ON MAY FOURTH OF 2000.

1 HE'S RECEIVED A 13 YEAR SENTENCE. HOWEVER, HE
2 WAS ALREADY OUT ON PAROLE IN THE YEAR 2003 AND CAME
3 IMMEDIATELY TO SOUTH CAROLINA. AND I WOULD LIKE TO
4 MAKE THIS DOCUMENT PART OF -- THE CERTIFIED
5 CONVICTIONS PART OF THE RECORD.

6 THE COURT: ALL RIGHT. YOU WANT TO GIVE IT TO
7 THE COURT REPORTER? SHE WILL MAKE IT A COURT'S
8 EXHIBIT.

9 MS. COOPER: THANK YOU, YOUR HONOR.

10 MRS. DURANT: YOUR HONOR, MAY I ADD JUST A
11 LITTLE BIT ABOUT HIM?

12 THE COURT: SURE.

13 MRS. DURANT: THANK YOU, YOUR HONOR. GARY IS
14 23. HE WAS A STUDENT AT ALLEN UNIVERSITY HERE IN
15 COLUMBIA WHEN THIS INCIDENT OCCURRED. HE IS
16 REPRESENTED -- HERE OF HIS FAMILY. HIS MOTHER IS IN
17 KENTUCKY NOW.

18 HIS FATHER WAS HERE AND RECENTLY MOVED TO
19 ARIZONA AND HAS CALLED CONCERNING HIS SON. I THINK
20 GARY WAS YOUNG WHEN THE FIRST OFFENSES OCCURRED IN
21 KENTUCKY, I THINK 17 OR 18 YEARS OLD, AND IS ONLY 23
22 AT THIS TIME. I JUST WANT TO PUT THAT ON THE RECORD,
23 YOUR HONOR.

24 THE COURT: ALL RIGHT. ANYTHING YOU WANT TO
25 SAY?

1 MRS. OWINGS: NO, SIR.

2 THE COURT: ALL RIGHT. 04-GS-40-3016, THE
3 SENTENCE OF THIS COURT THE DEFENDANT BE COMMITTED THE
4 DEPARTMENT OF CORRECTIONS FOR A TERM OF LIFE WITHOUT
5 PAROLE PURSUANT TO 17-25-45 STATUTE OF SOUTH
6 CAROLINA, COSTS AND ASSESSMENTS AS APPLICABLE.

7 AS TO INDICTMENT 04-GS-40-3017 WHICH IS THE
8 KIDNAPPING CHARGE, THE SENTENCE OF THIS COURT THE
9 DEFENDANT BE COMMITTED TO THE DEPARTMENT OF
10 CORRECTIONS FOR A TERM OF LIFE WITHOUT PAROLE
11 PURSUANT TO 17-25-45 PLUS COSTS AND ASSESSMENTS AS
12 APPLICABLE.

13 AND THE ARMED ROBBERY, 04-GS-40-3018, THE
14 SENTENCE OF THIS COURT THE DEFENDANT BE COMMITTED TO
15 THE DEPARTMENT OF CORRECTIONS FOR AN INDETERMINATE
16 TERM OF LIFE WITHOUT PAROLE PURSUANT TO 17-25-45 PLUS
17 COSTS AND ASSESSMENTS AS APPLICABLE. ALL OF THEM
18 WILL RUN CONCURRENT. GOOD LUCK TO YOU.

19 MRS. DURANT: THANK YOU, YOUR HONOR.

20 MS. COOPER: THANK YOU, YOUR HONOR.

21 THE COURT: MRS. OWINGS AND MRS. DURANT, DID
22 Y'ALL NEED TO SEE HIM? I NEED TO TALK -- GOT A
23 PRE-SENTENCE REPORT ON THE OTHER FELLOW AND WE NEED
24 TO... WHO WAS THE.

25 (OFF THE RECORD DISCUSSION WAS HAD CONCERNING

1 ANOTHER CASE.)

2 MS. COOPER: YOUR HONOR? IT'S ABOUT GARY WHITE
3 AND THE EVIDENCE THAT WE ADMITTED IN HIS TRIAL. I
4 WANTED TO ASK THE COURT TO PERMIT THE STATE TO OBTAIN
5 THE VICTIM'S PERSONAL ITEMS THAT WERE ADMITTED INTO
6 EVIDENCE AND SUBSTITUTE THEM WITH PHOTOCOPIES, NAMELY
7 OF HER -- HER PERSONAL FAMILY PHOTOGRAPHS IN HER
8 WALLET, HER SOCIAL SECURITY CARD, OTHER PERSONAL
9 IDENTIFICATION CARDS THAT ARE IN THAT WALLET AS WELL
10 AS THE CERTIFIED 1 DOLLAR BILL AND 2-DOLLAR BILLS
11 THAT SHE COLLECTS AND SUBSTITUTE THOSE WITH
12 PHOTOGRAPHS OR PHOTOCOPIES.

13 ACCORDING TO MR. TRUETT THAT I SPOKE TO, HE
14 REQUIRES A ORDER, AND I WANTED MRS. DURANT TO.

15 THE COURT: HAVE YOU TALKED -- DO Y'ALL HAVE ANY
16 OBJECTION TO THAT?

17 MRS. DURANT: YOUR HONOR, OUR ONLY CONCERN WOULD
18 BE PRESERVING THE RECORD FOR APPEAL, YOU KNOW, IF
19 PHOTOCOPIES--

20 THE COURT: WELL, THOSE THINGS ARE NOT -- I
21 MEAN, ARE THEY ANY ISSUE IN THE--

22 MRS. DURANT: I DON'T THINK SO. I THINK
23 PHOTOCOPIES WOULD BE FINE.

24 THE COURT: YOUR CHANCES OF SUCCESS ON APPEAL
25 ARE BASED ON ME, NOT HER; RIGHT?

1 MRS. DURANT: YES, SIR.

2 THE COURT: I DON'T HAVE A PROBLEM WITH THAT.

3 MS. COOPER: THANK YOU, YOUR HONOR. I WILL
4 PREPARE AN ORDER.

5 THE COURT: ALL RIGHT.

6 END OF REQUESTED TRANSCRIPT OF RECORD
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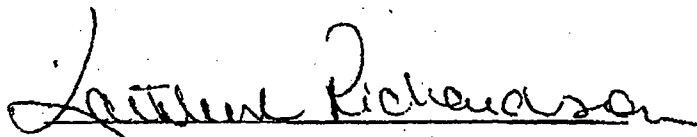
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

I, KATHLEEN RICHARDSON, RPR, OFFICIAL COURT
REPORTER FOR THE FIFTH JUDICIAL CIRCUIT OF THE STATE OF
SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE TRIAL OF
THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF
GENERAL SESSIONS FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE SIXTEENTH DAY OF JUNE, 2005.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL NOR INTEREST TO ANY PARTY HERETO.

SEPTEMBER 22, 2005



KATHLEEN RICHARDSON, RPR

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

FINAL BRIEF OF APPELLANT

AILEEN P. CLARE
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
Post Office Box 11589
Columbia, South Carolina 29211-1589
(803) 734-1343

ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUES ON APPEAL

1. Is appellant entitled to a new trial based on newly-discovered evidence, when his co-defendant, who testified against him at trial, has retracted his testimony?
2. Did the trial court err by denying appellant's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field?

STATEMENT OF THE CASE

Richland County grand jurors indicted appellant for kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a violent crime. Appellant stood trial during the June 2005 term of the Richland County Court of General Sessions before the Honorable James R. Barber and a jury. The jury found appellant guilty as charged, and he was sentenced to life confinement without the possibility of parole under to S.C. Code § 17-25-45.

This appeal follows.

ARGUMENT

1. Appellant is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Appellant was accused of being one of two masked men who robbed a Columbia convenience store at gunpoint. The state arrested appellant's co-defendant, Anthony Morris, as the other man. Morris pled guilty before appellant's trial, but sentencing was deferred until after he testified against appellant. He testified that he participated in the robbery, but that appellant was the instigator and gunman. He testified that his initial statements to police, which implicated appellant and a third co-defendant, Roy Wiggins, who drove the getaway car, were not truthful. ROA. p. 369, l. 13 - p. 406, l. 5.

On October 12, 2005, trial counsel LaNelle Durant, of the Richland County Public Defender, contacted the undersigned and informed her that Morris had retracted his testimony. Ms. Durant provided the attached sworn statement by Morris, as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Courthouse, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy['s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I believed [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic]to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what

was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris¹

Morris' statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Havden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility. The new statement does not entirely exonerate appellant, but it does weaken a foundation of the state's case. Morris' testimony was instrumental in producing appellant's conviction and life sentence without the possibility of parole. There is a reasonable probability that the testimony was false. In the interests of fundamental fairness, appellant should receive a new trial.

¹This affidavit and argument also formed the basis for appellant's motion for a new trial, which this Court denied on December 9, 2005.

2. The trial court erred by denying appellant's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.

The state alleged that appellant was located near the scene of the crime by a scent-tracking police dog. The state proffered the dog-handler, Officer Richard Gunter, as an expert witness. Appellant objected on the basis that the underlying scientific reliability of dog-tracking had not been established under State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). The court overruled appellant's objection after establishing that Gunter was qualified as an expert in the field of dog-tracking, without requiring proof of the field's scientific or technical validity. ROA. p. 191, l. 25 - p. 202, l. 10. This ruling was error.

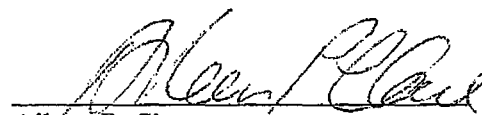
The admissibility of scientific or technical evidence should be analyzed under Rule 702, SCRE. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). When determining the admissibility of evidence under Rule 702, the trial court "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should apply the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Appellant did not challenge the expertise of the witness, but the foundation of the technique. The court should have applied the Jones factors and required the state to demonstrate the reliability of dog-tracking. While dog-tracking has been used for centuries,

the reliability of many applications has not been widely or rigorously studied. See The Mythic Infallibility of the Dog, in Andrew E. Taslitz, Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup, 42 Hastings L.J. 15 (November 1990). And, historical use, alone, should not create a presumption of reliability. If challenged, the scientific basis of an "old" but untested technique should be subjected to the same scrutiny as a new technique.

Appellant's case is distinguishable from State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). The defendant in Childs challenged the qualifications of the canine handler to testify as an expert. This Court held that the handler's experience and background was sufficient. Id. Appellant, by contrast, challenges the reliability of the entire field, and not the individual witness' qualifications. The state should have been required to present evidence showing that the fundamental bases of dog-tracking, regarding, for example, the acuity of a dog's olfactory perception and its ability to distinguish between scents, has been demonstrated by reliable, published clinical or scientific research, and not merely longtime use. At the very least, the state should have been required to submit evidence about quality control and consistency, as required under Jones. Appellant should receive a new trial.

Respectfully submitted,



Aileen P. Clare
Appellate Defender

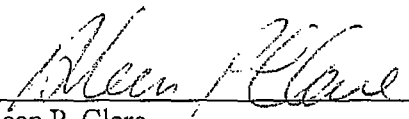
ATTORNEY FOR APPELLANT.

This 7th day of September, 2006.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

September 7, 2006


Aileen P. Clare
Appellate Defender

S.C. Commission on Indigent Defense
Division of Appellate Defense
1330 Lady Street, Suite 401
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Columbia, South Carolina 29211-1589

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

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RESPONDENT,

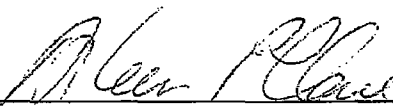
V.

GARY A. WHITE,

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CERTIFICATE OF SERVICE

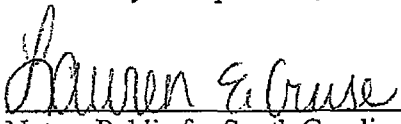
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Salley W. Elliott, Esquire, this 7th day of September, 2006.



Aileen P. Clare
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 7th day of September, 2006.



(L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

V.

GARY A. WHITE,

Appellant.

FINAL BRIEF OF RESPONDENT

HENRY DARGAN McMASTER
Attorney General

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STATEMENT OF ISSUES ON APPEAL

I.

Since his co-defendant purportedly retracted trial testimony, Appellant seeks a new trial. (Appellant's Statement of Issues on Appeal 1).

II.

Appellant says the trial court did not require the state to establish the underlying reliability of tracking dog evidence as a scientific or technical field and asks whether the trial court erred in denying his objection to testimony from the state's dog handler. (Appellant's Statement of Issues on Appeal 2).

STATEMENT OF THE CASE

Indictments 04-GS-40-3016, 04-GS-40-3017, 04-GS-40-3018 charged Appellant with two counts of armed robbery and kidnaping at a Circle K store in Richland County on, or about, April 19, 2004. Appellant and counsel came to trial June 14, 2005, before the Honorable James R. Barber, Judge, and a jury. The jury found Appellant guilty. The state had served notice to seek a sentence of life without parole, and the court sentenced Appellant to concurrent terms of life without parole. June 16, 2005, Appellant served opposing counsel notice of appeal. July 15, 2005, witness Anthony Morris made a written statement. October 19, 2005, Appellant made Motion to Remand for a New Trial, or, in the Alternative, for a Hearing into New Evidence. November 16, 2005, the state made its Return to Motion to Remand for a New Trial. By Order dated December 9, 2005, the South Carolina Court of Appeals denied the motion.

ARGUMENT

I.

The appellate court should not review a statement and issue not presented to and ruled upon by the circuit court.

After Appellant served his notice of appeal, trial witness Anthony “Amp” Morris (Morris) made a written statement claiming that he (Morris) was not at the scene of the crime. Appellant moved this Court either to remand the case for a new trial or to remand the case to the trial court for a hearing into the purported new evidence. The State opposed. This Court denied the motion. (See Respondent’s Statement of the Case; Initial Brief of Appellant, pp. 5-6).

In this appeal, Appellant incorporates the text of Morris’ purported post-trial statement into his Initial Brief and says he (Appellant) should receive a new trial. The appellate court should not consider the purported statement since it has not been considered and ruled upon by the court of general trial jurisdiction, and the statement itself is not properly before this Court.¹

The want of a lower court ruling presents nothing for this Court’s review. The appellate court does not make factual determinations, and this Court should not consider whether Appellant is entitled to a new trial based upon Appellant’s fellow’s purported recantation. E.g., State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001)(in criminal cases appellate court sits to review errors of law only and is bound by trial court’s factual

¹ Rule 29 (b), SCRCrimP governs post motions on after discovered evidence. A motion for a new trial based upon after discovered evidence may not be made while the case is on appeal unless the appellate court exercises its discretionary authority, suspends the appeal, and grants leave to proceed in the circuit court.

findings unless they are clearly erroneous); State v. Primus, 312 S.C. 256, 440 S.E.2d 128 (1994)(appellate court wanted jurisdiction to resolve whether defendant's statements were made during custody and remanded to the circuit court); State v. Moultrie, 261 S.C. 14, 198 S.E.2d 231 (1973)(citing S.C. Const. art. V, § 4 that contains provisions similar to the present art. V, § 5, effective February 26, 1985, providing "The Supreme Court shall constitute a court for the correction of errors at law under such regulations as the General Assembly may prescribe.");

A brief must reference the Record on Appeal to support the facts alleged. Rule 207(b)(4), SCACR. "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210 (c), SCACR. Morris' statement was not presented to the lower court. It could not be properly included the Record, and it should not be referenced in the Initial Brief of Appellant.

II.

The trial judge exercised sound discretion in admitting the testimony of a tracking dog handler.

Appellant objected to tracking dog evidence on the grounds that it did not meet the standards of State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979)(expert was forensic odontologist who testified about similarity of bite marks found on the victim and plaster dental impressions taken from defendant) for scientific evidence and asked the court to determine whether the tracking dog evidence was reliable, relevant, and helpful to the jury. The court noted that expert testimony did not have to be scientific or technical. Rather, it might involve specialized knowledge. (R. p. 191, line 25 - p. 193, line 9).

The state wanted to show that a tracking dog followed the scent that led to the suspect. (R. p. 201, lines 10-12). The state offered the testimony of Officer Richard Gunter, a senior master K9 handler - the highest level of handling a dog with his national association - and an assistant trainer. His dog Aurie, a German Shepherd from a known bloodline of working dogs, is a human scent dog and very reliable. Together they had followed some seven hundred fifty tracks, and he (Gunter) had been qualified as an expert witness one time previously. (R. pp. 194-198; p. 212). To track a suspect, they typically used a "fresh start point" - the last point where a suspect was seen - and the dog should stay on that one scent until he finds a suspect. When the dog finds the suspect or the person he is tracking, the dog will alert. Officer Gunter allowed that it is possible for a dog - and everybody else - to make a mistake. (R. p. 199, line 8 - p. 200, line 16). The court thought the testimony clearly admissible. (R. p. 201, lines 19-22). Appellant offered a final objection to the testimony on the ground of reliability. (R. p. 202, lines 9-

10.)

After Officer Gunter offered the foundation for his testimony before the jury, Appellant renewed his objection - apparently on the ground of reliability. The court found the officer was qualified as an expert in the field of canine tracking and charged the jury that he could offer opinions in his area of expertise. However, as with the testimony of any witness, the weight and credibility of his testimony was for the jury's determination. (Tr. p. 218 - p. 219, line 11). After the verdict, Appellant identified the "reliability" of the dog tracking testimony as a ground for a new trial, and the court denied the motion finding the dog handler's expert testimony was appropriate. (R. p. 520, line 8 - p. 521, line 7).

Officer Gunter testified that at the scene Officer Rouppasong told him that the suspect ran from the vehicle toward a tree beside 121 Old Woodlands. He got the dog to the starting point and began tracking. They tracked until Officer Gunter's back up officers and the dog located the armed subject together. (R. pp. 227-235). Officer Gunter opined that the area of the search was ideal for the dog, and the time lapse of some thirty minutes was also good, although they had followed a trail that was three or four hours old. (R. p. 237 - p. 238, line 3).

The admission of expert testimony rests in the sound discretion of the trial court. E.g., State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996). Rule 702, SCRE requires the court to find that scientific evidence "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(addressing scientific evidence - mitochondrial DNA). In addition to scientific and technical evidence, Rule 702, SCRE also addresses specialized knowl-

edge that will assist the trier of fact, and a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto. The trial judge may find tracking dog testimony admissible if the party offering such testimony is able to establish a sufficient foundation. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) (“Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into evidence.”); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)(where the court observed such factors as the handler’s experience and the scent dog’s ability and reliability could be considered); State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)(instinct of the dog must be free and untrammelled; period of dog’s efficiency in detecting scent [up to 15 hours in this case]; the handler, not the dog, is the witness). See Winston v. State, 78 S.W.3d 522 (Tex.App. 2002)(court declines to apply reliability test for scientific evidence; rather, the court noted that the admission of expert testimony is governed by Tex.R. Evid. 702, and interpretation of a dog’s reaction to a scent lineup is based upon training and experience, and not scientific method); Brooks v. People, 975 P.2d 1105 (Colo. 1999)(dog scent tracking evidence is not subject to scientific validation factors, and conventional Rule 702 and Rule 403 analysis is appropriate).

The trial judge exercised sound discretion in the admission of the tracking dog testimony under Rule 702, SCRE. Further, the expert witness’ testimony was cumulative to Officer Rouppasong’s independent identification of Appellant as the person he saw fleeing contemporaneously with the victim’s signal from the Circle K (R. pp. 150-155; pp. 160-179) and Roy Wiggins’ testimony identifying Appellant to be the instigator and a participant in the armed robbery. (R. pp. 306-323; pp. 339-341; pp. 352-354; pp. 361-362).

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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August 23, 2006

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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August 23, 2006

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Appellant.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Final Brief of Respondent on Appellant by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, Aileen P. Clare, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of August, 2006.


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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State,

Respondent,

v.

Gary A. White.

Appellant.

**Appeal from Richland County
James R. Barber, III, Circuit Court Judge**

**Opinion No. 4196
Submitted January 1, 2007 – Filed January 16, 2007**

AFFIRMED

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ANDERSON, J.: Gary A. White appeals his convictions for kidnapping and two counts of armed robbery on the grounds: (1) the trial court erred in admitting the testimony of State's expert witness, a dog handler, without establishing the underlying scientific reliability of dog tracking; and (2) newly discovered evidence entitles White to a new trial. We affirm.¹

FACTUAL/PROCEDURAL BACKGROUND

In the early morning hours of April 19, 2004, two men entered the Circle K Convenience Store on the corner of Garners Ferry Road and Old Woodlands Road in Columbia, South Carolina, where the store manager, Gwen Anthony (Anthony), was working the night shift. One of the men, Gary White (White), wore a mask and carried a gun. White approached Anthony, grasped her around her neck with his arm, and held the gun to her head. The other man removed items from Anthony's purse, emptied cash out of the register, and took lottery tickets along with an eighteen (18)-count case of beer. White held Anthony with the gun to her head the entire time the other man moved through the store taking items. However, at one point, Anthony suspected White had passed out for a few seconds, because his head fell onto her shoulder and the gun dropped. She smelled alcohol on his breath. While White dozed, Anthony had an opportunity to observe his clothes and to see the gun. The other man shouted at him and White awoke. As they exited the store, White forced Anthony outside, still holding her in his grip with the gun to her head.

White released Anthony and fled toward the east side of the store, following the other perpetrator in the direction of Old Woodlands Road. At the same time, Officer Rouppasong drove into the Circle K parking lot, and Anthony alerted him to the fleeing robbers. Officer Rouppasong saw one suspect running from the parking lot, pursued him, and called for back up. Following the suspect around the corner of the store, Rouppasong observed a parked vehicle with the headlights on. The suspect he had seen running from

¹ We decide this case without oral argument pursuant to Rule 215, SCARC.

the parking lot exited the car from the passenger side and ran into the neighborhood; the driver remained in the vehicle. When his backup arrived Rouppasong approached the vehicle, apprehended the driver, and secured the car. Items that were stolen from Anthony and the Circle K were found in the vehicle.

Back-up officers, including Officer Gunter of the K9 unit, arrived within several minutes. Gunter began tracking with his dog approximately thirty minutes after the officers set up the perimeter. The tracking started from the location where the suspect ran from the passenger side of the vehicle and ended with the discovery of the suspect lying on the ground under some bushes. The suspect was holding a gun but appeared to be asleep.

The State moved to have Gunter qualified as an expert in K9 tracking. Gunter testified he was a Senior Master K9 Handler, which is the highest level of K9 handling that can be acquired. Aurie, Gunter's dog, is a German shepherd descended from a working bloodline of known police and military dogs. Gunter stated he trained with Aurie weekly, and they had probably run a total of 750 tracks throughout the dog's career. Yearly, they met the standards to qualify with the American Association of K9 Trainers. Gunter had been with the K9 unit for approximately fourteen years, and Aurie had been with Gunter for eight years, since he was a six-month-old puppy. The dog's training was primarily for tracking lost or missing people, rather than for sniffing for drugs or other contraband.

Gunter confirmed he had been qualified previously as an expert witness in Richland County. He professed that Aurie was very reliable. The trial court found Gunter qualified as an expert in the field of K9 tracking and handling and instructed the jury that Gunter could offer opinions in his areas of expertise. White objected to admission of dog tracking evidence on the ground it did not meet standards set forth in State v. Jones concerning scientific evidence, and it was not reliable, relevant, and helpful to the jury.

The jury found White guilty of the kidnapping and two armed robbery charges. White then moved for a new trial on the ground the dog tracking testimony did not meet the reliability standard required. The court denied the

motion, finding Gunter's testimony admissible. White was sentenced to concurrent terms of life imprisonment without parole.

During the pendency of this appeal, witness Anthony Morris issued a written statement retracting his trial testimony. Subsequently, White moved for a new trial or, alternatively, for remand to the trial court for a hearing on newly discovered evidence. This court denied White's motion.

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 625 S.E.2d 216 (2006); State v. Wilson, 345 S.C. 1, 545 S.E.2d 827 (2001); State v. Wood, 362 S.C. 520, 608 S.E.2d 435 (Ct. App. 2004). We are bound by the trial court's factual findings unless they are clearly erroneous. State v. Quattlebaum, 338 S.C. 441, 527 S.E.2d 105 (2000); State v. Patterson, 367 S.C. 219, 625 S.E.2d 239 (Ct. App. 2006); State v. Landis, 362 S.C. 97, 606 S.E.2d 503 (Ct. App. 2004). This Court does not re-evaluate the facts based on its own view of the preponderance of the evidence but simply determines whether the trial judge's ruling is supported by any evidence. Wilson, 345 S.C. at 1, 545 S.E.2d at 827; State v. Mattison, 352 S.C. 577, 575 S.E.2d 852 (Ct. App. 2003).

On appeal, we are limited to determining whether the trial judge abused his discretion. State v. Reed, 332 S.C. 35, 503 S.E.2d 747 (1998); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Walker, 366 S.C. 643, 623 S.E.2d 122 (Ct. App. 2005). An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Renney v. Dobbs House, Inc., 275 S.C. 562, 274 S.E.2d 290 (1981); see also Simon v. Flowers, 231 S.C. 545, 550, 99 S.E.2d 391, 393-94 (1957) (" '[E]rror at law' exists: (1) when the circuit judge, in issuing [the order], was controlled by some error of law . . . or (2) where the order, based upon factual, as distinguished from legal, considerations, is without adequate evidentiary support."); McSween v.

Windham, 77 S.C. 223, 226, 57 S.E. 847, 848 (1907) (“[T]he determination of the court will not be interfered with, unless there is an abuse of discretion, or unless the exercise of discretion was controlled by some error of law.”). A trial court’s ruling on the admissibility of an expert’s testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair. Fields, 363 S.C. at 26, 609 S.E.2d at 509; Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001).

LAW/ANALYSIS

I. Admission of Expert Testimony

White contends the trial court erred in admitting the State’s expert witness testimony about dog tracking without requiring the State to establish the underlying reliability of dog tracking as a scientific or technical field. We disagree.

A. Qualification of Expert Witness

The qualification of an expert witness and the admissibility of the expert’s testimony are matters within the trial court’s sound discretion. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990); State v. Douglas, 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006) cert. pending; State v. Harris, 318 S.C. 178, 456 S.E.2d 433 (Ct. App. 1995); see also Prince v. Associated Petroleum Carriers, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974) (“Whether a witness has qualified as an expert, and whether his opinion is admissible on a fact in issue, are matters resting largely in the discretion of the trial judge.”). The trial court’s decision to admit expert testimony will not be reversed on appeal absent an abuse of discretion. State v. Myers, 359 S.C. 40, 596 S.E.2d 488 (2004); Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); State v. Grubbs, 353 S.C. 374, 577 S.E.2d 493 (Ct. App. 2003); State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); see also Jenkins v. E.L. Long Motor Lines, Inc., 233 S.C. 87, 94, 103

S.E.2d 523, 527 (1958) ("It was for the trial [c]ourt to say whether the inquiry was one upon which expert testimony was proper, and its ruling thereon will not be disturbed unless its [sic] appears that there has been an abuse of discretion.").

To warrant reversal based on the admission or exclusion of evidence, the complaining party must prove both the error of the ruling and the resulting prejudice. Vaught v. A.O. Hardee & Sons, Inc., 366 S.C. 475, 623 S.E.2d 373 (2005); Fields, 363 S.C. at 26, 609 S.E.2d at 509; Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). To show prejudice, there must be a reasonable probability that the jury's verdict was influenced by the challenged evidence or the lack thereof. Fields, 363 S.C. at 26, 609 S.E.2d at 509.

State v. Council inculcates the Bench and Bar as to the law extant in regard to admission of scientific evidence and expert testimony. 335 S.C. 1, 515 S.E.2d 508 (1999). In 1993, the United States Supreme Court adopted new parameters for admissibility of expert testimony under Rules 702 and 703 in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). The Daubert court declared:

Before scientific evidence is admitted, the trial judge must determine the evidence is relevant, reliable and helpful to the jury. The Court suggested four factors to consider in deciding reliability in scientific evidence cases: (1) scientific methodology; (2) peer review; (3) consideration of general acceptance; and (4) the rate of error of a particular technique.

Council, 335 S.C. at 19, 515 S.E.2d at 518 (citing Daubert, 509 U.S. at 579, 113 S. Ct. at 2786, 125 L.Ed.2d at 469). If the evidence is reliable and relevant, the trial judge should determine if the probative value of the evidence is outweighed by its prejudicial effect. Id. Accordingly, the South Carolina Supreme Court instructed that "[w]hile this Court does not adopt Daubert, we find the proper analysis for determining admissibility of scientific evidence is now under the SCRE." Council, 335 S.C. at 20, 515 S.E.2d at 518.

Rule 702, SCRE, articulates the guidelines for admissibility of expert testimony in South Carolina. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. There is no abuse of discretion as long as the witness has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury's good judgment and common knowledge. State v. Henry, 329 S.C. 266, 495 S.E.2d 463 (Ct. App. 1997); State v. Goode, 305 S.C. 176, 406 S.E.2d 391 (Ct. App. 1991). The test for qualification of an expert is a relative one that is dependent on the particular witness's reference to the subject. Wilson v. Rivers, 357 S.C. 447, 593 S.E.2d 603 (2004). For a court to find a witness competent to testify as an expert, the witness must be better qualified than the fact finder to form an opinion on the particular subject of the testimony. Ellis, 358 S.C. at 525, 595 S.E.2d at 825; Mizell v. Glover, 351 S.C. 392, 570 S.E.2d 176 (2002); Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003); see also Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252-53, 487 S.E.2d 596, 598 (1997) ("To be considered competent to testify as an expert, 'a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony.' "). An expert is not limited to any class of persons acting professionally. Gooding, 326 S.C. at 253, 487 S.E.2d at 598; Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002). There is no exact requirement concerning how knowledge or skill must be acquired. Honea v. Prior, 295 S.C. 526, 369 S.E.2d 846 (Ct. App. 1988).

The party offering the expert testimony has the burden of showing the witness possesses the necessary learning, skill, or practical experience to enable the witness to give opinion testimony. State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996); State v. Schumpert, 312 S.C. 502, 435 S.E.2d 859 (1993); Henry, 329 S.C. at 274, 495 S.E.2d at 466. Generally, however, defects in the amount and quality of the expert's education or experience go

to the weight to be accorded the expert's testimony and not to its admissibility. Id.; see also Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 580, 560 S.E.2d 624, 629 (Ct. App. 2001) ("Any defect in the education or experience of an expert affects the weight and not the admissibility of the expert's testimony.").

The admissibility of scientific evidence is dependent on "the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Jones, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citing People v. Marx, 54 Cal. App. 3d 100 (1975)). This standard is designed to prevent the fact finders from being misled by the aura of infallibility surrounding unproven scientific methods. State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997). In considering the admissibility of scientific evidence under the Jones standard, the court looks at several factors, including: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. at 19, 515 S.E.2d at 517 (citing State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990)).

However, not all expert testimony is subject to a Jones analysis. State v. Douglas, 367 S.C. 498, 510, 626 S.E.2d 59, 65 (Ct. App. 2006) (citing State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991)). In Whaley, the court distinguished an expert's testimony that explained certain human behaviors from "'scientific' evidence, such as DNA test results, blood spatter interpretation, and bite mark comparisons." Whaley, 305 S.C. at 142, 406 S.E.2d at 371. The expert's testimony in Whaley was not based on a scientific technique, but on his knowledge, skill, experience, and training as a psychologist. The court emphasized: "[w]here the witness is a qualified psychologist who simply explains how certain aspects of every day experience shown by the record can affect human perception and memory, and through them, the accuracy of eyewitness identification, we see no reason to require a greater foundation." Id. at 142, 406 S.E.2d at 371-72. Therefore, "[i]f the expert's opinion does not fall within Jones, questions about the reliability of an expert's methods go only to the weight, but not admissibility,

of the testimony.” Morgan, 326 S.C. at 513, 485 S.E.2d at 118. A trial court’s threshold inquiry is whether the expert’s methods and techniques even fall within Jones’ central purpose: to prevent the aura of infallibility which surrounds “scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom” from misleading the fact finders. Id. (citing Jones, 273 S.C. at 731, 259 S.E.2d at 124).

B. Recognized Areas of Expertise in South Carolina

South Carolina recognizes many areas in which an expert “has acquired by study or practical experience such knowledge of the subject matter of his testimony as would enable him to give guidance and assistance to the jury in resolving a factual issue which is beyond the scope of the jury’s good judgment and common knowledge.” Douglas, 367 S.C. at 510-11, 626 S.E.2d at 65 (quoting State v. Henry, 329 S.C. 266, 273, 495 S.E.2d 463, 466 (Ct. App. 1997) and citing Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506 (2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); Burroughs v. Worsham, 352 S.C. 382, 574 S.E.2d 215 (Ct. App. 2002); Means v. Gates, 348 S.C. 161, 558 S.E.2d 921 (Ct. App. 2001); Small v. Pioneer Mach., Inc., 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997)).

The significance of expert testimony in assisting or guiding the trier of fact in criminal cases is well established. See, e.g., Douglas, 367 S.C. at 511, 626 S.E.2d at 66 (citing State v. Ellis, 345 S.C. 175, 547 S.E.2d 490 (2001) (clarifying that while police officer may testify as expert in crime scene processing and fingerprint identification, he may not testify to ultimate issue as to whether defendant acted in self-defense); State v. Von Dohlen, 322 S.C. 234, 471 S.E.2d 689 (1996) (upholding trial court’s decision to allow forensic pathologist to testify, during sentencing, about the amount of pain victim suffered); State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991) (finding eyewitness identification expert qualified); State v. Myers, 301 S.C. 251, 391 S.E.2d 551 (1990) (allowing expert in blood spatter interpretation to testify).

South Carolina courts have repeatedly acknowledged dog handling as an area of expertise in the criminal context. "Testimony of a dog handler based upon his observation of a tracking dog may be properly admitted into evidence." State v. Johnson, 306 S.C. 119, 127, 410 S.E.2d 547, 552 (1991). A foundation for the admission of dog tracking evidence is sufficient if it provides evidence as to (1) the extent of the handler's experience and training; (2) the dog's characteristics of scent acuity and power to discriminate between human and other scents; and (3) the handler's assessment of the dog's reliability. See State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) (qualifying a bloodhound handler as an expert witness based on the handler's experience and the scent dog's ability and reliability); see also State v. Jordan, 258 S.C. 340, 346, 188 S.E.2d 780, 784 (1972) ("[A] ppellant concedes that the action of bloodhounds which were placed on the supposed track of the offender is admissible as evidence provided that the dogs are allowed to follow their instincts free and untrampled by their handlers."); State v. Bostick, 253 S.C. 205, 207-08, 169 S.E.2d 608, 609 (1969) (finding challenge to dog handler's testimony on bloodhounds' conduct on the ground it "violated appellant's right to be confronted by the witnesses against him" was without merit; the handler was the witness, not the dog.); State v. Brown, 103 S.C. 437, 88 S.E. 21, (1916) (instructing that the conduct of dogs is only a circumstance to be weighed with other circumstances).

C. Other Jurisdictions

1. Admissibility of Dog Tracking Evidence

The North Carolina Supreme Court articulated the foundational requirements adopted in majority of jurisdictions for the admission of dog tracking evidence in State v. Taylor, 337 N.C. 597 (1994). The court announced evidence of bloodhounds' actions was admissible when:

- (1) they are of pure blood, and of a stock characterized by acuteness of scent and power of discrimination; (2) . . . they possess these qualities, and have been accustomed and trained to pursue the human track; (3) . . . they have been found by

experience reliable in such pursuit; [and] (4) . . . they were put on the trail of the guilty party, which was pursued and followed under such circumstances and in such way as to afford substantial assurance, or permit a reasonable inference, of identification.

Id. at 609. Though foundational requirements vary somewhat among jurisdictions, an overwhelming number allow admission of dog tracking evidence in a criminal case to prove identity. State v. Cole, 695 A.2d 1180 (Me. 1997); accord Gavin v. State, 891 So. 2d 907 (Ala. Crim. App. 2003); Wilkie v. State, 715 P.2d 1199 (Alaska Ct. App. 1986); State v. Coleman, 593 P.2d 684 (Ariz. Ct. App. 1978), aff'd in part, reversed in part by State v. Coleman, 593 P.2d 653 (Ariz. 1979); Fox v. State, 246 S.W. 863 (Ark. 1923); People v. Malgren, 139 Cal. App. 3d 234 (Cal. Ct. App. 1983); Brooks v. People, 975 P.2d 1105 (Colo. 1999), as modified on denial of reh'g, (Apr. 12, 1999); State v. Esposito, 670 A.2d 301 (Conn. 1996); Cook v. State, 374 A.2d 264 (Del. 1977); Starkes v. United States, 427 A.2d 437 (D.C. 1981); McCray v. State, 915 So. 2d 239, (Fla. Dist. Ct. App. 2005); Bogan v. State, 303 S.E.2d 48 (Ga. Ct. App. 1983); State v. Streeper, 747 P.2d 71 (Idaho 1987); State v. Buller, 517 N.W.2d 711 (Iowa 1994); State v. Brown, 973 P.2d 773 (Kan. 1999); Brummett v. Commonwealth, 92 S.W.2d 787 (Ky. 1936); State v. King, 80 So. 615 (La. 1919); Roberts v. State, 469 A.2d 442 (Md. 1983); Com. v. Hill, 147, 751 N.E.2d 446 (Mass. App. Ct. 2001); People v. Harper, 204 N.W.2d 263 (Mich. Ct. App. 1972); McDuffie v. State, 482 N.W.2d 234 (Minn. Ct. App. 1992); Byrom v. State, 863 So. 2d 836 (Miss. 2003); State v. Thomas, 536 S.W.2d 529 (Mo. Ct. App. 1976); State v. Taylor, 395 A.2d 505 (N.H. 1978); State v. Parton, 597 A.2d 1088 (N.J. Super. Ct. App. Div. 1991); People v. Roraback, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997); State v. Iverson, 187 N.W.2d 1 (N.D. 1971); State v. Neeley, 758 N.E.2d 745 (Ohio Ct. App. 2001); Buck v. State, 138 P.2d 115 (Okla. Crim. App. 1943); State v. Harris, 547 P.2d 1394 (Or. Ct. App. 1976) overruled on other grounds; Com. v. Patterson, 572 A.2d 1258 (Pa. Super. Ct. 1990); State v. Shepherd, 902 S.W.2d 895 (Tenn. 1995); Johnson v. State, 673 S.W.2d 203 (Tex. App. 1984); State v. Bourassa, 399 A.2d 507 (Vt. 1979); Pelletier v. Com., 592 S.E.2d 382 (Va. Ct. App. 2004); State v. Nicholas, 663 P.2d 1356 (Wash. Ct. App. 1983); State v. Broughton, 470 S.E.2d 413 (W. Va. 1996).

Most jurisdictions find a sufficient foundation for the admission of dog-tracking evidence is established if (1) the evidence shows the dog was of a breed characterized by an acute power of scent; (2) the dog was trained to follow a trail by scent; (3) by experience the dog was found to be reliable; (4) the dog was placed on the trail where the defendant was known to have been within a reasonable time; and (5) the trail was not otherwise contaminated. See Jay M. Zitter, Annotation, Evidence of Trailing by Dogs in Criminal Cases, 81 A.L.R.5th 563 (2006). However, many jurisdictions regard dog tracking evidence alone as legally insufficient and require corroborating evidence to prove identification. See, e.g., People v. Gonzales, 267 Cal. Rptr. 138, 142 (Cal. Ct. App. 1990) ("a conviction cannot rest on dog tracking evidence alone"); People v. Stone, 491 N.W.2d 628, 630 (Mich. Ct. App. 1992) ("Tracking-dog evidence is admissible only after certain foundational requirements are met. In addition, there must be other corroborating evidence presented before identification based on tracking-dog evidence is sufficient to support a guilty verdict.") * State v. Loucks, 656 P.2d 480, 482 (Wash. 1983) ("The dangers inherent in the use of dog tracking evidence can only be alleviated by the presence of corroborating evidence identifying the accused as the perpetrator of the crime."). Additionally, a number of jurisdictions require the trial court to instruct the jury to view dog tracking evidence with caution. See People v. Gangler, 643 N.Y.S.2d 839, 840 (N.Y. App. Div. 1996) ("[T]racking evidence is admissible on the issue of identity if the proper foundation is laid and if the jury is given cautionary instructions."); accord Wilkie v. State, 715 P.2d 1199, n. 3 (Alaska Ct. App. 1986); People v. McMillen, 336 N.W.2d 895 (Mich. 1983); State v. Taylor, 395 A.2d 505 (N.H. 1978).

Several jurisdictions find dog tracking evidence inadmissible under any circumstances. See People v. McDonald, 749 N.E.2d 1066 (Ill. App. Ct. 2001); Brafford v. State, 516 N.E.2d 45 (Ind. 1987); State v. Storm, 238 P.2d 1161 (Mont. 1951); Brott v. State, 97 N.W. 593 (Neb. 1903). These courts object to dog tracking evidence on the following grounds: (1) the actions of the bloodhounds are unreliable; (2) the evidence constitutes hearsay; (3) the defendant is deprived of his constitutional right to confront the witnesses against him; (4) the defendant should not be placed in jeopardy by the actions of an animal; (5) a defendant cannot cross-examine the dogs; and (6) a jury might be awed by such testimony and give it much greater weight and

importance than warranted. People v. Centolella, 305 N.Y.S.2d 279, 281-82 (N.Y. Cty. Cl. 1969). In response to these arguments, the Centolella court explained:

[S]uch evidence falls into the category of opinion evidence rather than hearsay . . . the animals are not witnesses against a defendant any more than is a microscope or a spectrograph . . . these machines are not subject to cross-examination any more than the animal, and . . . a person is no more placed in jeopardy by the action of an animal than he or she is by a breath analyzer or a blood test.

Id. The court added the alleged undue importance a jury might attribute to the animal evidence can be minimized by cautionary instructions from the trial judge. Id.

2. Scientific Evidence versus Experience-Based Knowledge

In applying standards for admissibility, a number of courts differentiate between a dog handler's expert opinion based on experience-based knowledge and an expert opinion based on scientific evidence that requires a Daubert analysis. The Virginia Appellate Court held empirical evidence provided by a K9 officer sufficiently established a dog's reliability without requiring evidence of a scientific basis for the dog's ability to track a scent. Pelletier v. Com., 592 S.E.2d 382, 388 (Va. Ct. App. 2004). The court emphasized: "An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond common intelligence and ordinary experience." Id. For instance, "the typical police officer qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion." Id.

The Colorado Supreme Court ruled "dog scent trailing evidence" was admissible" if foundational requirements were satisfied, and "neither the Frye nor Daubert standards of general acceptance or scientific reliability applied." Brooks v. People, 975 P.2d 1105, 1111 (Colo. 1999). Distinguishing between scientific knowledge based on the scientific method and experience-

based, specialized knowledge, the court declined to apply factors designed to ascertain scientific validity in analyzing dog tracking evidence. Id. at 1113. “[W]e hold that testimony pertaining to scent tracking by a trained police dog is not readily subjected to standards which were not designed with experience-based specialized knowledge in mind.” Id. at 1115. The court further reasoned the proper analysis of reliability in dog tracking cases was based on Rule 702 of the Colorado Rules of Evidence (CRE) admissibility standards.

In State v. Bourassa, 399 A.2d 507 (Vt. 1979), the Vermont Supreme Court dismissed a defendant’s contention that dog tracking testimony was inadmissible because the scientific principles underlying such testimony were not established in the record. The court held evidence in the record was sufficient to find that a “well trained dog, supervised by an experienced handler and working under reasonable conditions, is capable of trailing a human being accurately.” Id. at 510. Agreeing with the majority of jurisdictions, the court concluded the foundation sufficiently established that: (1) the handler was qualified to use the dog; (2) the dog was trained and accurate in tracking humans; (3) the dog was placed on the trail where circumstances indicate that the accused had been; and (4) the trail had not become so stale or contaminated that it was beyond the dog’s tracking capabilities. Id. at 511; accord Reisch v. State, 628 A.2d 84 (Del. 1993) (deciding scientific testing not required to support evidence obtained by a dog if foundational requirements are met); People v. Roraback, 662 N.Y.S.2d 327 (N.Y. App. Div. 1997) (holding the use of a trained dog is an investigative rather than scientific procedure); Winston v. State, 78 S.W.3d 522, 526 (Tex. Ct. App. 2002) (finding interpretation of a dog’s reaction to a scent lineup is based upon training and experience, and not on scientific methodology).

D. The Extant Factual Record

The underlying rationale in Pelletier, Brooks, and Bourassa comports with our Supreme Court’s analysis in State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). The Whaley court’s distinction between scientific evidence requiring a Jones analysis and expert testimony based on specialized knowledge and experience is equally applicable in the instant case.

Gunter's testimony established the proper foundation under State v. Childs, 299 S.C. 471, 477, 385 S.E.2d 839, 843 (1989) for admitting his opinion as to the reliability of dog tracking evidence. The officer had been with the Columbia Police Department for nearly fourteen years, working as a K9 handler and trainer. He had attained the rank of Senior Master K9 Handler and assisted with the training of other K9 handlers and dogs in the department. Initially, Gunter trained with the Columbia Police Department in 1991. He holds a membership in the American Association of K9 Trainers and maintains his certification by attending week-long training sessions annually. Additionally, while his dog, Aurie, was in service, he trained weekly with the K9 unit of the Columbia Police Department. Gunter's partnership with Aurie lasted over seven years, the entire duration of the dog's career. During that time the team engaged in approximately 750 tracking excursions.

Gunter opined that Aurie was "very reliable." The dog was a German shepherd, who had descended from a bloodline of known police and military working dogs. He was certified in tracking, article searches, building searches, protection, and obedience. However, Gunter emphasized Aurie's strongest skill was tracking people.

White advanced his objection to the admission of the dog tracking evidence on the ground it was not scientifically reliable and did not meet the standards set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979) concerning scientific evidence. Addressing White's challenge outside of the jury's presence, the trial judge explained:

The Court: Well, you know, not all expert testimony deals with scientific evidence.

White's Counsel: Yes, sir. We do understand but we do feel that if they are using it, they are qualifying his as an expert if he—the evidence should meet the standards of scientific evidence, your honor.

The Court: Well, even if it's not a scientific evidence that they are offering?

White's Counsel: Your Honor, any evidence he is offering as an expert—

The Court: Well, expert is scientific, technical, or other specialized knowledge. Doesn't have to be scientific or technical.

Accordingly, the trial court ruled Gunter could offer his opinion testimony as to the reliability of what tracking dogs do provided the State laid the proper foundation. Based on testimony about the extent of Gunter's training and experience, Aurie's acuity and skill in tracking human scent, and Gunter's assessment of Aurie's reliability, the trial court instructed the jury:

I'm going to find the officer qualified as an expert in the field of K9 tracking and handling with respect to his dog and the dogs in general. Ladies and gentlemen, if scientific, technical, or other specialized knowledge will assist you, the trier of fact, in understanding any issue that is—any fact that's in issue or any evidence that may be an issue, then a person who is qualified by virtue of his or her knowledge, skill, experience, training or education may be qualified as an expert in that particular field.

I'm going to find the officer to be qualified as I said in the area of animal or dog tracking and handling, and as such he can offer opinions in his area of expertise.

Now, you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial.

Gunter's testimony verified he had acquired, by training and experience, such knowledge and skill in the area of dog handling and tracking that rendered him better qualified than the jury to form an opinion on the particular subject of dog tracking. Furthermore, Gunter's testimony was

based on his specialized knowledge, skill, and experience in the use of a scent-tracking dog, rather than on the validity of dog tracking as a scientific procedure. The nature of Gunter's testimony is analogous to that offered by a typical police officer who qualifies as an expert based on his experience with narcotics, not on his ability to explain the scientific theory behind his opinion. As such, the evidence Gunter provided complies with Rule 702, SCRE by helping the jury understand the evidence or resolve a factual issue. As the Whaley court indicated, when a proper foundation is established, a Jones analysis is not warranted if expert testimony is based on specialized skill or knowledge rather than on scientific techniques. See State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). Furthermore, the trial court cautioned the jury that questions about the reliability of Gunter's methods go only to the weight of his testimony, not the admissibility. See State v. Morgan, 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997).

E. Harmless Error

Though we discern no error in the trial court's qualification of Gunter as an expert witness, the admission of his opinion testimony, if error, was harmless. Pursuant to Rule 103, SCRE, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected"

No definite rule of law governs finding an error harmless; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Gillian, 360 S.C. 433, 454-55, 602 S.E.2d 62, 73 (Ct. App. 2004) (citing State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990); State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985); State v. Curry, 370 S.C. 674, 636 S.E.2d 649 (Ct. App. 2006); State v. Pagan, 357 S.C. 132, 591 S.E.2d 646 (Ct. App. 2004)). Whether an error is harmless depends on the particular facts of each case, including:

the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and of course the overall strength of the prosecution's case.

State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318-19 (2002) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L.Ed.2d 674 (1986)).

"Harmless beyond a reasonable doubt" means the reviewing court can conclude the error did not contribute to the verdict beyond a reasonable doubt. Mizzell, 349 S.C. at 334, 563 S.E.2d at 319; Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992). "In determining whether an error is harmless, the reviewing court must review the entire record to determine what effect the error had on the verdict." Mizzell, 349 S.C. at 334, 563 S.E.2d at 319 (internal quotations omitted).

Error is harmless where it could not reasonably have affected the result of the trial. In re Harvey, 355 S.C. 53, 584 S.E.2d 893 (2003); Mitchell, 286 S.C. at 573, 336 S.E.2d at 151; State v. Burton, 326 S.C. 605, 486 S.E.2d 762 (Ct. App. 1997). Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 399 S.E.2d 595 (1991); State v. Adams, 354 S.C. 361, 580 S.E.2d 785 (Ct. App. 2003). Thus, an insubstantial error not affecting the result of the trial is harmless where guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached. State v. Bailey, 298 S.C. 1, 377 S.E.2d 581 (1989); Adams, 354 S.C. at 381, 580 S.E.2d at 795; see also State v. Primus, 349 S.C. 576, 564 S.E.2d 103 (2002) (holding assistant solicitor's improper comment, during closing argument was harmless error, where evidence of guilt was overwhelming) overruled on other grounds; State v. Kelley, 319 S.C. 173, 460 S.E.2d 368 (1995) (noting that when guilt is conclusively proven by competent evidence, such that no other rational conclusion could be reached, this court will not set aside conviction for insubstantial errors not affecting result).

Ample evidence linked White to the crimes charged. The testimonies of the victim, Gwen Anthony, and co-defendant, Anthony Morris, were corroborated by a surveillance videotape that recorded the crime as it unfolded. In addition, Roy Wiggins, the driver of the escape car, testified

against White. Items taken from the crime scene were located in the escape vehicle. Officer Rouppasong witnessed a man carrying something in his hand and wearing dark jeans and a white shirt run from the Circle K parking lot. In pursuit, the officer lost sight of the man briefly and then came upon the escape car. The same man wearing the dark jeans and white shirt ran from the escape car toward the yard of the residence where White was eventually found. Gunter put his tracking dog on the scent at the location where the man exited the vehicle. The area in which the dog began tracking had been secured in order to preserve evidence. The dog's tracks led to the location where White was discovered. He appeared to be asleep and was clutching a gun in his hand. The gun matched Anthony's description of the weapon the robber carried, and both Morris and Wiggins positively identified it as the gun White had in his possession immediately prior to the robbery.

The evidentiary record reflects other substantial evidence of White's guilt without the inclusion of Gunter's testimony. Consequently, the admission of the dog tracking evidence was cumulative and harmless.

II. Newly Discovered Evidence

White claims newly discovered evidence entitles him to a new trial. We disagree.

After White served his notice of appeal, co-defendant Anthony Morris issued a written statement retracting his trial testimony against White. Morris claimed he was not at the scene of the crime. In a motion to this court, White urged that we either remand the case for a new trial or remand the case to the trial court for a hearing on the purported new evidence. The State opposed and this court denied the motion. The State argues this court should not consider Morris' statement because it has not been raised to and ruled on by the trial court and is not properly before this court. We agree.

Rule 29(b), SCRCrimP, governs post trial motions on after discovered evidence. A motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court exercises its discretionary authority, suspends the appeal, and grants leave to proceed in

the circuit court. The lack of a ruling from the trial court presents nothing for this court's review.

Furthermore, a brief must reference the Record on Appeal to support the facts alleged. Rule 207(b)(4), SCACR. "The Record shall not, however, include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal.

CONCLUSION

We rule that dog tracking evidence is recognized in South Carolina. We hold that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120, (1979). We conclude that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog handling and dog tracking. In the case sub judice, Gunter's specialized knowledge, skill, experience, and training qualified him to offer his opinion in the area of dog handling and dog tracking. Luculently, the testimony of Gunter complies with expert testimony law extant in South Carolina.

There is no error in the trial court's qualification of Gunter as an expert witness and the admission of his opinion testimony. Assumptively concluding that error exists, the error is harmless beyond a reasonable doubt. There is overwhelming evidence in the trial record without the inclusion or consideration of Gunter's testimony to support the convictions of the Appellant.

The Appellant's claim as to the right to a new trial based on newly discovered evidence is dismissed based on procedural grounds.

Accordingly, the trial court's ruling is

AFFIRMED.

HUFF and BEATTY, JJ., concur.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

COPY

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

Opinion No. 4196

RECEIVED

JAN 29 2007

SC Court of Appeals

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on January 16, 2007. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following.

Appellant argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Appellant *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, appellant submits that dog-tracking, although it has a long history of use, has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. White, p. 5-13, citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v. Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Appellant respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition.

A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. White at p. 7-8 (citations omitted). Appellant respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Appellant was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because appellant did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). White at p. 9-10. In Whaley, the trial court granted the state's motion to suppress the testimony of an expert in memory retention on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience. Appellant's case is distinguishable. As noted, appellant did not dispute the handler's qualifications. Appellant challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina. Dog-tracking is not and does not resemble a medical field. Appellant properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Court to reconsider its ruling.

Appellant also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. He asked the Court to order a new trial based on an exculpatory affidavit attached to his motion, or, in the alternative, to remand for a hearing on the motion. The Court denied the motion and affirmed on the basis that the issue had not been presented the trial court and was not preserved for appellate review. White at p. 12-13. Appellant respectfully submits that the issue was not addressed below because, as noted in the pleadings, it involves new evidence that was not discovered until after the appeal was underway. He respectfully asks the Court to reconsider its ruling.

Respectfully submitted,



Aileen P. Clare
Appellate Defender

This 29th day of January, 2007.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

CERTIFICATE OF SERVICE

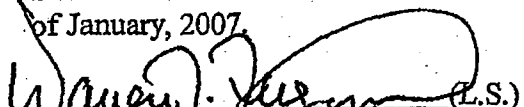
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Harold M. Coombs, Jr., Esquire, and Gary White, #309726, McCormick Correctional Institution, 386 Redemption Way, McCormick, SC, this 29th day of January, 2007.



Aileen P. Clare
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 29th day
of January, 2007.



(L.S.)
Notary Public for South Carolina

My Commission Expires: Sept. 22, 2008.

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

The State,

Respondent,

v.

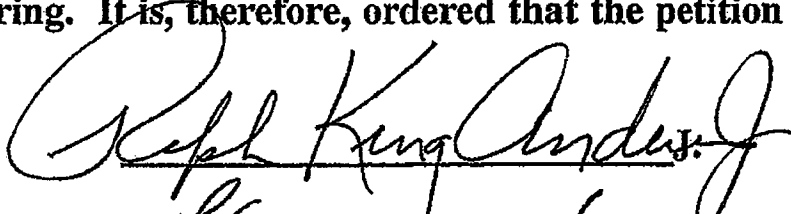
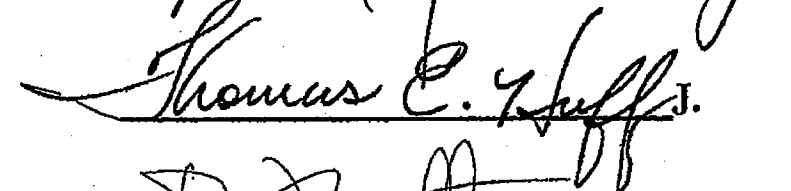
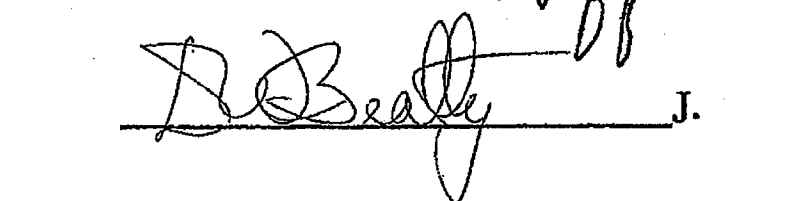
Gary A. White,

Appellant.

**Appeal from Richland County
James R. Barber, III, Circuit Court Judge**

**ORDER DENYING PETITION FOR
REHEARING**

PER CURIAM: After a careful consideration of the Petition for Rehearing, this court is unable to discover any material fact or principle of law that has been overlooked or disregarded, and hence, there is no basis for granting a rehearing. It is, therefore, ordered that the petition for rehearing be denied.

**Columbia, South Carolina
March 22, 2007**

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

PETITIONER

PETITION FOR WRIT OF CERTIORARI

LANELLE C. DURANT
Appellate Defender

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

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ISSUES PRESENTED

1. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.
2. The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

STATEMENT OF CASE

Richland County grand jurors indicted petitioner for kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a violent crime. Petitioner stood trial during the June 2005 term of the Richland County Court of General Sessions before the Honorable James R. Barber and a jury. The jury found petitioner guilty as charged, and he was sentenced to life confinement without the possibility of parole under to S.C. Code § 17-25-45.

On direct appeal to the Court of Appeals, White argued:

1. The trial court erred by denying petitioner's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.
2. Petitioner is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Brief of Appellant, p. 3. The Court affirmed. State v. White, Op. no. 4196, filed January 16, 2007 (Ct.App. 2007). It wrote that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) and that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog tracking. The Court also wrote that the Petitioner's claim as to the right to a new trial based on newly-discovered evidence is dismissed based on procedural grounds that the trial court did not rule on the issue so there was nothing for the appellate court's review. Counsel for White filed a timely petition for rehearing pursuant to *South Carolina Appellate Court Rule 221(a)*. The Court denied rehearing by order dated March 22, 2007.

This petition for writ of certiorari follows.

ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19; 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. White, p. 5-13, citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188

S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v. Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition. AA nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. White at p. 7-8 (citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). White at p. 9-10. In Whaley, the trial court granted the state's motion to suppress the testimony of an expert in memory retention on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina. The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Court to reconsider its ruling.

2.

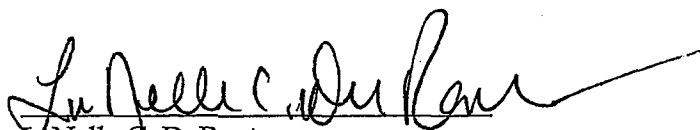
The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. He asked the Court to order a new trial based on an exculpatory affidavit attached to his motion, or, in the alternative, to remand for a hearing on the motion. The Court denied the motion and affirmed on the basis that the issue had not been presented the trial court and was not preserved for appellate review. White at p. 12-13. Petitioner respectfully submits that the issue was not addressed below because, as noted in the pleadings, it involves new evidence that was not discovered until after the appeal was underway. He respectfully asks the Court to reconsider its ruling.

CONCLUSION

For the above reasons, the Court should grant certiorari, reverse White's convictions, and remand for further proceedings.

Respectfully submitted,



LaNelle C. DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 23rd day of April, 2007.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. The petitioner says that the South Carolina Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the dog handler's testimony. (Petitioner's Issues Presented 1).
2. The petitioner says that the South Carolina Court of Appeals "incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly discovered evidence when his co-defendant, who testified against him at trial" recanted. (Petitioner's Issues Presented 2).

STATEMENT OF THE CASE

Petitioner asks the Supreme Court of South Carolina to review State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007).

ARGUMENT

I.

The court of appeals correctly found that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler. (Questions Presented 1).

Petitioner says the court of appeals failed to address his complaint about the underlying validity or reliability of the field itself [dog tracking] and his not receiving a hearing under State v. Jones.

To the contrary, the court of appeals specified: “White advanced his objection to the admission of the dog tracking evidence on the ground it was not scientifically reliable and did not meet the standards set forth in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) concerning scientific evidence.” State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). The court recognized the admissibility of a dog handler's expert opinion grounded upon knowledge gained from experience and distinguished other expert opinion based upon scientific knowledge derived from experimentation and scientific method. “An expert's testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond common intelligence and ordinary experience.” State v. White (citation omitted). Further, the court observed that the unique facts of the present case independently verified the reliability of the expert testimony.

II.

The court of appeals soundly declined to consider a matter that had not been ruled upon by the circuit court. (Questions Presented 2).

The substance of Petitioner's issue is that the court of appeals should have considered a witness' purported recantation of testimony since it was newly discovered evidence. The want of a ruling from the trial court leaves the appellate court with nothing to review, and Petitioner advances no meaningful reason to depart from this maxim.

CONCLUSION

The South Carolina Court of Appeals ably selected and applied the correct law, resolved the questions presented, and its resolution is supported by the record. This Court should decline to exercise its discretionary review.

Respectfully submitted,

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Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

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May 23, 2007

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County
Honorable James R. Barber, III, Circuit Court Judge

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Return to Petition for Writ of Certiorari by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 23rd day of May, 2007.

Harold M. Coombs, Jr.
HAROLD M. COOMBS, JR.
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ATTORNEY FOR RESPONDENT

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

James R. Barber, III, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT

BRIEF OF PETITIONER

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ISSUES PRESENTED

1. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

2. The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony

STATEMENT

Richland County grand jurors indicted petitioner for kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a violent crime. Petitioner stood trial during the June 2005 term of the Richland County Court of General Sessions before the Honorable James R. Barber and a jury. The jury found petitioner guilty as charged, and he was sentenced to life confinement without the possibility of parole under to S.C. Code § 17-25-45.

On direct appeal to the Court of Appeals, White argued:

1. The trial court erred by denying petitioner's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.
2. Petitioner is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Brief of Appellant, p. 3. The Court affirmed. App. p. 1-21: State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). It wrote that dog tracking evidence is not required to meet the scientific evidence standard articulated in State v. Jones, 273 S.C. 723, 259 S.E.2d 120 (1979) and that dog tracking evidence is admissible provided the dog handler's knowledge, skill, experience, and training qualifies the handler in the area of dog tracking.

On October 19, 2005, White's appellate attorney filed a Motion to Remand for a New Trial or in the Alternative, For a Hearing Into New Evidence. On December 9, 2005 the Court of Appeals denied this motion. In their opinion, the Court wrote that the Petitioner's claim as to the right to a new trial based on newly-discovered evidence was dismissed based on procedural grounds that the trial court did not rule on the issue so there was nothing for the appellate court's

review. Counsel for White filed a timely petition for rehearing pursuant to *South Carolina Appellate Court Rule 221(a)*. The Court denied rehearing by order dated March 22, 2007.

Appellate counsel filed a petition for writ of certiorari to the Supreme Court on April 23, 2007. The Court issued an order on November 19, 2007 granting the petition for a writ of certiorari.

ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. App. p. 5 – 10: White citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v.

Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition. A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. App. p. 10 – 13.(citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). App. p. 13 – 17. In Whaley, the trial court granted the state's

motion to suppress the testimony of an expert (Ph.D. in psychology) in memory retention related to eyewitness reliability on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience. However, the Supreme Court also ruled that the expert's testimony would have been admissible under Jones as the expert's testimony was based on established techniques and authorities. Whaley at 142.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina.

The court should have applied the Jones factors and required the state to demonstrate the reliability of dog-tracking. While dog-tracking has been used for centuries, the reliability of many applications has not been widely or rigorously studied. See The Mythic Infallibility of the Dog, in Andrew E. Taslitz, Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup, 42 Hastings L.J. 15 (November 1990). And, historical use, alone, should not create a presumption of reliability. If challenged, the scientific basis of an "old" but untested technique should be subjected to the same scrutiny as a new technique.

The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner

properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Supreme Court to reconsider this ruling.

2.

The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. Appellant's co-defendant, Anthony Morris, testified against him at trial. On October 12, 2005, trial counsel of the Richland County Public Defender's Office contacted the appellate attorney and informed her that Mr. Morris had retracted his testimony. Trial attorney provided the attached sworn statement by Mr. Morris, which reads as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy['s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I beleived [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic]to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris

Petitioner, by motion, asked the Court of Appeals to order a new trial based on the exculpatory affidavit, or, in the alternative, to remand for a hearing on the motion. The Court of Appeals denied the motion on December 9, 2005 and affirmed on the basis that the issue had not been presented to the trial court and was not preserved for appellate review. App. p. 19 – 21.

Mr. Morris' new statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Petitioner submits that the issue was not addressed below because it involves new evidence that was not discovered until after the appeal was underway. Rule 29(b), SCRCP provides that a motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.

The new statement exonerates appellant, where Mr. Morris' retracted testimony had incriminated appellant. The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility.

Petitioner has been convicted of very serious offenses and is serving a life sentence without the possibility of parole. In the interest of due process and fundamental fairness, this Court should

grant him a new trial based on Mr. Morris' affidavit. At the very least, he should receive a hearing with the opportunity to subpoena Mr. Morris to determine if his retraction warrants a new trial. He respectfully asks the Supreme Court to reconsider this issue.

CONCLUSION

Based on the foregoing reasons, the Court of Appeals should be reversed and the case remanded.

Respectfully submitted,

LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

This 19th day of December, 2007

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
James R. Barber, III, Circuit Court Judge

State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App.2007)

THE STATE,

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V.

GARY A. WHITE,

APPELLANT

BRIEF OF RESPONDENT

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ISSUES PRESENTED

1. The trial court did not require the state to demonstrate the scientific reliability of the tracking dog testimony, and there was no error.
2. The South Carolina Court of Appeals did not include the post-trial statement of witness Morris in the appellate record, and there was no error. If the statement is ever presented to the circuit court, it would not reasonably warrant a new trial.

STATEMENT OF THE CASE

Indictments 04-GS-40-3016, 04-GS-40-3017, and 04-GS-40-3018 charged the defendant with kidnaping and two counts of armed robbery at a Circle K store in Richland County on April 19, 2004. The defendant and his counsel came to trial June 14, 2005 before the Honorable James R. Barber, Judge, and a jury. The jury found the defendant guilty. The state had served notice to seek a sentence of life without parole, and the court sentenced the defendant to concurrent terms of life without parole. The defendant served opposing counsel a timely notice of appeal. July 15, 2005 witness Anthony Morris made a written statement. October 19, 2005 the defendant made Motion to Remand for a New Trial, or, in the Alternative, for a Hearing into New Evidence, and the South Carolina Court of Appeals denied the motion. The appellate court affirmed the judgment of the trial court. State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). By Order dated November 19, 2007 the Supreme Court of South Carolina granted discretionary review of the decision.

ARGUMENT

I.

The trial court recognized that the officer's tracking dog testimony was based upon specialized training, experience, and observation of the working scent dog. The testimony about the dog's scenting and seeing the defendant was not about the methods and procedures of science.

Summary Facts

In the early hours of April 19 two robbers confronted the clerk (Gwen) in the Circle K. The taller held a gun to her head. The other took property from her purse, register and store. Meanwhile, the taller robber with the gun appeared either to pass out or to sleep for a few seconds. The robber with the loot left. The taller robber with the gun held Gwen and pushed her out the door. Coincidentally, a police officer (Rouppasong) drove in, Gwen signaled him, and the officer give chase. (R. pp. 80-100).

Officer Rouppasong arrived at the Circle K for refreshment and observed a store employee (Gwen) signaling him and the defendant running. The defendant first ran to a Civic parked around the store and then fled. Rouppasong arrested the driver of the Civic (Roy Wiggins) and called dispatch. Officer Gunter brought the K9 unit. Rouppasong showed Gunter where the defendant ran from the Civic. Gunter put the dog there and began tracking. The dog found an area with a lot of scent. Rouppasong saw the defendant, apparently sleeping with a pistol in his hand, lying under a bush before either the dog or Gunter. The dog alerted by both barking and trying to get to the suspect [defendant]. Gunter thought the search area was ideal, and the time lapse of about thirty minutes was good. (R. pp. 150-155; pp. 160-179; pp. 227-235; p. 237 - p. 238, line 3).

Roy Wiggins (Wiggins) knew Anthony "Amp" Morris (Morris) for years and met the defendant the evening of the armed robbery. When Wiggins drove his mother's Civic to a club, he learned the defendant had a gun. Later, the defendant instigated the Circle K armed robbery. The defendant went to the store with his gun and a ski mask but left his driver's license and other articles in the passenger seat. Morris accompanied the defendant. Wiggins stayed in the Civic. When the police came, Morris was the first back to the car. Seconds later, the defendant returned. Morris and the defendant fled when Wiggins refused to help with any escape. (R. pp. 306-325; pp. 339-340; p. 352). Later, in jail, Wiggins thought the defendant "looked pretty messed up . . . They had to carry him in, so it wasn't like he was walking on his own." (R. pp. 350-351).

Anthony Morris (Morris) acknowledged volunteering to go into the store with the defendant. (R. pp. 382-383). Wiggins got clothes for him (Morris) to wear (e.g., shirt to cover tattoo). (R. pp. 384-385). The defendant is taller than Morris, and the defendant had the only gun. (R. pp. 388-389; p. 405). Morris successfully fled but was arrested about a month after the robbery. (R. pp. 395 and 397). At trial he had pled guilty to two counts armed robbery and one count kidnaping and was awaiting sentencing. (R. pp. 399-400).

How the Issue was Raised at Trial

The state wanted to show that a tracking dog followed the scent that led to the suspect. (R. p. 201, lines 10-12). The defendant objected on the ground that dog tracking evidence was not scientifically reliable and did not meet the standard for scientific evidence. The court found that expert testimony did not have to be scientific or technical. Rather, it might involve specialized knowledge. (R. p. 191, line 25 - p. 193,

line 9).

The state offered Gunter, an assistant trainer and a senior master K9 handler - the highest level of dog handler with his national association. Aurie was a German Shepherd from a known bloodline of working dogs, a human scent dog and reliable. Together they had followed some seven hundred fifty tracks, and Gunter had been qualified as an expert witness one time before. (R. pp. 194-198; p. 212). To track a suspect, they typically used the last point where a suspect was seen, and the dog stayed on that one scent until he found a suspect. When the dog finds the suspect or the person he is tracking, the dog will alert. Officer Gunter allowed that it is possible for a dog - and everybody else - to make a mistake. (R. p. 199, line 8 - p. 200, line 16). The court found the officer was qualified as an expert in the field of canine tracking and charged the jury that he could offer opinions in his area of expertise. However, as with the testimony of any witness, the weight and credibility of his testimony was for the jury's determination. (Tr. p. 201, lines 19-22; p. 218 - p. 219, line 11).

The defendant feels that the trial court erred in admitting the testimony of an officer working with a scent dog since the court did not compel the state to demonstrate its scientific reliability. (Brief of Petitioner Issues Presented 1 and pp. 6 and 8).

Law and Discussion

The defendant cites an article critical of dog scent lineups. In a dog scent lineup, a dog sniffs the scent of something connected with a crime and then sniffs a lineup of people or an object with the scent of a suspect; an alert is admitted to prove that the identified person committed the crime. One complaint is that courts admit evidence from dog scent lineups but apply foundation required for tracking dogs to the, arguably,

different circumstances of the dog scent lineup. After observing that the Supreme Court of the United States contributes to other courts' considering a dog's alert to narcotics inherently reliable, the article believes, not surprisingly, that "neither the alleged failure of dogs in scent lineup cases nor the weaknesses in the courts' analyses necessarily require wholesale rejection of scent lineup evidence." 42 HASTINGS L. J. 15 (1990).

The present case is not a dog scent lineup. The Court's respect for the scent dog's work is unabated. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005)(dog's vehicle sniff during traffic stop infringes no constitutional right, and alert supports probable cause for search).

Rule 702, SCRE requires the court to find that scientific evidence "will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999)(addressing mitochondrial DNA).

Admissibility of scientific testimony depends upon "the degree that the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom." State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990). DNA fingerprinting is an example of scientific evidence. In finding that DNA fingerprinting is recognized and reliable and generally accepted in the scientific community, this Court found that the "experts did not rely on untested methods, unproven hypotheses, intuition or revelation, but rather applied scientifically and professionally established techniques to the solution of a particular problem." Id.

Scent dog tracking testimony is about the dog handler's investigation through observation of a trained tracking dog following a scent. State v. Johnson, 306 S.C. 119, 410 S.E.2d 547 (1991) ("Testimony of a dog handler based upon his observation of a

tracking dog may be properly admitted into evidence.”)(emphasis added); State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989)(in determining the sufficiency of the foundation for expert witness in bloodhound handling “to testify about his work with the bloodhounds during the investigation” the handler’s experience and the scent dog’s ability and reliability could be considered in determining the sufficiency of the foundation)(emphasis added). The dog handler’s testimony is the result of an investigative technique rather than a scientific procedure. “[T]he practice of using trained dogs to track a human scent lacks the hallmark of scientific knowledge identified by the Supreme Court, i.e., ‘a grounding in the methods and procedures of science.’ . . . [C]anine scent tracking is not a technique amenable to peer review or scientific standards and testing. Rather, it concerns the behaviors of the dog and the meanings of those behaviors, a knowledge acquired through experience and training.” Debruler v. Commonwealth, 231 S.W.3d 752 (Ky. 2007). Accord, State v. Brown, 103 S.C. 437, 88 S.E. 21 (1916)(dog’s instinct must be free and untrammelled; the handler, not the dog, is the witness)(emphasis added); Brooks v. People, 975 P.2d 1105 (Colo. 1999)(dog scent tracking evidence is not subject to scientific validation factors, and conventional Rule 702 and Rule 403 analysis is appropriate).

The trial court did not err in declining to require the state to demonstrate the scientific reliability of scent dog, tracking testimony.

II.

Witness Morris' recantation was soundly excluded from the appellate record, and the defendant's claim that the recantation entitles him to a new trial wants substance.

The Supplemental Appendix contains Anthony Morris' July 15, 2005 statement. In substance Morris says that he was not at the scene and wants knowledge of the crime. Purportedly on the advice of counsel, he testified at trial to get a light sentence after pleading guilty to two counts armed robbery and one count kidnaping. (Supplemental Appendix p. 5; R. pp. 399-400).

The defendant (White) feels that the statement exonerates him. (Supplemental Appendix p. 3; Brief of Petitioner p. 11). Since Morris' July 15 statement claims to exonerate himself (Morris) in that he was not at the scene and wants knowledge of the crime, it is difficult to understand how the statement exonerates Gary White: Roy Wiggins testified that Gary White instigated the Circle K armed robbery and went to the store with the gun. Officer Rouppasong found Gary White holding the gun, apparently sleeping under a bush about thirty minutes after the armed robbery, and testified he was the man who fled the Circle K. (Please see Summary Facts, Argument I, supra).

The Court of Appeals excluded the statement from the record on appeal since it had not been ruled upon in the circuit court. The Court of Appeals exercised sound discretion in declining to remand the case for a hearing in the circuit court since that would have required the court, on its own motion, to suspend the appeal. Rule 29, SCRCrimP. State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). The defendant's claim that the statement warrants a new trial wants substance.

CONCLUSION

The judgment of the trial court should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

April 17, 2008

STATE OF SOUTH CAROLINA

In the Supreme Court

Appeal from Richland County
Honorable James R. Barber, III, Circuit Court Judge

State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007)

THE STATE,

Respondent,

vs.

GARY A. WHITE,

Petitioner.

PROOF OF SERVICE

I, Harold M. Coombs, Jr., certify that I have served the Brief of Respondent by depositing three copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, LaNelle C. DuRant, Esquire, South Carolina Commission on Indigent Defense, Division of Appellate Defense, Post Office Box 11589, Columbia, South Carolina 29211.

I further certify that all parties required by Rule to be served have been served.

This 17th day of April, 2008.

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382 S.C. 265

The STATE, Respondent,

v.

Gary A. WHITE, Petitioner.

No. 26642.

Supreme Court of South Carolina.

Heard Feb. 4, 2009.

Decided April 27, 2009.

Rehearing Denied May 28, 2009.

Background: Defendant was convicted in the Circuit Court, Richland County, James R. Barber, III, J., of kidnapping and armed robbery. Defendant appealed. The Court of Appeals, 372 S.C. 364, 642 S.E.2d 607, affirmed. Defendant sought certiorari review.

Holdings: The Supreme Court, Kittredge, J., held that:

- (1) expert testimony related to dog tracking evidence was reliable, and
- (2) trial court's gatekeeping function in assuring reliability of expert testimony applies to nonscientific evidence, overruling *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112.

Affirmed in result.

1. Criminal Law ⇨1153.12(3), 1169.9, 1170(1)

A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. Rules of Evid., Rule 702.

2. Criminal Law ⇨469

All expert testimony must satisfy criteria of rule of evidence governing testimony of experts, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rules of Evid., Rule 702.

3. Criminal Law ⇨386

Dog tracking evidence must be reliable to be admissible. Rules of Evid., Rule 702.

4. Criminal Law ⇨488

Expert testimony related to dog tracking evidence was reliable, thus supporting admissibility in prosecution for robbery that followed defendant's arrest after fleeing crime scene and being found by tracking dog; beyond dog handler's extensive training and experience, there was ample evidence concerning the training and reliability of the dog, namely that dog, a German shepherd, was descended from a bloodline of known police and military working dogs, that dog had been certified in several areas of tracking and was particularly skilled in tracking people, and that dog and handler had been "partners" in excess of seven years and had accomplished approximately 750 tracks together. Rules of Evid., Rule 702.

5. Criminal Law ⇨785(7)

Upon admitting expert testimony after discharging its gatekeeping role in assessing the reliability of expert testimony related to dog tracking evidence, trial court properly instructed jury that it was to give expert's testimony such weight and credibility as it deemed appropriate, just as with any other witness. Rules of Evid., Rule 702.

6. Criminal Law ⇨386

A sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert witness, (2) the evidence shows the dog is of a breed characterized by an acute power of scent, (3) the dog has been trained to follow a trail by scent, (4) by experience the dog is found to be reliable, (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time, and (6) the trail was not otherwise contaminated. Rules of Evid., Rule 702.

7. Criminal Law ⇨469, 478(1)

Nonscientific expert testimony must satisfy criteria of rule of evidence governing testimony of experts, both in terms of expert qualifications and reliability of the subject matter; overruling *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112. Rules of Evid., Rule 702.

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Cite as 676 S.E.2d 684 (S.C. 2009)

Appellate Defender LaNelle C. DuRant, of South Carolina Commission on Indigent Defense, of Columbia, for Petitioner.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia, and Solicitor Warren Blair Giese, of Columbia, for Respondent.

Justice KITTREDGE:

We granted a writ of certiorari to review a court of appeals opinion upholding the admissibility of Rule 702, SCRE, expert testimony related to dog tracking evidence. *State v. White*, 372 S.C. 364, 642 S.E.2d 607 (Ct.App. 2007). We affirm the court of appeals in result.

I.

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun

was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect.

Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sen-

tenced to life without parole.¹ The court of appeals affirmed, rejecting the contention that dog tracking evidence must satisfy the standard for "scientific based" expert testimony under *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979). The court of appeals noted a distinction between two types of expert testimony, "scientific evidence versus experience-based knowledge." *White*, 372 S.C. at 381, 642 S.E.2d at 615. With regard to nonscientific expert testimony (which includes dog tracking evidence), the court of appeals found that "questions about the reliability of [the dog handler] go only to the weight [of his testimony], but not admissibility." *Id.* at 376, 642 S.E.2d at 613. Because of the suggestion that an initial determination of reliability is not part of the trial court's gatekeeping role, we granted White's petition for a writ of certiorari.²

II.

A.

[1] A trial court's decision to admit or exclude expert testimony will not be reversed absent a prejudicial abuse of discretion. *State v. Price*, 368 S.C. 494, 498, 629 S.E.2d 363, 365 (2006).

White concedes the dog handler met the Rule 702, SCORE, qualifications due to his experience and training.³ White contends the trial court failed in its gatekeeping role to vet the reliability of the dog's tracking skills, thus leaving the jury to speculate about the dog's reliability. We agree with White's premise that all expert testimony under Rule 702, SCORE, imposes on the trial

courts an affirmative and meaningful gatekeeping duty. To the extent the court of appeals opinion may be construed as excluding a gatekeeping role for trial courts in connection with nonscientific (or experienced based)⁴ expert testimony, such construction is rejected.

[2] All expert testimony must satisfy the Rule 702 criteria, and that includes the trial court's gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury's ultimate consideration. Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"This language makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. It makes clear that any such knowledge might become the subject of expert testimony.... Hence, as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Reliability is a central feature of Rule 702 admissibility, and our jurisprudence is in complete accord. *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001) (finding error in the trial court's decision to admit "unreliable" expert evidence); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (noting that before expert

properly before th[e] court." *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

3. There is likewise no challenge to the Rule 702 criteria that the evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue."

4. We note that case law uses the terms nonscientific expert testimony and experienced based expert testimony interchangeably. For consistency, we will use the term nonscientific expert testimony.

1. White's criminal history triggered a life without parole sentence pursuant to S.C.Code Ann. § 17-25-45 (2003).

2. White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. See *State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of appeals declined to address the issue "because it ha[d] not been raised to and ruled on by the trial court and [wa]s not

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evidence is admitted the trial court must determine it is reliable).

[3] With regard to dog tracking evidence, this Court's jurisprudence (even prior to the adoption of the South Carolina Rules of Evidence in 1995) speaks to the reliability foundational requirement of such evidence. *State v. Childs*, 299 S.C. 471, 476-77, 385 S.E.2d 839, 842-43 (1989) (finding no abuse of discretion in trial court's admission of dog tracking testimony where a deputy sheriff had "run" bloodhounds for eleven years and finding of reliability supported by "dogs ... characteristics of acuteness in scent as well as the power of discrimination between human and other scents"); *State v. Brown*, 103 S.C. 437, 444, 88 S.E. 21, 23 (1916) (finding trial court's admission of dog tracking evidence constituted an abuse of discretion where evidence established that the dog tracking occurred outside the "period of efficiency" and was therefore unreliable).

[4] While we agree with White concerning the important gatekeeping role of the trial court in determining the admissibility of expert testimony under Rule 702, the trial court properly discharged its duty in this case. As noted, White concedes the qualifications of Officer Gunter as a dog handler. White's argument is that the dog tracking evidence is unreliable. The trial court permitted a thorough examination of all matters relating to admissibility, including reliability.

Beyond Officer Gunter's extensive training and experience, there was ample evidence concerning the training and reliability of the dog, Aurie. Aurie is a German shepherd that descended from a bloodline of known police and military working dogs. Through testing, Aurie has been certified in several areas of tracking, yet Aurie's strongest skill is tracking people. Officer Gunter and Aurie, as of the trial, had been "partners" in excess of seven years and had accomplished approximately 750 tracks together. The finding of reliability is well supported by the record, and we find no abuse of discretion in the admission of the dog tracking evidence.

[5] In addition to the trial court's discharge of its gatekeeping role in assessing the admissibility of the dog tracking evi-

dence, the court properly instructed the jury that "you are to give his testimony such weight and credibility as you deem appropriate as you will with any and all witnesses that will testify in this trial."

B.

[6] The court of appeals is commended for its thorough analysis of our country's jurisprudence concerning dog tracking evidence. While foundational requirements vary, "an overwhelming number [of jurisdictions] allow admission of dog tracking evidence in a criminal case to prove identity." *White*, 372 S.C. at 378, 642 S.E.2d at 614. To provide uniformity, we think it advisable to adopt the following evidentiary framework to guide our bench and bar concerning dog tracking evidence. By extrapolating from our case law and other authorities, we conclude a sufficient foundation for the admission of dog tracking evidence is established if (1) the evidence shows the dog handler satisfies the qualifications of an expert under Rule 702; (2) the evidence shows the dog is of a breed characterized by an acute power of scent; (3) the dog has been trained to follow a trail by scent; (4) by experience the dog is found to be reliable; (5) the dog was placed on the trail where the suspect was known to have been within a reasonable time; and (6) the trail was not otherwise contaminated. See *State v. Childs*, 299 S.C. at 476-77, 385 S.E.2d at 842-43; *State v. Brown*, 103 S.C. at 443-45, 88 S.E. at 22-23; see also *State v. Taylor*, 337 N.C. 597, 447 S.E.2d 360, 368-69 (1994); Jay M. Zitter, Annotation, *Evidence of Trailing by Dogs in Criminal Cases*, 81 A.L.R. 5th 563 (2000).

C.

[7] The case before us may appear straightforward, especially in light of the overwhelming evidence of guilt. Yet on appeal the State has persisted with the argument that reliability need not be shown for the admission of nonscientific expert testimony. Because the court of appeals in this case has approvingly cited *State v. Morgan*, 326 S.C. 503, 485 S.E.2d 112 (Ct.App.1997) in support of the State's position, we believe clarification of the analytical framework for

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the admissibility of nonscientific expert testimony is warranted.

At oral argument, the State argued this Court need not concern itself with the issue of reliability because the case *only* involves nonscientific expert testimony. Presumably, the State relies on the court of appeals' decision in *State v. Morgan*, which held "[i]f the expert's opinion does not fall within [the] *Jones*⁵ [standard for scientific expert testimony], questions about the reliability of an expert's methods go only to the weight, but not admissibility, of the testimony." *Morgan*, 326 S.C. at 513, 485 S.E.2d at 118. This is an incorrect statement of law.

We overrule *Morgan* to the extent it suggests that only scientific expert testimony must pass a threshold reliability determination by the trial court prior to its admission in evidence.⁶ The familiar tenet of evidence law that a continuing challenge to evidence goes to "weight, not admissibility" has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability. Nonscientific expert testimony must satisfy Rule 702, both in terms of expert qualifications and reliability of the subject matter.

Courts are often presented with challenges on both fronts—qualifications and reliability. The party offering the expert must establish that his witness has the necessary qualifications in terms of "knowledge, skill, experi-

ence, training or education." Rule 702, SCRE. With respect to qualifications, a witness may satisfy the Rule 702 threshold yet the opponent may still challenge the amount or quality of the qualifications. It is in this latter context that the trial court properly concludes that "defects in the amount and quality of education or experience go to the weight to be accorded the expert's testimony and not its admissibility." *State v. Myers*, 301 S.C. 251, 256, 391 S.E.2d 551, 554 (1990). Turning to the reliability factor, a trial court may ultimately take the same approach, but only after making a threshold determination for purposes of admissibility.

State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999) is often cited for the gatekeeping role of the trial court with regard to expert testimony under Rule 702, as well as the standard reliability factors for scientific evidence.⁷ The foundational reliability requirement for expert testimony does not lend itself to a one-size-fits-all approach, for the *Council* factors for scientific evidence serve no useful analytical purpose when evaluating nonscientific expert testimony. We have set forth above foundational requirements for Rule 702 expert testimony concerning dog tracking evidence.

We do not pretend to know the myriad of Rule 702 qualification and reliability challenges that could arise with respect to nonscientific expert evidence. Consequently, we offer no formulaic approach that will apply in the generality of cases. Yet the trial court in

need not be subjected to the *Jones* test, we reject any contention that it does not comport with *Jones*." *Id.* at 142 n. 2, 406 S.E.2d at 372 n. 2. *Whaley* then proceeded to analyze the matter of reliability and held, in the factual context presented, the trial court abused its discretion by excluding the expert's testimony. *Id.* at 143, 406 S.E.2d at 372. In short, neither *Schumpert* nor *Whaley* contains the slightest hint that a trial court may ignore the question of reliability when considering the admissibility of nonscientific expert testimony.

7. The *State v. Council* factors for scientific expert testimony are: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.

5. *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979).

6. *Morgan* relies on this Court's opinions in *State v. Schumpert*, 312 S.C. 502, 435 S.E.2d 859 (1993) and *State v. Whaley*, 305 S.C. 138, 406 S.E.2d 369 (1991) to support its finding that only scientific expert testimony includes reliability as part of the foundation for admission in evidence. *Schumpert* and *Whaley* stand for no such proposition. *Schumpert* addressed the qualifications of a proposed mental health professional and her ability to give expert testimony on rape trauma syndrome. *Whaley* dealt with the admissibility of a proposed expert in eyewitness identifications. Because the area of expertise was "distinguishable from 'scientific' evidence," the *State v. Jones* scientific framework was not appropriate. *Whaley*, 305 S.C. at 142, 406 S.E.2d at 371-72. The *Whaley* Court further observed, "[a]lthough we are of the opinion that this type of testimony

IN RE ELTZROTH

S.C. 689

Cite as 676 S.E.2d 689 (S.C. 2009)

the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold questions of qualification and reliability.

John E. Parker, of Peters Murdaugh Parker Eltzroth & Derrick, PA, of Hampton, for respondent.

PER CURIAM.

In this attorney disciplinary matter, respondent and the Office of Disciplinary Counsel (ODC) have entered into an Agreement for Discipline by Consent (Agreement) pursuant to Rule 21, RLDE, Rule 413, SCACR. In the Agreement, respondent admits misconduct and consents to the issuance of an admonition, public reprimand, or definite suspension not to exceed ninety (90) days. *See* Rule 7(b), RLDE, Rule 413, SCACR. We accept the Agreement and definitely suspend respondent from the practice of law in this state for a ninety (90) day period. The facts, as set forth in the Agreement, are as follows.

FACTS

Respondent self-reported to ODC that he failed to file his state and federal income tax returns from 2000 to 2007. Respondent represents that no criminal charges are pending or anticipated.

LAW

Respondent admits that his misconduct constitutes grounds for discipline pursuant to Rule 7, RLDE, Rule 413, SCACR, specifically Rule 7(a)(1) (it shall be a ground for discipline for a lawyer to violate the Rules of Professional Conduct or any other rules of this jurisdiction regarding professional conduct of lawyers). Further, he admits he has violated Rule 8.4(b) of the Rules of Professional Conduct, Rule 407, SCACR (it is professional misconduct for lawyer to commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects).

CONCLUSION

We accept the Agreement for Discipline by Consent and definitely suspend respondent from the practice of law for a ninety (90) day period. Within fifteen days of the date of this opinion, respondent shall file an affidavit

III.

We hold that the trial courts of this state have a gatekeeping role with respect to all evidence sought to be admitted under Rule 702, whether the evidence is scientific or nonscientific. In the discharge of its gatekeeping role, a trial court must assess the threshold foundational requirements of qualifications and reliability and further find that the proposed evidence will assist the trier of fact. The familiar evidentiary mantra that a challenge to evidence goes to "weight, not admissibility" may be invoked only after the trial court has vetted the matters of qualifications and reliability and admitted the evidence.

We affirm the court of appeals in result. The trial court properly discharged its gatekeeping role in assessing the dog tracking evidence under Rule 702, as to qualifications and reliability.

AFFIRMED IN RESULT.

TOAL, C.J., WALLER, PLEICONES, JJ., and Acting Justice E.C. BURNETT, III, concur.



382 S.C. 275

In the Matter of Clyde A. ELTZROTH, Jr., Respondent.

No. 26643.

Supreme Court of South Carolina.

Submitted April 3, 2009.

Decided April 27, 2009.

Lesley M. Coggiola, Disciplinary Counsel, and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

2009 C P 400 554

STATE OF SOUTH CAROLINA)

In the Court of Common Pleas

County of RICHLAND)

Full name and prison number, if any, of applicant)

v. #309726)

GARY A. WHITE JR.)

Name of Respondent)

APPLICATION FOR

POST-CONVICTION RELIEF

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 AUG -5 AM 11:15

RICHLAND COUNTY
FILEDINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly, handwritten, or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicant should, therefore, exercise care to assure that all answers are true and correct.

If the applicant is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

- Place of detention McCormick C.I. 386 Redemption Way
McCormick S.C. 29899
- Name and location of Court which imposed sentence RICHLAND COUNTY GENERAL
SESSION COURT. Columbia S.C.
- The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - 2004-65-3016
 - 2004-65-3017
 - 2004-65-3018
- The date upon which sentence was imposed and the terms of the sentence:
 - JUNE 16th 2005 (3) CONCURRENT LIFE w/ PAROLE SENTENCES
 -
 -

5. Check whether a finding of guilty was made
- (a) after a plea of guilty _____
 - (b) after a plea of not guilty ✓ _____
 - (c) after a plea of nolo contendere _____
6. Did you appeal from the judgment of conviction or the imposition of sentence? YES
7. If you answered "yes" to (6), list
- (a) the name of each Court to which you appealed:
 - i. S.C. Appellate Court (Direct Appeal)
 - ii. S.C. Supreme Court
 - iii. S.C. Court of Appeals
 - (b) the result in each such Court to which you appealed:
 - i. Affirmed JAN 16, 2007
 - ii. DENIED DEC 9, 2005
 - iii. DENIED MARCH 22, 2007
 - (c) the date of each such result:
 - i. JANUARY 16th 2007
 - ii. DECEMBER 9th 2005
 - iii. MARCH 22nd 2007
 - (d) if known, citations of any written opinion or orders entered pursuant to such results:
 - i. _____
 - ii. _____
 - iii. _____
8. If you answered "no" to (6), state your reasons for not so appealing:
- (a) _____
 - (b) _____
 - (c) _____
9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) NEW DISCOVERED EVIDENCE
 - (b) INEFFECTIVE ASSISTENCE OF TRIAL COUNSEL
 - (c) INEFFECTIVE ASSISTENCE OF TRIAL COUNSEL

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

(a) SEE ATTACHED SHEET

(b) _____

(c) _____

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

(a) any petition in a State Court under South Carolina Law?

YES

(b) any petitions in State or Federal Courts for habeas corpus or post-conviction relief?

NO

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

(d) any other petitions, motions or applications in this or any other Court?

YES

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

(a) the specific nature thereof:

i. DIRECT APPEAL

ii. PETITION FOR REHEARING

iii. WRIT OF CERTIORARI

iv. MOTION TO REMAND FOR A NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.

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

i. RICHLAND COUNTY, Columbia S.C.

ii. RICHLAND COUNTY, Columbia S.C.

iii. RICHLAND COUNTY, Columbia S.C.

iv. RICHLAND COUNTY, Columbia S.C.

(c) the disposition thereof:

i. AFFIRMED

ii. DENIED

iii. AFFIRMED

iv. DENIED

(d) the date of each such disposition:

- i. JANUARY 16, 2007
- ii. MARCH 22, 2007
- iii. April 27, 2009
- iv. December 9, 2008

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

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

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

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

(a) which grounds have been presented:

- i. NEWLY DISCOVERED EVIDENCE
- ii. _____
- iii. _____

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

- i. By MOTION TO REMAND FOR NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) CERTAIN ISSUES WERE NOT PERSEVERED AT TRIAL AND COULD NOT BE RAISED ON DIRECT APPEAL.

(b) _____

(c) _____

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

(a) your arraignment and plea? YES

(b) your trial, if any? YES

(c) your sentencing? YES

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

YES

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

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

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

- i. LANELLE DURANT, STACY OWINGS - RICHMOND COUNTY PUBLIC DEFENSE
- ii. AILEEN P. CLARE APPELLATE DEFENSE
- iii. LANELLE DURANT APPELLATE DEFENSE

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

- i. TRIAL, TRIAL SENTENCING
- ii. APPELLATE COUNSEL
- iii. APPELLATE COUNSEL

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

TO HAVE SENTENCE VACATED OR IN THE ALTERNATIVE, TO HAVE
A NEW TRIAL.

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

YES

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

VERIFICATION

I, GARY A. WHITE JR, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Gary A. White Jr

Sworn to and subscribed before me

This 29 day of July, 2009

Jennifer C. Franklin L.S.

Notary Public for South Carolina

My Commission Expires 01/31/2010

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 AUG -5 AM 11:49

RICHLAND COUNTY
FILED

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

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

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

Gary A. White Jr
Applicant

Sworn to and subscribed before me

This 29 day of July, 2009

Jennifer C. Franklin L.S.

Notary Public for South Carolina

My Commission Expires: 01/31/2010

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

(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:

IV. WRIT OF CERTIORARI TO SUPREME COURT (S.C.)

V. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IV. GRANTED NOV. 19, 2007 AFFIRMED APRIL 27, 2009

V. DENIED MAY 28, 2009

(C) THE DATE OF SUCH RESULT:

IV. APRIL 27, 2009

V. MAY 28, 2009

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9)

(A) CO-DEFENDANT ANTHONY MORRIS RETRACTED HIS TRIAL TESTIMONY BY WAY OF A SWORN STATEMENT. THE STATEMENT ITSELF WEAKENS THE STATES CASE AGAINST MR. WHITE.

(B) TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO PRESENT EVIDENCE IN CASE ON A ~~CHARGED~~ CHARGE THAT WAS DISMISSED AT THE START OF TRIAL.

(C) TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE OBJECTION OF JURY CHARGE HAND OF ONE HAND OF ALL. BY FAIL TO PURSUE OBJECTION, COUNSEL ALLOWED THE JUDGE TO GIVE THE CHARGE WITHOUT MAKING A RULING ON OBJECTED CHARGE.

CONTINUED ON BACK SIDE →

12. IF YOU ANSWERED "YES" TO ANY PART OF (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF:

IV. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED:

IV RICHLAND COUNTY, COLUMBIA S.C.

STATE OF SOUTH CAROLINA)	
COUNTY OF RICHLAND)	IN THE COURT OF COMMON PLEAS
	2009-CP-400-5549
WHITE Gary A , #309726)	
Applicant,)	
v.)	RETURN
State of South Carolina,)	
Respondent.)	

The Respondent, making its Return to the Application for Post-Conviction Relief filed August 5 2009, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Stacy Owings, Esquire. The Applicant was convicted following a jury trial on on June 16 2005, with the Honorable James R. Barber, III. The Applicant was indicted for and/or convicted of: Armed Robbery (2 counts), and Kidnapping, - 2004-GS-40-3016;3017;18;. According to the South Carolina Department of Corrections (SCDC), the Applicant is serving a Life sentence for "Kidnapping."

Attached herewith and incorporated herein by reference are the records of the Richland County Clerk of Court regarding the subject conviction(s), the Applicant's records from the Department of Corrections, the Applicant's trial transcript, and [if applicable] the Applicant's appellate records.

II.

The Applicant interprets each of the Applicant's allegations as a claim of ineffective assistance of counsel.

III.

The Respondent interprets each of the Applicant's allegations to be claims that he received ineffective assistance of counsel. The Respondent contends that the Applicant's counsel rendered adequate assistance and provided representation within the range of competence required by attorneys in criminal cases. See Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

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

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80

L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

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

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

The Respondent therefore requests that this Court convene an evidentiary hearing solely on the issue of ineffective assistance of counsel. As to all other allegations, the Respondent moves for summary dismissal pursuant to S.C. Code Ann. § 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing and that those allegations should be dismissed as a matter of law.

V.

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

VI.

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

The Respondent will coordinate with the Applicant's attorney who is, according to the Respondent's file, Charlie Jay Johnson, Jr., Esquire regarding when the hearing should be set.¹

HENRY DARGAN McMASTER
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

BRIAN T. PETRANO
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

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

May 10, 2010

¹ See: <http://www.scattorneygeneral.com/inside/pcr.html> for current and archived PCR rosters.

2009LP4005549 - 59(e) MOTION

PCR AMENDED ISSUE ONE

Trial Counsel was ineffective for failure to protest Applicant's Fifth and Sixth Amendment rights. See U.S.C.A. 14th amendment.

ARGUMENT

The Applicant contends that his conviction is in violation of the Fifth amendment, U.S. Constitution. Applicant was convicted on a non-charged offense, which violated his substantial rights to be convicted, if convicted at all on a presentment of a indictment by the Grand Jury.

The State, in its opening statement and through the evidence presented, attempted to establish that Applicant participated in indicted offenses, aiding and abetting codefendants in accomplishing crimes. The Applicant was eventually convicted on the theory of accomplice liability, by indictments charging him only with the principal offenses. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of aiding and abetting beyond a reasonable doubt on indictments charging him with the principal offenses. Under the theory of the "hand of one is the hand of all" the State first must inform Applicant of codefendants within the indictment.

The Applicant was eventually convicted on the theory of accomplice liability by indictments charging him with the principals offenses of armed robbery and kidnapping. The Fifth amendment guarantees that an individuals cannot be prosecuted for a capital or infamous offense except on presentment or indictment by a Grand Jury. The Sixth amendment provides that a defendant must be informed of the nature and cause of the accusation against him. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of the above offenses beyond a reasonable doubt on an indictment charging him with the principal offenses under the theory of the "hand of one is the hand of all", the State must first charge him with knowledge of his

codefendants criminal conduct within the indictments. The alleged fatal omission was the failure to charge that the Applicant had knowledge of codefendants; this was an essential element of the offenses that needed to be establish to properly inform Applicant of charges called upon to answer. The body of these indictments do not expressly set forth any of the facts regarding the participation of Applicants codefendants. The indictments only apprised Applicant of being charged as the one actually committing these crimes. Therefore, Applicant contends that the cryptic form of indictments required Applicant to proceed to trial with his alleged criminal activity undefined. An indictment must contain all of the elements of the charged offenses and fairly inform a defendant of the charges against him. In South Carolina, [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Gunn, 437 S.E.2d 75, 82 (1993) (Quoting State v. Cody, 186 S.E. 165 (1936)). The Supreme Court of South Carolina has held that a defendant may not ignore the plain language of an indictment merely because its caption does not precisely conform with the wording on its face. Cody v. State, 151 S.E.2d 670 (1966), by the same token, the State may not support a conviction for a offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment. State v. Tobory, 202 S.E.2d 852. A defendant's understanding of the offense is not aided by repetition of this statutory language when the statute, or even recitation of the statutory language, is not an adequate allegation for every element of an offense, for some elements require grater detail or description of the alleged conduct of a defendant. In the case at bar, look alone at the body of these indictments. It is evident that the Applicants convictions are merely being supported by the caption of these three (3) indictments, where as these indictments mention not a shed of the events regarding the involvement of any indictments therein. "The very purpose of the requirement that the Applicant

be indicted by an Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens, acting independently of either prosecuting Attorney or Judge." Stirone v. United States, 361 U.S. at 218, 80 S.Ct. 273. A mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "Fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." See, Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). Furthermore, a statutory citation does not ensure that the Grand Jury has considered and found all essential elements of the offense charged. Therefore the indictments fails to satisfy the Fifth amendment guarantee that no person shall be held to answer for an infamous crime unless on a presentment or indictment of Grand Jury, see Article I § II. Fairness and Due Process of law requires Applicant receives sufficient notice of the charges against him to enable him to properly prepare a defense. See U.S. Const. Amend. 5, S.C. Const. Art. 1, § 3. Furthermore, it is held that an indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute." United States v. Simmons, 96, U.S. 360, 362. It is irrefutable the defectiveness of these indictments, for its failure to plainly set forth the expressed elements intended to be charged. The indictments, noneless failed to fulfil its purpose. More importantly, the Supreme Court has held that a later jury instruction or a petit jury verdict cannot satisfy Applicants Fifth amendment right to be tried upon charges considered and found by a Grand Jury. Stirone, supra; also see, United States v. Campi, 541 F.2d 737, 740 (6th Cir. 1976).

CONCLUSION

Applicant was denied the right to a fair trial, because the indictments were not framed to inform Applicant of the ALLEGATIONS AGAINST HIM TO ENSURE THAT THE GRAND JURY HAD CONSIDERED AND FOUND FACTS REGARDING THE INDICTED OFFENSES. THEREFORE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROTECT APPLICANTS 5TH, 14TH, 6TH, 7TH, 8TH, 9TH, 10TH, 11TH, 12TH, 13TH, 14TH, 15TH, 16TH, 17TH, 18TH, 19TH, 20TH, 21ST, 22ND, 23RD, 24TH, 25TH, 26TH, 27TH, 28TH, 29TH, 30TH, 31ST, 32ND, 33RD, 34TH, 35TH, 36TH, 37TH, 38TH, 39TH, 40TH, 41ST, 42ND, 43RD, 44TH, 45TH, 46TH, 47TH, 48TH, 49TH, 50TH, 51ST, 52ND, 53RD, 54TH, 55TH, 56TH, 57TH, 58TH, 59TH, 60TH, 61ST, 62ND, 63RD, 64TH, 65TH, 66TH, 67TH, 68TH, 69TH, 70TH, 71ST, 72ND, 73RD, 74TH, 75TH, 76TH, 77TH, 78TH, 79TH, 80TH, 81ST, 82ND, 83RD, 84TH, 85TH, 86TH, 87TH, 88TH, 89TH, 90TH, 91ST, 92ND, 93RD, 94TH, 95TH, 96TH, 97TH, 98TH, 99TH, 100TH, 101ST, 102ND, 103RD, 104TH, 105TH, 106TH, 107TH, 108TH, 109TH, 110TH, 111TH, 112TH, 113TH, 114TH, 115TH, 116TH, 117TH, 118TH, 119TH, 120TH, 121ST, 122ND, 123RD, 124TH, 125TH, 126TH, 127TH, 128TH, 129TH, 130TH, 131ST, 132ND, 133RD, 134TH, 135TH, 136TH, 137TH, 138TH, 139TH, 140TH, 141ST, 142ND, 143RD, 144TH, 145TH, 146TH, 147TH, 148TH, 149TH, 150TH, 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#2009CP4005544 - 59(e) MOTION

PCR AMENDED ISSUE TWO

On Ground 10 (a) of my PCR Application, I amend that assertion to state my Trial Counsel provided "Deficient Performance" in failing to pursue a ruling on the clear objection to the "Hand of One Hand of All" instruction to be given to the jury. I move for Trial Transcript page 407, line 16-page 408, line 7, to be entered as Applicants Evidence one (1) as proof within this record that my Trial Counsel did not move for ruling on an important objection to a burden - shifting instruction.

ARGUMENT

"All other reasonable attorneys here in South Carolina are aware of the law relating to contemporaneous objections and laws concerning aggrieved parties only allowed to appeal a "order, judgement, ...or decision" under SCACR Rule 201 (b). Even South Carolina Rule of Criminal Procedure 18 (a) highlights that a ruling of the court will be pronounced on an objection.

"Here, you Honor, the Deficient Performance waived any opposition to the instruction which I could have raised on Direct Appeal concerning the Trial Judge giving a burden - shifting instruction to the jury at Trial Transcript page 501, line 16-page 503, line 3. And it is the nature of the evidence which the State used in support of the "Hand of One Hand of All" instruction which turned that otherwise legal instruction into a burden - shifting instruction.

For example, the only evidence which the State submitted to support that jury instruction was the testimony of Anthony Morris. Morris committed perjury as defined by State law [§. 16-9-10, S.C. Code of Laws] where he made a statement to police implication no one, then contradicted that sworn statement by testifying to it being a lie at my trial - my proof is at Transcript Page 374, line 11-page 376, line 20, which I want entered into this record as Applicant's Evidence two (2); to prove perjured evidence was, in fact, used against me. I also want to come back to this evidence in my next Ground.

"Your honor, Strickland v. Washington, says my Trial Counsel was supposed to advocate my cause (in being free from imprisonment except upon proof beyond a reasonable doubt of every element supporting the State's charges against me). Counsel didn't do this in her failure to pursue a ruling on her objection to the "Hand of One Hand of All" instruction, so as to meet the legal requirements for appealing the Court's use of an otherwise burden - shifting jury instruction.

"Also on this point, your Honor, Counsel's deficient performance 'prejudiced' my most plausible defense to the State's charges where the 'Hand of One Hand of All' instruction is the only possible means used before the jury, and had Counsel press the Judge for a ruling on the objection, there is a chance that the Court would've reconsidered charging 'Hand of One Hand of All' to the jury or, there is a reasonable probability that if a ruling on Counsel's objection was made, that the Court of Appeals could've reversed my conviction on the burden - shifting instruction alone - because it would've been proper before them.

"Finally, your Honor, that is why I claim my Trial Counsel was ineffective for failing to pursue a ruling on the objection to that burden - shifting instruction."

Long Witt

#2004CP4005549 - 5912) MOTION

PCR AMENDED ISSUE THREE

On Ground 10 (b) of my PCR Application, I amend that assertion to state that my Trial Counsel provided 'Deficient Performance' in failing to object to a material State witness committing perjury before the jury. Again, your Honor, Applicant's Evidence two (2) is State witness Anthony Morris admitting to the Court that his initial statement to police was a complete lie; here, the record shows Trial Counsel Stacey Owings did not object to Morris commission of perjury when it surfaced, nor did Owings object in her Cross Examination at Trial Transcript page 397, line 14-page 403, line 18, which I'd move to have admitted into this record as Applicant's Evidence three (3) as proof of Counsel not objecting to very damaging and prejudicial evidence against Applicant.

ARGUMENT

"Your Honor, the law is clear a statement to police becomes an official document once the officer receives it from the declarant on a "document or report required by the laws of this State." [§ 16-9-10 (A) (2), S.C. Code]; and a declarant commits perjury if they either give a false statement to the police on such 'document or report' or if they've given a truthful statement to police then contradict it under oath while testifying into a Court record - that is how our Court of Appeals interpreted § 16-9-10 in State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (S.C. App. 2005).

Further, the U.S. Supreme Court has clearly stated that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence" [Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)].

"Where my Trial Counsel is presumed to have conducted a factual and legal investigation into my case, I assert that my Counsel rendered Deficient Performance in not objecting to the State's material witness committing perjury.

"I also assert that Counsel's deficient performance

6 of 7

'Prejudiced' my defense where the State's witness was the only reason for the 'Hand of One Hand of All' being used against me. If Counsel would've objected to that witness commission of perjury, there is a reasonable probability that the Court would've suppressed the perjured testimony, and the jury could've acquitted me where nothing else 'sufficiently' connected me to the charges I am convicted of."

Ray White

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2009-CP-40-5549

Gary A. White, Jr.,)
Plaintiff/Applicant,)
vs.) TRANSCRIPT OF RECORD
The State of South Carolina,)
Defendant.)

October 18, 2010
Columbia, South Carolina

B E F O R E:

HONORABLE L. CASEY MANNING, JUDGE.

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

MARK E. SCHNEE, ESQUIRE
Attorney for Plaintiff/Applicant

BRIAN T. PETRANO, ESQUIRE
Attorney for the State

Crystal Holmes
Official Court Reporter

E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVD.</u>

1	(REPORTER'S NOTE: NO EXHIBITS WERE INTRODUCED AT THE		
2	HEARING.)		
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1		<u>I N D E X</u>			
2	<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
3	Gary A. White, Jr.				
4	By Mr. Schnee	6		20	
5	By Mr. Petrano		15		
6	Stacey Owings				
7	By Mr. Schnee	21		35	
8	By Mr. Petrano		25		
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1 THE COURT: Yes, sir.

2 MR. PETRANO: Thank you, Your Honor. This is
3 2009-CP-40-05549, Mr. Gary White, Jr. There was a P-
4 C-R application filed August 5th, 2009.

5 This was a jury trial in front of Judge
6 Barber on June 16th, 2005. At that time he was
7 represented by Ms. -- the Public Defender's office,
8 Ms. LaNelle DuRant and Ms. Stacey Owings. There was a
9 direct appeal. That was affirmed. The remittiture
10 date is May 28, 2009.

11 It's kind of a lengthy -- a pretty lengthy
12 opinion on average. It had gone through the Court of
13 Appeals and then the Supreme Court. Basically was
14 that big dog tracking case that we all heard about a
15 few years ago.

16 Anyway, the Applicant had been indicted by
17 the July 2004 term of the Richland County Grand Jury,
18 three charges. 2004-GS-40-03016, that was an armed
19 robbery, 3017 a kidnapping and 3018 is another armed
20 robbery. The armed robbery -- the two armed robberies
21 is a situation where he robbed a person individually
22 and then that clerk, the same person, of the store
23 goods. Ultimately there was life without the
24 possibility of parole because of strikes.
25

1 And then there was a charge -- there was a
2 weapons charge and I really couldn't figure out what
3 happened to it. But if you notice -- are wondering,
4 it's on page 12, there was a problem with that
5 indictment. I think it was the wrong code. The
6 Solicitor just basically abandoned that weapons
7 charge.

8 On that, I will turn it over to Mr. Mark
9 Schnee, counsel of record. Thank you, Judge

10 MR. SCHNEE: Thank you, Your Honor. I call
11 Gary White to the stand.

12 THE COURT: Come around, Mr. White.

13 MR. SCHNEE: And, Your Honor, I believe that
14 my client also submitted a brief in this case which I
15 believe Your Honor has.

16 (GARY A. WHITE, JR., Applicant, having first
17 been duly sworn, testified as follows:)

18 THE COURT: All right, please take a seat.
19 Tell us your full name and spell your last name for
20 the record.

21 THE APPLICANT: Gary White, W-h-i-t-e.

22 MR. SCHNEE: Your Honor, do you have a copy
23 of the brief and the supplemental appendix from the
24 Office of Appellate Defense?
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

6

1 THE COURT: I beg your pardon?

2 MR. SCHNEE: Do you have a copy of the brief
3 that was submitted to the Court of Appeals along with
4 the appendix?

5 THE COURT: Oh, yes.

6 MR. SCHNEE: Okay.

7 DIRECT EXAMINATION

8 BY MR. SCHNEE:

9 Q Mr. White, I want to address first and foremost,
10 the testimony of your Co-Defendant, Anthony
11 Morris.

12 A Yes, sir.

13 Q Do you remember that testimony?

14 A Yes, I do.

15 Q Okay. Now, at trial, did he implicate you as
16 participating in the crime?

17 A Yes, he did.

18 Q Okay. And he testified on the stand in front of
19 the jury?

20 A Yes, sir.

21 Q Flat out saying, you're the one that did this?

22 A Yes, sir.

23 Q Okay. Ran away and then got caught later?

24 A Yes, sir.

25
WHITE VERSUS THE STATE

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

7

1 Q Okay. Now, is it your understanding that that
2 was a major piece of evidence against you?

3 A That was the direct testimony that put me at the
4 crime scene, the only thing that put me at the
5 crime scene.

6 Q Okay. Was there any DNA or fingerprints or
7 anything else that put you at the crime scene?

8 A No, sir.

9 Q Okay. Were there any other eyewitnesses that put
10 you at the crime scene?

11 A No, sir.

12 Q Okay. Now, part of the testimony involved a dog
13 tracking after the offense occurred?

14 A Yes, sir.

15 Q Okay. And that's ---

16 A The dog track ---

17 Q --- got to you?

18 A Yeah, the dog tracked from the car -- they
19 tracked from the place of the robbery where it
20 happened, they tracked to where I was at.

21 Q Now, you always maintained your innocence in
22 terms of committing this crime, right?

23 A Yes, sir.

24 Q Okay. Now, once your trial was over and you were
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

8

1 convicted, you had counsel, I believe it was also

2 ---

3 A First it was ---

4 Q --- on direct appeal ---

5 A Yes, sir.

6 Q --- the same as one of your trial attorneys?

7 A Yes, sir.

8 Q Okay. And she received a letter from Anthony
9 Morris?

10 A (Affirmative response.)

11 Q And you've seen that letter?

12 A Yes, I've seen it.

13 MR. SCHNEE: Your Honor, there is a -- in the
14 supplemental appendix, there is the handwritten
15 version of a letter, it is notarized, as an admission
16 against his own interest and admission by the party-
17 opponent. I would request that that be part of the
18 record as evidence.

19
20 THE COURT: All right.

21 MR. PETRANO: I do object to it as hearsay
22 and it's not actually part of the record properly. If
23 you the -- part of the reply brief are that it's
24 merely offered as a proffer. The appellate rules are
25 very specific, it's only what the lower court had. By

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

9

1 definition this was newly discovered without -- not
2 part of the lower court. So it wasn't actually part
3 of the appellate record, it was offered as a proffer,
4 it wasn't actually admitted when they rejected the
5 argument.

6 THE COURT: Okay.

7 MR. PETRANO: But I still submit to you it's
8 hearsay.

9 THE COURT: Well, this is non-jury. You can
10 proffer it ---

11 MR. PETRANO: Thank you, Judge.

12 THE COURT: On that basis, I have to take a
13 look at it whether I want to or not.

14 MR. SCHNEE: Thank you. Your Honor. In the
15 initial -- I guess, final brief, there is a typed out
16 version, that LaNelle DuRant made. And if I may
17 approach, I want to ask my client to read that.

18 THE COURT: All right.

19 THE APPLICANT: All right.

20 Reading: My name is Anthony Terrell
21 (phonetic) Morris. I am claiming this to be a true
22 statement that I'm about to write. On June 15th,
23 2005, I gave a statement to the courthouse which was a
24 lie but the reason why was because I was told that if
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

10

1 I testify on my Co-Defendant, I would plea to a lesser
2 charge than what they wanted me to plead to. So being
3 that I had illegible (phonetic) of my motion, and saw
4 the videotape, I put parts together, and come up with
5 a story. I also was able to see Roy's statement. To
6 be truthful I wasn't on the scene of the crime. My
7 lawyer just told me that I was now in the middle of
8 all this, and either way it went I was going to face
9 some time. But if I wanted the minimum I would have
10 to testify on a person and a crime that I don't know
11 anything about. This is my first time ever being in
12 trouble with the law, so whatever my lawyer told me, I
13 believed him. On the day that it was time for me to
14 plea, he came to the county and told me that they were
15 not gonna drop my charges, so I told him that I didn't
16 want to plead -- want to testify and I wasn't ready to
17 plea. In return, he told me that I would have to
18 testify, and I would either have to plea, or either go
19 to trial with my Co-Defendant, and would get 90 years.
20 So being that I didn't know what was going on, I did
21 what I was told, and in return, I received 13 years
22 for something I didn't do, and also got my Co-
23 Defendant time, and really don't know him, or if he
24 was on the crime scene either.
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

11

1 Signed -- dated 7/15/05 by Anthony Morris.

2 Q Okay. I would like to show you the original
3 handwritten version, if I could. Is this what
4 you've seen before?

5 A Yes, sir.

6 Q Okay. Now, at the bottom left corner, that's a
7 notary signature?

8 A Yes, it is.

9 Q Okay. Now, during your trial, Mr. Wiggins also
10 testified?

11 A Yes, he did.

12 Q Okay. And according to Mr. Wiggins, Anthony
13 Morris was there and you were there?

14 A Yes, sir.

15 Q Okay. Had you had this letter or this statement
16 or any version of the facts by Mr. Morris, you
17 would have used that or your attorney would have
18 used that against Mr. Wiggins as well, would you
19 not?

20
21 A Yes. There actually was a statement that he gave
22 to the police when he got arrested and he didn't
23 implicate nobody in no robbery or doing the
24 robberies.

25 Q Did ---

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

12

1 A In his initial statement, his initial statement
2 to the police.

3 Q Okay. And -- but it's your assertion that had
4 you had this at the time of trial, it drastically
5 would have affected ---

6 A It would have changed the outcome of the trial.

7 Q It also would have affected how you cross-
8 examined Mr. Wiggins?

9 A Yes, it would have.

10 Q In fact, had you had this, you would probably
11 would have called Anthony Morris to the stand in
12 your own defense?

13 A Yes, I would have, definitely.

14 Q Okay. Now, you also submitted a brief to the
15 court raising a number of issues, if you would
16 just explain to the Judge generally what those
17 issues entail.

18 A Well, my first -- my first issue is that counsel
19 was ineffective for basically failing to protect
20 my Fifth and Sixth Amendment rights of the
21 Constitution. There was a -- the indictments in
22 my case, they never alleged any Co-Defendants
23 within these indictments. I was the only one
24 they alleged to have committed these crimes. So
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

13

1 when I proceeded to trial, I was going into trial
2 thinking that basically I was going to have to
3 prove my innocence from what's on these
4 indictments. But when I got to trial, they
5 attempted to establish the hand of one-the hand
6 of all, and I'm not saying that it is an illegal
7 charge but being that I didn't have no knowledge
8 of no Co-Defendants in these indictments, that's
9 what made the hand of one-hand of all charge
10 illegal against me and shifts the burden. That's
11 what I'm saying but ---

12 Q Okay.

13 A But I'm saying that I had to have actual
14 knowledge of my Co-Defendants being in the
15 indictments the first one -- the first time.

16 Q What's your second issue in the brief?

17 A My second issue is failure to object to a --
18 failure to object to -- failure to pursue an
19 objection. We objected to the hand of one-hand
20 of all jury charge but Judge Barber never made a
21 ruling on it. He said he would come back to it.
22 And as the trial proceeded on, he went ahead and
23 charged the jury under the jury charge of hand of
24 one-hand of all without making a ruling on it.
25

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

14

1 I feel that if we would have -- if my lawyer
2 would have been persistent and maintained --
3 maintained -- got a ruling on the objection, that
4 there's a reasonable possibility that charge
5 wouldn't have been listed as the hand of one -- I
6 mean, we wouldn't -- that jury charge wouldn't
7 have been submitted to the jury. And there's a
8 possibility without that jury charge, I wouldn't
9 have been convicted of this charge. Because they
10 say that one took while the other one pointed and
11 presented the firearm. And the elements of armed
12 robbery say that you have to take something to
13 commit armed robbery, you've got to take
14 something from this person. But they combined
15 the act of hand of one-hand of all to get a
16 conviction.

17 And we objected to that jury charge but they
18 never made a ruling on it, they charged it
19 anyway.

20
21 Q And the third issue in your brief is the one
22 we've already addressed, the new statement by
23 Anthony Morris ---

24 A Yes ---

25 Q --- correct?

GARY A. WHITE, JR. -- DIRECT BY MR. SCHNEE:

15

1 A Yes, the perjury statement, that he committed
2 perjury on the stand.

3 Q Okay. Were there any other issues that we have
4 not addressed that you need to discuss with the
5 Judge at this point?

6 A No, there isn't.

7 Q Okay.

8 A That's about it.

9 MR. SCHNEE: No furtherer questions at this
10 time.

11 THE COURT: Mr. Petrano.

12 CROSS-EXAMINATION

13 BY MR. PETRANO:

14 Q Do you know Morris?

15 A No, I don't.

16 Q Never ---

17 A I mean just acquaintance, maybe five hours at the
18 most.

19 Q When?

20 A April 18th.

21 Q Before the robbery, alleged robbery, whatever you
22 want to call it?

23 A Yeah.

24 Q You did know him before that?

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

16

1 A Yes, I met him -- I mean, no, did I know him
2 before the robbery -- I mean -- that day -- I met
3 him that day, the first time I ever seen him in
4 my life.

5 Q Okay. Y'all got in Wiggins's car, right?

6 A Yes.

7 Q Who was sitting where?

8 A I am in the front seat.

9 Q Passenger?

10 A Passenger.

11 Q Okay. Wiggins' driving?

12 A Yes.

13 Q And then Morris in the back?

14 A I believe so.

15 Q What kind of car was it, four door, two door, you
16 don't have to be specific?

17 A I believe it was a two door.

18 Q Did you ever see Morris after that day?

19 A After that day?

20 Q Yes.

21 A Yes, I seen him.

22 Q When?

23 A Umm...

24 Q You saw him in jail, right?

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

17

1 A Yeah, in jail.

2 Q What happened there?

3 A We was going to Court.

4 Q Together?

5 A They -- yeah, the day of my trial he had to come
6 testify.

7 Q He ---

8 A He came, I seen him. When we came out the cells
9 that morning to go to the holding cell, they got
10 -- the put him in line with me.

11 Q And you road together?

12 A No.

13 Q Okay.

14 A No.

15 Q Did you see him again?

16 A Yes, I seen him again.

17 Q And tell us about that.

18 A There's nothing to tell.

19 Q So you've seen him after he testified against you
20 and in the trial where you received life without
21 the possibility of parole?

22 A Yes, I have.

23 Q Did you confront him about that?

24 A I didn't do nothing to him.

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

18

1 Q Did ---

2 A I mean, they put him on the same yard as me and
3 he did something and they put him on lock up,
4 then they shipped me to another yard.

5 Q And you being shipped away and him being put on
6 lock up, had nothing to do with it, there was no
7 sort of physical encounter with the two of you?

8 A No, never.

9 Q Oh, okay.

10 A Never.

11 Q And when did the retraction come out, right after
12 that incident?

13 A No, it was before that incident, before -- that
14 retraction came out before that incident. I was
15 already at Lee County.

16 Q Okay. And you didn't talk to him about that?

17 A About what?

18 Q Well, first he testifies against you, you get
19 life without the possibility of parole?
20

21 A Yes.

22 Q Then he issues a retraction saying he lied. And
23 then, according to you, you saw him in the yard
24 after that.

25 A Yes.

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

19

1 Q So did you discuss ----

2 A Did I have anything to do with that retraction,
3 no.

4 Q No, not even that. Hey, thanks for issuing a
5 retraction, why did you testify against me to
6 begin with? I don't understand. It seems like a
7 real weird scenario to just kind of brush off.

8 A I mean, he got me a life sentence. He was the
9 cause of me getting the life sentence because he
10 implicated me doing a crime that I didn't do.

11 Q Right.

12 A He put me at a crime scene that I ain't had
13 nothing to do with.

14 Q And did you ---

15 A So, I mean, I guess a guilty mind would want him
16 to do that.

17 Q And did you confront him about it?

18 A Did I confront him as far as telling him that he
19 needed to do something for me?

20 Q Yes.

21 A No, I did not.

22 Q Okay. Did you ever thank him for the retraction,
23 finally coming forward and telling the truth?

24 A No, I did not.

GARY A. WHITE, JR. -- CROSS BY MR. PETRANO:

20

1 Q So you saw each other in the yard after the
2 retraction and that you never mentioned it to
3 him?

4 A When I seen him, I was on my way to chow and it
5 was just passing through. I wouldn't have wanted
6 -- honestly speaking I wouldn't have wanted to be
7 in the dorm with him knowing that I've got to
8 serve this life sentence because of something
9 that he did. So by him doing what he did,
10 whatever he did to get out the dorm, that was on
11 him. I ain't had nothing to do with that.

12 Q Do you know what he did to get out the dorm?

13 A No, I don't.

14 Q All right. Why did you get transferred?

15 A I suppose because he was still on the same yard
16 as me.

17 (Pause.)

18 MR. PETRANO: Nothing further, thank you.

19 REDIRECT EXAMINATION

20 BY MR. SCHNEE:

21 Q Just to clear this up, did you ever ask Anthony
22 Morris to write the retraction?

23 A No, I didn't.

24 Q Did you ever talk to him about his testimony

GARY A. WHITE, JR. -- REDIRECT BY MR. SCHNEE: 21

1 after he testified?

2 A No, I haven't.

3 MR. SCHNEE: Okay. No further questions.

4 THE COURT: Anything further of this witness?

5 MR. PETRANO: Nothing from the State.

6 THE COURT: You may step down, sir, Mr.

7 White.

8 (The witness leaves the witness stand.).

9 MR. SCHNEE: Judge, I call Stacey Owings.

10 (STACEY OWINGS, having first been duly sworn,
11 testified as follows:)

12 THE COURT: Please take a seat. Tell us your
13 full name and spell your last name for the record,
14 assuming it still is Owings.

15 THE WITNESS: It is for now, sir. Stacey
16 Owings, O-w-i-n-g-s.

17 THE COURT: Go ahead, Mr. Schnee.

18 MR. SCHNEE: May it please the Court.

19 DIRECT EXAMINATION

20 BY MR. SCHNEE:

21 Q Ms. Owings, you remember a lot about this case?

22 A Yes, I do.

23 Q This is a case you worked on for a very long
24 time?
25

STACEY OWINGS -- DIRECT BY MR. SCHNEE:

22

1 A Yes.

2 Q Would you say that the testimony of Anthony
3 Morris was pivotal in the conviction of Gary
4 White?

5 A It was very important.

6 Q And you didn't have this retraction at the time
7 of the trial?

8 A No, we didn't.

9 Q Okay. In fact, it's dated July 15th of 2005 --
10 do you have copy of it?

11 A I'm looking in LaNelle's file right now. Yes,
12 it's notarized on July 15th of 2005.

13 Q And the trial was June 14th through 16th?

14 A Yes.

15 Q A whole month earlier?

16 A Yes.

17 Q Okay. Had you had this retraction or statement
18 or any version of the facts consistent with this
19 retraction would that have drastically affected
20 how you proceeded with the trial?

21 A It would have gave us some significant cross-
22 examination fodder for Mr. Williams (sic),
23 certainly -- for both Mr. Morris and Mr. Wiggins.
24

25 Q Okay. Would it also have affected how you

STACEY OWINGS -- DIRECT BY MR. SCHNEE:

23

1 cross-examined the police officers?

2 A Yes.

3 Q And why is that?

4 A Well, we would have maybe had some issues on
5 whether -- how the confession was brought out,
6 the circumstances of the questioning. I mean we
7 would have had a statement that they gave to him
8 under duress -- that he had done under duress and
9 then something that he gave later after he had
10 had some time to think about it.

11 It just would have given us more -- more to
12 work on. We didn't have a lot here, so it would
13 have given us something more to work on.

14 Q Okay. And is it your belief that the two Co-
15 Defendants, Wiggins and Morris, were essentially
16 the only evidence against Gary White?

17 A No, I don't exactly agree with that.

18 Q Okay. What other ---

19 A Well ---

20 Q --- evidence placed him at the scene of the
21 crime?

22 A Okay, that you're right on. There was other
23 evidence but you needed the two statements from
24 Wiggins and Mr. Morris in order to tie the
25

STACEY OWINGS -- DIRECT BY MR. SCHNEE:

24

1 evidence to Gary. So that -- I will agree with
2 you there.

3 Q And would you agree that had the jury not
4 believed Wiggins and Morris or believed that --
5 the second statement, the new statement from
6 Morris, do you believe that a conviction would
7 have been probable at that point?

8 MR. PETRANO: I'm going to have to object as
9 to speculation ---

10 THE COURT: I beg your pardon?

11 MR. PETRANO: Object as to speculation, I'm
12 sorry.

13 THE COURT: Oh, I'm going to let her answer
14 it anyway, go ahead.

15 A I think that if we hadn't had two witnesses with
16 the same testimony testifying against Gary, I
17 think we would have had a much better chance of
18 getting a non-conviction.

19 Q Okay. And in fact, with Mr. Morris's statement
20 you would have drastically had a different direct
21 -- cross-examination of Mr. Wiggins?

22 A Yes, and as I remember, Mr. Wiggins was also a
23 problem too because, you know, Mr. -- Mr. Morris
24 came in in a jumpsuit and he was obviously
25

STACEY OWINGS -- DIRECT BY MR. SCHNEE:

25

1 incarcerated. But Mr. Wiggins came in on bond
2 and was dressed nicely and was such a credible
3 witness and we had nothing to cross him on, this
4 would have helped a lot with beating down Mr.
5 Wiggins' testimony.

6 MR. SCHNEE: I have no further questions.

7 THE COURT: All right, Mr. Petrano.

8 CROSS-EXAMINATION

9 BY MR. PETRANO:

10 Q How does Morris help your case in cross of
11 Wiggins? Morris says he doesn't know anybody and
12 he was nowhere around? But then you have
13 Wiggins, another person coming in and saying,
14 yeah, White and I were here.

15 A I think that if -- I think if -- it would have
16 been something that we could have used to
17 somewhat muddy the testimony of -- I mean, they
18 -- because we had the two witnesses who were
19 testifying and we had the two corroborating
20 witnesses, the two co-conspirators who were
21 testifying against him.

22 I think having anything to kind of throw
23 their stories and pit them against each other
24 would have helped.
25

WHITE VERSUS THE STATE

STACEY OWINGS -- CROSS BY MR. PETRANO:

26

1 Q Okay. I see what you're saying. So because
2 Wiggins said Morris was in the car with me, and
3 then you've got Morris's coming in.

4 A Right.

5 Q Okay. Now, you did -- now, Morris pled guilty
6 and then came and testified at the trial, right?

7 A I think so -- but I don't really remember, this
8 was several years ago. And at the time the
9 policy the Solicitor's office had is they
10 wouldn't let a Co-Defendant plead until after the
11 trial. He kind of had to earn his plea. But
12 sometimes they would let them plead guilty and
13 reserve sentencing. I'm not sure what they did
14 in the case of Morris and Wiggins here.

15 Q Okay.

16 A I think -- honestly, I don't remember.

17 Q Okay. Now, just generally as kind of background
18 information, you were first chair, second chair?

19 A I was second chair.

20 Q To Ms. DuRant?

21 A Right.

22 Q Okay. And were you involved in the case just as
23 much as her and she just makes the decisions?

24 Just kind of explain how that works?
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

27

1 A The way it works is LaNelle handled the case up
2 to the time she was appointed. I think Mr. White
3 went through a couple of attorneys. He was in
4 jail a long time. I think that he had -- he had
5 a couple of attorneys or maybe one attorney who
6 left and got transferred.

7 So LaNelle actually handled the file.
8 Whenever she was noticed for trial, she was
9 looking for a second seat and she asked me, I was
10 on her team. She asked me to sit with her.

11 So I did not become involved until we came up
12 for trail prep. And I did meet with Gary a few
13 times while we were preparing for trial. But all
14 trial strategy and most of the meetings with Gary
15 were done by LaNelle.

16 Q And by the time -- so based on that scenario, by
17 the time you would come on board, any type of
18 plea negotiations would have just been failed and
19 over with, right, because you're going to trial
20 once you come in?

21 A Right, I don't recall any plea negotiations when I
22 was involved because he was served with LWOP
23 notice. And so once that happens, there's not a
24 lot you can do. But, you know, up -- up until
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

28

1 the jury came back -- and we didn't know if Gary
2 would accept anything, but up until the jury came
3 back, we were still begging LaNelle -- I mean, we
4 were still begging Vanessa to give us something,
5 so.

6 Q And you had indicated just a few minutes ago that
7 really it was Wiggins and Morris that put him at
8 the scene?

9 A As I remember, yes.

10 Q Okay. But the cop who pulls up, he actually sees
11 him too, right, sees him run off? Not the dog
12 cop, and I'm not trying to put you on the spot, I
13 know the record's old? But ---

14 A Can you reference me to something in the record
15 that would remind me of that? I'm sorry.

16 Q I didn't know how to say his name, Rouppasong?

17 A Yeah, Rouppasong.

18 Q Rouppasong witnessed a man carrying something in
19 his hand, wearing dark jeans and a white shirt,
20 run from the Circle K. He was the one who chased
21 him, lost sight. That's when they preserved the
22 scene and then they get the dog.

23 A (Affirmative response.)

24 Q Then, we can call it a show-up or what not, but
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

29

1 Rouppasong also says, yeah, that's the guy,
2 talking about your client. So that puts him at
3 the scene as well, correct? If I'm getting this
4 correct, but I could be way off here but ---

5 MR. SCHNEE: Judge, I would just ask for a
6 page of the transcript that says that.

7 MR. PETRANO: I reading right from the
8 appellate brief.

9 A I well I would certainly agree at the point that
10 brief was written, the appellate attorney had
11 studied the case closer than I have.

12 MR. PETRANO: Page 6 of the final brief of
13 the Respondent and there are page citations, so page
14 227 to 235 and 237 to 238.

15 THE WITNESS: Okay.

16 THE COURT: What page is this Mr. Petrano?

17 MR. PETRANO: 227, I believe is actually
18 Office Gunter but he's explaining Officer Rouppasong?
19

20 THE WITNESS: Rouppasong.

21 MR. PETRANO: Sorry.

22 Q And if those facts aren't correct, then the
23 record will correct me if my argument is junk.
24 But my point being, there are other people that
25 put him at the scene, it wasn't just Wiggins and

STACEY OWINGS -- CROSS BY MR. PETRANO:

30

1 Morris?

2 A Right, my understanding was Rouppasong could give
3 a basic description of the person he saw running
4 away. He didn't know it was Gary White but he
5 gave a basic description of the person he saw
6 running from the gas station. I think that's
7 what -- yeah.

8 Q Then the dog?

9 A The dog.

10 Q And we're all laughing but the dog put him at the
11 scene too, right, in its own way?

12 A Yes.

13 THE COURT: This is the dog comes to the
14 scene tracking him.

15 THE WITNESS: Yes, sir, this the big dog
16 appellate tracking case.

17 THE COURT: Ma'am?

18 THE WITNESS: This is was the big dog
19 tracking appellate case. That's why we're laughing,
20 the dog.

21 THE COURT: Oh, yeah, yeah, yeah.

22 A So the dog does, you're right.

23 Q We've also got the vehicle, right?

24 A Yes.

STACEY OWINGS -- CROSS BY MR. PETRANO:

31

1 Q And the Applicant's admitted being in the
2 vehicle, he did here?

3 A The Applicants? Yes, he did.

4 Q And then there's surveillance video that
5 corroborates Ms. Anthony's story?

6 A Yes, there was surveillance video in this case.

7 Q Okay. So we've got Rouppasong, the dog, the
8 video, Ms. Anthony and the car?

9 A Yes.

10 Q And then Wiggins and Morris?

11 A Yes.

12 Q Okay. I have a weird procedural question ---

13 A Yes.

14 Q --- regarding how the Public Defender's office
15 would handle something in this case. So if you
16 don't know, just tell us. Morris's retraction
17 coming in, at that point the case is on appeal,
18 right?

19 A Right.

20 Q Okay. What if it had come to you, would you move
21 for a Rule 29? How would it work? How -- do you
22 ever get retractions, things like that? Do you
23 have a procedure for this? Because up until now
24 we've haven't really talked about real procedure
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

32

1 here at the Public Defender's office, I'm
2 thinking is there a procedure for this scenario?
3 A This never came -- I've never actually had this
4 come up. I can tell you what LaNelle did. And
5 she, I think at the time, was my team leader so I
6 would have followed LaNelle's procedure.

7 What it looks like she did, from looking at
8 her file -- I mean, the time for filing a motion
9 for a new trial is over, you've -- we've already
10 filed the appeal. So it's removed from our
11 office. And it looks like LaNelle called the
12 appellate defender and told the appellate
13 defender what she had. And she sent it to her
14 and she asked her to let her know if she was
15 going to file a motion for a new trial with the
16 Court of Appeals. And it looks like the appellate
17 defender responded that, yes, she was.

18 And so it looks like that's what I would have
19 been told to do when I was there. This never
20 came up for me.

21
22 Q Okay. And in this case, it's kind of weird that
23 Ms. DuRant, the team leader, the first chair,
24 ultimately ends up leaving the Public Defender's
25 office, goes to Appellate Defense and handles

STACEY OWINGS -- CROSS BY MR. PETRANO:

33

1 this case, right?

2 A Yes, she takes it over.

3 Q Now, one of the arguments that they try to make
4 was -- and they moved to have the case remanded
5 to General Sessions Court to handle this
6 retraction. Would that be something you would
7 have handled, and stop me if you're not sure how
8 all this would have worked or does Appellate
9 Defense drive on down and handle it in General
10 Sessions Court?

11 A That's an interesting question. My understanding
12 is once it's remanded, it's back to the trial
13 level.

14 Q Okay, so you ---

15 A And so it would have been someone -- if not me,
16 it would have been somebody else in our office
17 that the Judge would have assigned.

18 Q Okay, so ---

19 A My understanding it would still be handled by us.

20 Q Okay. And that being said, we walked up to this
21 made up scenario following what we have here in
22 the record and the arguments being made. What
23 would you do in General Sessions Court with this
24 retraction from Mr. Morris? It's been remanded.
25

STACEY OWINGS -- CROSS BY MR. PETRANO:

34

1 A It's been remanded.

2 Q Just for this issue ---

3 A Remanded for a new trial?

4 Q No, the issue on the appellate motion was to
5 remand it and address this issue of retraction.
6 So what do we do here? I'm not trying to put you
7 on the spot, I just don't see what the prejudice
8 is and I don't understand what the big deal is
9 with the retraction.

10 A Right.

11 Q And I'll tell you where I'm going and if you want
12 to stop me and answer, go ahead but ---

13 A Keep talking, I'm thinking.

14 Q Here's what I'm thinking here. You've got a
15 retraction. Now the appellate court calls it
16 newly created, I think -- that's their words, not
17 mine. But you have an individual who has now
18 admitted to perjury three times, Mr. Morris,
19 that's what his retraction does. He says, I was
20 lying at the plea, I was lying in my statement
21 and I was lying when I testified at the trial.
22 But no, no, no, here's the truth.

23
24 What are you going to do with that? Are you
25 going to call him down and cross-examine him? I

STACEY OWINGS -- CROSS BY MR. PETRANO:

35

1 don't understand.

2 A I understand your question and it's problematic.
3 You have someone you can't believe at all.
4 That's the problem. You have someone who, I lied
5 here, I lied here, I lied here and I think that
6 that's where it's problematic for his defense
7 lawyer because you can't believe anything he says
8 at that point.

9 Q And is something that you might explore as to
10 whether, as far as credibility goes of Mr.
11 Morris, whether there was any undue contact from
12 the Applicant, your client, with Mr. Morris?

13 A The prosecutor would certainly explore that.

14 Q And -- but in this case, the appellate court
15 denied the motion to remand it?

16 A That's my understanding, yes.

17 Q Thanks, nothing further. And I didn't mean to
18 put you on the spot.

19 A That's fine.

20
21 THE COURT: Mr. Schnee.

22 MR. SCHNEE: Just very briefly.

23 REDIRECT EXAMINATION

24 BY MR. SCHNEE:

25 Q Do you have a copy of the transcript?

WHITE VERSUS THE STATE

STACEY OWINGS -- REDIRECT BY MR. SCHNEE:

36

1 A Yes, I do. I have -- yes, I do.

2 Q Okay. Would you please turn to page 306.

3 A Yes.

4 Q It's where Mr. Wiggins begins to testify.

5 A Okay.

6 Q And at the very beginning, line number 11, could
7 you read the question and the answer for that?

8 3-0-6.

9 A 3-0-6, line 11?

10 Q Yes, ma'am.

11 A Why are you charged with those crimes, for what
12 incident? For the incident with Gary White and
13 Anthony Morris.

14 Q Okay. So one of the very first questions that
15 Mr. Wiggins addresses is that Anthony Morris is a
16 Co-Defendant?

17 A Yes.

18 Q Okay. And that goes back to my earlier
19 questioning in terms of how you would cross-
20 examine Mr. Wiggins with the statement from Mr.
21 Morris?

22 A Right, I could use it to impeach him.

23 Q Okay, or at least the officer ---

24 A At least the officers, right.

1 MR. SCHNEE: Judge, I don't have any further
2 questions of this witness.

3 THE COURT: Mr. Petrano, anything further?

4 MR. PETRANO: No, Your Honor.

5 THE COURT: You can step down, Ms. Owings.

6 THE WITNESS: Thank you.

7 (The witness leaves the witness stand.)

8 MR. SCHNEE: I have no further witnesses. I
9 don't know if the Attorney General does.

10 MR. PETRANO: Nothing, Your Honor, just a
11 brief rebuttable argument after argument is made, no
12 further evidence.

13 THE COURT: Go ahead, Mr. Schnee.

14 MR. SCHNEE: First I would like to address
15 the alleged contact between my client and Mr. Morris.
16 The only testimony that is before Your Honor is they
17 saw each other in passing, they had absolutely no
18 discussions regarding the retraction or anything of
19 that nature. There's no allegation that my client
20 attacked him or anything like that. And there's
21 absolutely no evidence of that.

22 So I just want to put that out there.

23 Secondly, I've reviewed the brief that the
24 State submitted along with the page numbers. The only
25

1 testimony by the officers conducting the dog tracking,
2 they say that a person was seen running. They don't
3 say it was Mr. White, they just say it is a person.
4 There's the 30 minute gap between when that happens
5 and when they track my client to the car to somewhere
6 else.

7 Clearly being somewhere after the fact does
8 not implicate him in the crime itself. The only
9 testimony that I can see in there of identifications
10 of my client participating in the actual armed robbery
11 are from Wiggins and Morris. And none of them has
12 said it's absolutely false, the whole thing was a lie,
13 I wanted to deal.

14 Now in terms of whether it's believable to a
15 jury and credibility, that's something for a jury to
16 determine. The statement certainly is going to be
17 admitted and his testimony would be admitted at trial
18 but it would be up to the jury to decide if it is
19 believable.
20

21 I think the transcript speaks for itself in
22 terms of how important the testimony of Anthony Morris
23 was along with Mr. Wiggins. I think once you
24 eliminate one of those and you begin to cross-examine
25 the main investigators who took those statements, I

1 think that drastically changes how the trial goes and
2 how it is presented to the jury.

3 I would simply argue that it's easy when you
4 discover evidence whether it's created after the fact
5 or not. The Court of Appeals' decision cites a number
6 of cases regarding new evidence. They say it was
7 never considered at the Circuit Court level and that
8 the appropriate forum is for it to be addressed on a
9 P-C-R. The appellate court didn't say they were
10 ignoring this, they're simply saying, this is not the
11 appropriate time, he has a P-C-R.

12 Well, this is his P-C-R and now we're here
13 with this evidence that the Court of Appeals said this
14 is for Your Honor to consider. I think it is a
15 substantial change and I would ask Your Honor to grant
16 him a new trial.

17 THE COURT: All right. Thank you, Mr.
18 Schnee. Mr. Petrano.

19 MR. PETRANO: Yeah, I'm going to kind of go
20 in reverse. The last thing mentioned was that this
21 was -- that the Court of Appeals kind implies that
22 this is P-C-R. I take issue to that. The decision by
23 the Court of Appeals when they reject the newly
24 discovered evidence, they cite Hayden (phonetic).
25

1 Hayden isn't just a nonsense case. Hayden is the
2 case, the standard we all cite for newly discovered
3 evidence. Obviously they flushed out the newly
4 discovered elements and those issues when they decided
5 to reject the motion to remand. They addressed this
6 issue, they thought it was nonsense and that's why
7 they dismissed it. If they thought there was any
8 credibility to it whatsoever and it would have made a
9 difference, I guess they would have to take it as
10 credible. But even they acknowledged there would be
11 no difference when they issued the denial of the
12 motion to remand and they cite Hayden. That's what
13 it's saying, like there is no newly discovered
14 evidence.

15
16 Now, Rouppasong ---

17 THE COURT: Spell that for record.

18 MR. PETRANO: R-o-u-p-p-a-s-o-n-g.

19 THE COURT: All right, sir.

20 MR. PETRANO: He witnesses an individual.

21 Now, according to my notes and the way I read it,
22 there's a show-up and he says, yeah, that's the guy I
23 saw running. Now it may have been a half-hour, an
24 hour. If I'm mistaken on that, the record will
25 reflect that and that kills that argument. But he

1 puts him there at the scene. He doesn't just say --
2 obviously he didn't know his name at that time but he
3 did identify him as the person the dog found. That
4 puts him at the scene.

5 The bottom line here is, if Morris -- even if
6 you say, okay, he's an admitted perjurer, he lied at
7 his plea, he lied at the trial of the Applicant and he
8 lied when he got sentenced a week later. That's three
9 times he perjured himself but now he's telling the
10 truth, Morris. It was just window-dressing. Morris
11 doesn't really make an effect here.

12 You have the victim, you have the
13 surveillance, you've got the dog. We've all joked
14 about the dog but the dog's good evidence and the
15 Supreme Court upheld that. You've got the dog,
16 you've got Rouppasong, you've got Wiggins. And then
17 if you look at Morris's statement, if you look at it
18 at the very end, Morris says, I don't know anybody, I
19 was nowhere near him. Well, then he doesn't know if
20 he was involved or not because he doesn't know him, he
21 was nowhere near him.

22 That all being said, Your Honor -- well, the
23 first thing in the Applicant's final argument here
24 was, there's no evidence of any improper contact by
25

1 the Applicant and Mr. Morris that started the creation
2 of the retraction.

3 Your Honor, I think that lack of evidence is
4 what goes to his credibility. It doesn't make sense
5 when analyzing his credibility here on the stand, he
6 says, yeah, that guy, he's the one who's responsible
7 for me getting three life sentences. That's him, he's
8 the one responsible. So to suggest that he doesn't
9 say anything to him is not credible, simply not
10 credible. And then there's all of a sudden a
11 retraction and then to again say, yeah, I saw him but
12 I didn't say anything about that. That makes no sense
13 whatsoever.

14 That is not credible, the State submits, and
15 that's why his testimony, being that he had no contact
16 with him, is not credible.

17 Thank you, Judge.

18 THE COURT: Mr. Schnee.

19 MR. SCHNEE: Very briefly I will address the
20 last issue first, the retraction. The mere fact that
21 Mr. Morris wanted a deal and ended up getting 13
22 years, that's a very good motivation, saying, you know
23 what, State, I'm pissed off at you, I'm going to tell
24 the truth. That's plenty of motivation, being --
25

1 speculating that my client attacked him or anything
2 else is simply improper or ---

3 THE COURT: Let me suggest that upset would
4 be a better word than pissed off.

5 MR. SCHNEE: I apologize.

6 THE COURT: Go ahead.

7 MR. SCHNEE: He's upset, let's say. The
8 simple fact is there is absolutely nothing on the
9 record before Your Honor or any records in the
10 Department of Corrections or anything else that would
11 show anything improper.

12 In dealing with the Court of Appeals issue,
13 they declined to remand it on procedural grounds.
14 They didn't have to and they chose not to. And the
15 fact is, in the appellate -- in the appellate brief
16 its cites State v. Spann, Hayden v. State and State v.
17 Kelly. The motion for retrial based on after-
18 discovered evidence, it should be -- it probably would
19 have changed the result of the trial, probably being
20 probable, 50/50. It's been discovered since the trial
21 date which is clear since it was a month after that it
22 was written. Could not have been discovered through
23 the exercise of due diligence before trial. Well,
24 Anthony Morris wasn't going to say what he had to say
25

1 until he decided to say it. There's no way of forcing
2 that to happen. Material, it's clearly material to
3 the cross-examination of the investigators, the cross-
4 examination of Mr. Wiggins, to putting Anthony Morris
5 on the stand to completely disrupt the State's theory
6 that these three people were all participating
7 together.

8 That drastically changes the entire effect to
9 the jury and is not merely cumulative or impeaching.
10 This is more than just -- it certainly is since no one
11 else testified in this regard. And it's not just
12 impeaching, it's an entire story that contradicts much
13 of the evidence.

14 Now in terms of the dog tracking, like I
15 said, I have not seen anything in this transcript that
16 they said Gary White is the one the dog picked out.
17 They picked out -- the dog followed and found three
18 people ---

19
20 THE COURT: Well, why was he arrested then?

21 MR. SCHNEE: Well, Your Honor, he was
22 arrested because he was with the other two people.

23 THE COURT: Okay.

24 MR. SCHNEE: They arrested all three of them
25 and charged all three of them.

1 THE COURT: Okay.

2 MR. SCHNEE: But there's no actual
3 identification that Gary White arm robbed that store.

4 THE COURT: I thought one or both of the Co-
5 Defendant's said he was involved.

6 MR. SCHNEE: They both testified that he was
7 involved and now one of them has changed his mind and
8 decided -- is deciding to tell the truth because he's
9 unhappy that he ---

10 THE COURT: Well, he decided to change his
11 story.

12 MR. SCHNEE: Well, that's correct, Your
13 Honor. And as to which is the truth should be left
14 for a jury.

15 THE COURT: All right, sir.

16 MR. SCHNEE: And that's why I'm asking for
17 the jury to reconsider this issue.

18 THE COURT: All right.

19 MR. SCHNEE: The only other thing, my
20 client's brief, I would ask it be part of the record.

21 THE COURT: What?

22 MR. SCHNEE: To be made part of the record,
23 the brief he submitted to Your Honor.

24 THE COURT: All right, very well. Mr.
25

1 Petrano, anything else?

2 MR. PETRANO: I do, and Your Honor, I hate
3 the go back and forth but there's a couple of things I
4 need to point out.

5 THE COURT: That's all right, go ahead.

6 MR. PETRANO: Thanks, judge. I'm looking at
7 the December 9th, 2005 order from the South Carolina
8 Court of Appeals. These aren't my words, these are
9 theirs.

10 Reading: Based on the authority of State
11 versus Porter and Hayden versus State, as applied to
12 the facts of this case, the motion is denied.

13 The Court of Appeals has addressed this.
14 They found that this supposedly newly discovered
15 evidence, and they call it recently created
16 recantation, that would not have made a difference,
17 that's what this order says.

18 And then there was some suggestion just now
19 that regarding Morris, that I think you said don't
20 used pissed off, say upset, that there was a deal for
21 him and that was why he's coming forward now and
22 telling the truth.

24 Well, Your Honor, I think you can take
25 judicial notice that there's -- where's the PCR for

1 us? I'll tell you where it is, he filed one then he
2 withdrew. And that's a matter of public record in the
3 Clerk's office. That was really an issue, that was
4 really an issue from Morris -- Morris's perspective,
5 he would have followed that up.

6 That's all I've got, Judge.

7 THE COURT: All right. Go ahead, Mr. Schnee.

8 MR. SCHNEE: Judge, I would simply direct
9 Your Honor's attention to the footnote dealing with
10 the Court of Appeals issue from the remittitur in the
11 Supreme Court. It says, White also asked the Court of
12 Appeals to grant a new trial based on newly discovered
13 evidence. It appears the new trial motion was not
14 presented to the trial court. Moreover, White did not
15 ask the Court of Appeals to remand for a new trial to
16 the trial court, and continues and says, we affirm the
17 issue -- disposition of this issue is without
18 prejudice to White seeking such relief in the trial
19 court. That's what we're here for today.

20 THE COURT: All right. Anything further?

21 MR. PETRANO: I just think we have a problem
22 here then based on that footnote and this order from
23 the Court of Appeals because they most certainly did
24 address it and I don't know where that leaves us but
25

1 with -- I'm not sure where that goes.

2 Thank you, Judge.

3 THE COURT: All right. Thank you both for
4 your lively presentations. I'll consider everything
5 I've heard here today and let you know my decision in
6 due course.

7 MR. SCHNEE: Thank you, Your Honor.

8 MR. PETRANO: Thank you, Your Honor.

9 ----- END OF TRANSCRIPT OF RECORD -----
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1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)

4 COUNTY OF RICHLAND)

5

6 I, Crystal Holmes, Official Court Reporter for
7 the Fifth Judicial Circuit of the State of South
8 Carolina, do hereby certify that the foregoing is a
9 true, accurate and Complete Transcript of Record of
10 the proceedings had and evidence introduced in the
11 hearing of the captioned case, relative to appeal,
12 in the Court of Common Pleas for Richland County,
13 South Carolina, on the 18th day of October, 2010.

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

16

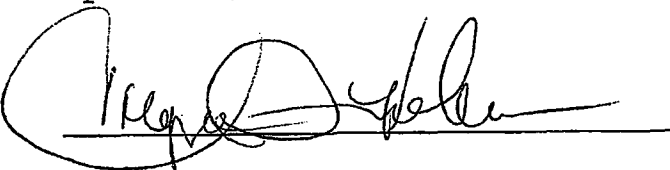
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April 15, 2012

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Crystal Holmes, Court Reporter

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STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

) IN THE COURT OF COMMON PLEAS

) 2009CP4005549

) White, Gary, #00309726,

) Applicant,

) v.

) ORDER OF DISMISSAL

) State of South Carolina,

) Respondent.

RICHLAND COUNTY
FILED
2011 AUG 31 AM 11:04
JEANETTE W. McBRIDE
C.C.P. & G.S.

PROCEDURAL HISTORY

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 5, 2009. The Respondent made its Return on or about May 24, 2010. An evidentiary hearing into the matter was convened on October 18, 2010 at the Richland County Courthouse. The Applicant was present at the hearing and was represented by Mark E. Schnee, Esquire. Brian T. Petrano of the South Carolina Attorney General's Office represented the Respondent.

At the hearing, the Applicant testified on his own behalf. The Applicant's trial counsel, who was at the time of the trial an Assistant Public Defender, Stacy Owings also testified. This Court had before it the records of the Richland County Clerk of Court, the transcript of the proceedings against the Applicant, the Applicant's records from the South Carolina Department of Corrections, and finally the records from the Applicant's direct appeal.

White, Gary, #00309726 - Order of Dismissal (2009CP4005549)

Page 1 of 18

SCANNED

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Richland County. The Applicant was represented by Stacy Owings, Assistant Public Defender.¹ On June 16, 2005, after a jury trial with the Honorable James R. Barber, III, the Applicant was convicted and sentenced to the following:

Grand Juror	Indictment Number	Charged Offense CDP - SIC Code S. Penal. Sentence* Offense Description	Sentence Received	Sentence Term
7-04	2004GS4003018	0139 16-11-0330(A) * 10-30 * Robbery / Armed Robbery (victim: Circle K)	☒ LWOP	No
7-04	2004GS4003017	0095 16-03-0910 * 30 * Kidnapping / Kidnapping (J. Gwen Anthony)	☒ LWOP	No
7-04	2004GS4003016	0139 16-11-0330(A) * 10-30 * Robbery / Armed Robbery (J. Gwen Anthony)	☒ LWOP	No
NOTES: LWOP was pursuant to S.C. Code 17-25-43. There was a weapons charge that was not pursued at trial b/c of... Indictment Issues 0-12				

A timely Notice of Appeal was filed on Applicant's behalf. The Court of Appeals affirmed the conviction. State v. White, 382 S.C. 265, 267, 676 S.E.2d 684, 685 (2009), reh'g denied (May 28, 2009). The South Carolina Supreme Court also confirmed the conviction. State v. White, 372 S.C. 364, 370, 642 S.E.2d 607, 609 (S.C. Ct. App. 2007) aff'd but criticized, 382 S.C. 265, 676 S.E.2d 684 (2009).² The facts of the case from the Supreme Court opinion are as follows:

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

¹ Ms. Owings is now in private practice.

² This case was our Supreme Court's "Case of the Month." A video of the oral argument is available online at: <http://www.sccourts.org/caseOfMonth/Feb2009/index.cfm>

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect. Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking

and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

White was convicted of two counts of armed robbery and kidnapping; he was sentenced to life without parole.

State v. White, 382 S.C. 265, 267-68, 676 S.E.2d 684, 685-86 (2009).

In the PCR application the Applicant made the following allegations:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) NEW DISCOVERED EVIDENCE
 - (b) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL
 - (c) INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

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

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

(a) which grounds have been presented:

i. NEWLY DISCOVERED EVIDENCE

ii. _____

iii. _____

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

i. BY MOTION TO REMOVE FOR NEW TRIAL OR IN THE ALTERNATIVE FOR A HEARING INTO NEW EVIDENCE.

ii. _____

iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) CERTAIN ISSUES WERE NOT PRESENTED AT TRIAL AND COULD NOT BE

(b) RAISED ON DIRECT APPEAL.

(c) _____

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

TO HAVE SENTENCE VACATED OR IN THE ALTERNATIVE, TO HAVE A NEW TRIAL.

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

(A) THE NAME OF EACH COURT TO WHICH YOU APPEALED:

IV. WRIT OF HABEAS CORPUS TO SUPREME COURT (S.C.)

IV. PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE RESULT IN EACH SUCH COURT TO WHICH YOU APPEALED:

IV. GRANTED NOV. 19, 2007 AFFIRMED APRIL 27, 2009

IV. DENIED MAY 28, 2009

(C) THE DATE OF SUCH RESULT:

IV. APRIL 27, 2009

IV. MAY 28, 2009

10. STATE CONCISELY AND IN THE SAME ORDER THE FACTS WHICH SUPPORT EACH OF THE GROUNDS SET OUT IN (9)

(A) CO-DEFENDANT ANTHONY MORRIS RETRACTED HIS TRIAL TESTIMONY BY WAY OF A SWORN STATEMENT. THE STATEMENT ITSELF WEAKENS THE STATE CASE AGAINST MR. WHITE.

(B) TRIAL COUNSEL WAS INEFFECTIVE BY ALLOWING THE STATE TO PRESENT EVIDENCE IN CASE ON A ~~CHARGED~~ CHARGE THAT WAS DISMISSED AT THE START OF TRIAL.

(C) TRIAL COUNSEL WAS INEFFECTIVE BY FAILING TO PURSUE OBJECTION OF JURY CHARGE HAND OF ONE HAND OF ALL. BY FAIL TO PURSUE OBJECTION, COUNSEL ALLOWED THE JUDGE TO GIVE THE CHARGE WITHOUT MAKING A RULING ON OBJECTED CHARGE.

CONTINUED ON BACK SIDE →

12. IF YOU ANSWERED "YES" TO ANY PART OF (11), LIST WITH RESPECT TO EACH PETITION, MOTION OR APPLICATION:

(A) THE SPECIFIC NATURE THEREOF:

IV PETITION FOR REHEARING TO SUPREME COURT (S.C.)

(B) THE NAME AND LOCATION OF THE COURT IN WHICH EACH WAS FILED:

IV RICHMOND COUNTY, COLUMBIA S.C.

As shown below, at the evidentiary hearing the Applicant proceeded, for the most part, on the allegations as stated in the application for post-conviction relief.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility and weigh their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 (1985).

The Applicant testified that Anthony Morris issued a statement following his (Morris') testimony at the trial recanting any involvement in the robbery. The Applicant argued that Morris' retraction affected the testimony of Higgins because Higgins testified that Morris was also at the scene, whereas Morris' recant disclaims any involvement or presence at the scene whatsoever. Morris' "recant" is inserted below:³

³ The "recant" was filed as page five (5) of the Applicant's "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" filed with the Court of Appeals on October 19, 2005. The State filed their "Return to Motion to Remand for a New Trial" on November 16, 2005. The South Carolina Court of Appeals denied the Applicant's request by written order dated December 9, 2005.

5

My Name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write, On June 15, 2004 I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my Co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had custody of my mother, and saw the video tape, I put parts together, and came up with a story, I also was able to see Ray's statements, to be truthful I was on the scene of the crime, My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face something. But if I wanted the minimum I would have to testify on a person, and a crime that I didn't ^{know} anything about. This is my first time ever being in trouble with the law, so what ever my lawyer told me, I believed him. On the day it was time for me to plea, he came to the County and told me that, they were not gonna drop my charges, so I told him that I didn't wanted to testify, and I wasn't ready to plea. In Return he told me that I would have to testify, and I would either have to plea, or either go to trial with my Co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in Return, I received 13 years for something I didn't do, and also got my Co-defendant time, and really don't know him, or if he was on the crime scene either.

SWORN or affirmed to and subscribed
before me this 15th day of July,
2005.

Anthony Morris
Notary Public

My Commission Expires May 18, 2014

7/15/05

Anthony Morris
Anthony Morris

The Applicant further alleged that the indictments failed to put him on proper notice that there would be any alleged co-defendants and that precluded him from properly preparing a defense. The Applicant testified that he did see Morris after Morris testified at the trial but that he (Applicant) did not say anything to Morris. The Applicant testified that he never asked Morris to issue the statement/recant.

Trial counsel testified that Morris' testimony during the trial was not unimportant. Trial counsel explained that the retraction would have provided something to cross examine the other co-defendant (the driver - Roy Wiggins). Trial counsel explained that Wiggins and Morris put the Applicant at the scene, and the recant would have given them a better chance.

In a post-conviction relief action, the Applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts

presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, 286 S.C. 441, 334 S.E.2d 813 (1985). The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, (citing Strickland). Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. As discussed above, the Applicant has failed to carry his burden in this action. Therefore, this Court finds that the application must be denied and dismissed.

Beyond his review of the undisputed procedural history, this Court finds Applicant's testimony is not credible. Trial counsel's testimony was credible.

Regarding Morris' supposed recant. This Court notes that Morris [Morris, Anthony Terrell #309858] was never produced at the PCR hearing as a witness to authenticate and/or be cross examined about his recant. According to the Richland County Clerk of Court's Online Judicial Index, Morris pled guilty on June 9, 2005 (a week prior to the Applicant's trial) about a month prior to his supposed recant

(2004GS4005082).⁴ Yet Morris, despite the supposed recant, waited until August 2006 to file an untimely PCR application (2006CP4004860).⁵ This Court notes that it is odd and somewhat inconsistent for Morris to supposedly issue this recant claiming his innocence yet never timely pursue any challenge to his conviction/sentence regarding the crime that he claims (according to the recant) he was not involved with.⁶

The Respondent argued that the recant issue was dealt with by the Court of Appeals and the issue is therefore not properly before this Court, i.e. the issues are procedurally barred by S.C. Code Ann. § 17-27-20(b) (1985). Post-conviction relief is not a substitute for a direct appeal. Simmons v. State, 264 S.C. 417, 215 S.E.2d 883 (1974). A post-conviction relief application cannot assert any issues that could have been raised at trial or on direct appeal. Ashley v. State, 260 S.C. 436, 196 S.E.2d 501 (1973). The Respondent argued specifically that issue (Morris recant) was presented to the Court of Appeals. The "recant" was filed as page five (5) of the Applicant's "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" filed with the Court of Appeals on October 19, 2005. The State filed their

⁴See <http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2004GS4005082&CourtType=G&CaseType=Criminal&CourtAgency=40001&LastName=Morris&FirstName=Anthony>

⁵ Anthony Morris' PCR was denied/dismissed on June 25, 2007 (2006CP4004860).
<http://www4.rcgov.us/publicindex/PICaseDetails.aspx?County=40+&Casenum=2006CP4004860&CourtType=G&CaseType=Civil&CourtAgency=40002&LastName=Morris&FirstName=Anthony>

⁶ Mr. Morris' testimony begins on page 369 of the Applicant's trial.

"Return to Motion to Remand for a New Trial" on November 16, 2005. The South Carolina Court of Appeals denied the Applicant's request by written order dated December 9, 2005.⁷

The South Carolina Court of Appeals	
The State,	Respondent,
v.	
Gary A. White,	Appellant:
The Honorable James R. Barber Richland County Trial Court Case No. 2004-GS-40-03015 2004-GS-40-03016 2004-GS-40-03017 2004-GS-40-03018	
ORDER	
The appellant moves for a remand for either a new trial or a hearing on whether a new trial should be ordered. The ground for this motion is the recently created recantation statement of a trial witness. Based on the authority of <u>State v. Porter</u>, 296 S.C.618, 219 S.E.2d 641(1977), and <u>Hayden v. State</u>, 278 S.C. 610, 299 S.E.2d 854(1983) as applied to facts of this case, the motion is denied. IT IS SO ORDERED.  Columbia, South Carolina December 9, 2005 cc: Assistant Appellate Defender Aileen P. Clare Assistant Deputy Attorney General Sally W. Elliott	

⁷ The Applicant's October 19, 2005 "Motion to Remand For a New Trial, Or, In the Alternative, For a Hearing into New Evidence" (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court.

The Respondent argues that the Court of Appeals Order and the specific citation to Hayden v. State makes it clear that this issue of Morris' recant as supposed newly discovered evidence was flatly rejected by the Court of Appeals.

A party requesting a new trial based on after-discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983)

The Respondent argued that the Court of Appeals was correct in denying the Applicant's newly discovered evidence motion because the Morris statement fails to satisfy the Hayden test. The Morris statement is self serving and it does not materially affect the outcome of the trial because Morris is not the only evidence putting the Applicant at the scene of the crime.⁸ Morris' statement is not exculpatory (but for Morris himself) because it denies any knowledge of whether the Applicant was involved in the crime.

The Applicant on the other hand relies on the published opinion by the Supreme Court that footnotes the newly discovered evidence issue:

White also asked the court of appeals to grant him a new trial based on newly discovered evidence. It appears the new trial motion was not presented to the trial court. Moreover, White did not ask the court of appeals to remand the new trial motion to the trial court. *See State v. Mercer*, 381 S.C. 149, 165-66, 672 S.E.2d 556, 564-65 (2009) (recognizing that a motion for a new trial based upon after discovered evidence must be presented to the trial court in the first instance). The court of

⁸ As the appellate opinion explained, Officer Rouppasong, Aurie (the German Shepherd), and substantial circumstantial evidence placed the Applicant at the scene of the crime.

White, Gary, #00309726 - Order of Dismissal (2009CP4005549)

appeals declined to address the issue “because it ha[d] not been raised to and ruled on by the trial court and [wa]s not properly before th[e] court.” *White*, 372 S.C. at 387, 642 S.E.2d at 619. We affirm the court of appeals on this issue. Rule 220(b)(1), SCACR. The disposition of this issue is without prejudice to White seeking such relief in the trial court.

State v. White, 382 S.C. 265, 275, 676 S.E.2d 684, 689 n.2 (2009), reh'g denied (May 28, 2009).

This Court respectfully notes that the Supreme Court footnote appears to be inconsistent with the appellate records before this Court. The footnote includes the following: “White did not ask the court of appeals to remand the new trial motion to the trial court.” The Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) clearly requested the Court of Appeals to remand the case to the trial court. To be clear, according to the appellate records, the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” (including the Morris statement itself) and the December 9, 2005 Order by the Court of Appeals was part of the Supplemental Appendix submitted on certiorari to the South Carolina Supreme Court. In fact, the first sentences of the Applicant’s October 19, 2005 “*Motion to Remand for a New Trial, Or, In the Alternative, For a Hearing into New Evidence*” request that the Court of Appeals remand the case for a hearing into the new evidence.

Accordingly, there is no good faith claim that counsel did not move the appellate court to remand the case to the trial court to determine if the Morris statement was sufficient newly discovered evidence. It is obvious that the Court of Appeals rejected the Applicant’s argument regarding the Morris statement and found that it did not satisfy the Hayden factors for newly discovered evidence – the Order specifically cites Hayden. The Applicant has failed to satisfy his

burden of proof and demonstrate that the Morris statement satisfies the Hayden factors and/or that the Court of Appeals decision was incorrect when his motion to remand was denied. The Court recognizes the Applicant's argument that the final sentence of the Supreme Court opinion implies that the newly discovered evidence issue is still available: "[t]he disposition of this issue is without prejudice to White seeking such relief in the trial court." White at n.2. Once again, the Applicant simply failed to satisfy his burden of proof at the PCR hearing and demonstrate that the Morris statement satisfied the Hayden factors, i.e. that it was/is material to his guilt or innocence and would have changed the result of the trial.⁹ Accordingly, there has been no demonstration of prejudice no matter which court was presented with the recant issue, i.e. the Supreme Court, the Court of Appeals, or the trial court.

The Applicant's remaining issue(s) are without merit. The Applicant had notice that the State's case included the co-defendants. The defense was well aware that the co-defendant(s) were part of the State's case. In fact, trial counsel, in pretrial matters, knew (from the discovery) that one of co-defendants might mention that the Applicant indicated he needed to do the robbery to pay his parole fees. (Transcript, p. 6 L. 20 – p. 11 L. 25).

⁹ Further, this Court did not find the Applicant credible that he did not confront Morris when the two crossed paths after Morris testified against the Applicant at trial.

CONCLUSION

Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Counsel was not deficient in any manner, nor was Applicant prejudiced by counsel's representation. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

Except as discussed above, this Court finds that the Applicant failed to raise the remaining allegations set forth in his application at the hearing and has, thereby, waived them. As to any and all allegations that were or could have been raised in the application or at the hearing in this matter, but were not specifically addressed in this Order, this Court finds Applicant failed to present any probative evidence regarding such allegations. Accordingly, this Court finds that Applicant waived such allegations and failed to meet his burden of proof regarding them. Accordingly, they are dismissed with prejudice. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992). A waiver may be express or implied. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." Lyles v. BMI, Inc., 292 S.C. 153, 158-59, 355 S.E.2d 282 (Ct. App. 1987). The Applicant's failure to address these issue at the hearing indicates a voluntary and intentional

relinquishment of his right to do so. Therefore, any and all remaining allegations are denied and dismissed.

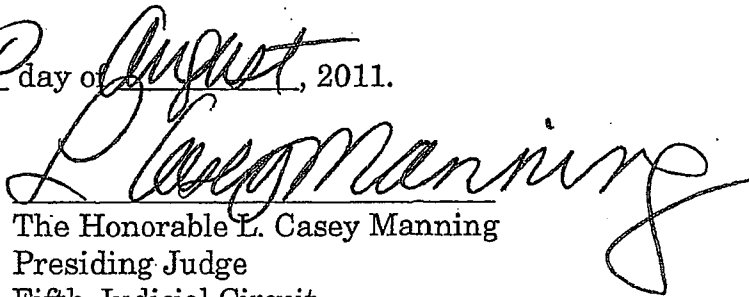
This Court cautions the Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRPC, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant and counsel are directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

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

AND IT IS SO ORDERED this 30 day of August, 2011.

Colle, South Carolina.


The Honorable L. Casey Manning
Presiding Judge
Fifth Judicial Circuit



COPY

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland CountyL. Casey Manning, Circuit Court Judge

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**S.C. Supreme Court
RECEIVED**

GARY A. WHITE,

SEP 12 2012

PETITIONER

SC OFFICE OF
APPELLATE DEFENSE

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

JOHNSON PETITION FOR WRIT OF CERTIORARI

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

ATTORNEY FOR PETITIONER

ISSUE PRESENTED

Whether petitioner should be granted a new trial because a key witness recanted his testimony after petitioner's trial?

STATEMENT

Procedural Background

On July 21, 2004, petitioner Gary A. White was indicted for two counts of armed robbery and one count of kidnapping. App. 697 – 702. On June 14 – 16, 2005, White was tried in Richland County before the Honorable James R. Barber. App. 1. White was represented by LaNelle C. DuRant and Stacey Owings. App. 1. Vanessa Cooper and Dolly J. Garfield represented the State. App. 1. White was convicted and Judge Barber sentenced him to life without parole pursuant to S.C. Code Ann. § 17-25-45. App. 526, ll. 2 – 18.

White appealed his conviction and sentence. During his appeal, White's co-defendant, Anthony Morris, wrote a statement recanting his testimony at White's trial. App. 686. Based on this statement, White filed with the Court of Appeals a Motion to Remand for a New Trial or a Hearing on Whether a New Trial Should be Ordered. App. 690. On December 9, 2005, the Court of Appeals denied this motion. App. 690. On January 16, 2007, the Court of Appeals affirmed White's conviction and sentence. State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007). White again raised the issue of a new trial based on Morris' recantation in his appeal. Id. at 387, 642 S.E.2d at 618-19. The Court of Appeals denied White's appeal on this issue on the basis of its earlier denial of his motion and because the issue had not been presented to the trial court. Id.

The Supreme Court granted certiorari and affirmed the Court of Appeals' result. State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009). In a footnote, the Supreme Court addressed the issue of whether White was entitled to a new trial based on Morris' recantation. This Court affirmed the Court of Appeals, but stated that the "disposition of this issue is without prejudice to White seeking such relief in the trial court." Id. at 269 n.2, 676 S.E.2d at 686 n.2.

White timely filed a PCR application. App. 608-15. On October 18, 2010, a hearing on White's PCR application was held before the Honorable L. Casey Manning. App. 629. White was represented by Mark E. Schnee and Brian T. Petrano represented the State. App. 629. On August 31, 2011, Judge Manning denied White's application. App. 678-95. This petition follows.

Factual Background

Gwen Anthony managed the Circle K convenience store in Richland County. App. 63, ll. 18 – 24. On the night of April 19, 2004, Anthony was working third shift. App. 64, ll. 9 – 11. Two masked men rushed into the store. App. 80, ll. 19 – 81, l. 14. One of the men had a gun. App. 81, ll. 11 – 14. The man with the gun grabbed Anthony and held the gun to her neck. App. 82, ll. 1 – 6. The other man took Anthony's wallet and cell phone from her purse. App. 82, ll. 20 – 83, ll. 2. He also took money from the store's cash register. App. 87, ll. 1 – 4. He also took lottery tickets and an 18-pack of beer. App. 88, ll. 17 – 21; App. 89, ll. 24 – 25.

She described the man with the gun as wearing a 6 foot tall black male wearing a white shirt, dark baggy jeans, and a mask. App. 98, ll. 21 – 99, l. 5; App. 81, ll. 5 – 10; App. 92, ll. 11 – 13. She also saw his gun and described it as a black .45 with a silver top. App. 91, ll. 9 – 14. Anthony smelled alcohol on his breath. App. 90, l. 25 – 91, l. 2. During the robbery, the man with the gun passed out for "a couple of seconds." App. 91, ll. 3 – 5. He woke up after being yelled at by the other robber. App. 92, ll. 20 – 22. The other robber left the store.¹ App. 92, l. 23 – 93, l. 2.

While still holding Anthony, the gunman pushed her out of the door of the store. App. 93, ll. 13 – 19. He shoved Anthony to the side and ran. App. 94, ll. 3 – 7. Anthony then noticed a police officer coming into the parking lot. App. 94, ll. 12 – 17. The officer pursued in

¹ The State introduced the store's surveillance videos into evidence. App. 115, l. 12 – 117, l. 4.

his car to the back of the store, but briefly lost sight of the suspect. App. 153, ll. 21 - 25. Behind the store, the officer noticed a parked car. App. 153, l. 21 - 154, l. 9. The officer then saw the same person who had run from the store flee from the car. App. 154, ll. 12 - 19. The officer described the fleeing suspect as a black male wearing a white shirt and dark pants with something in his hand. App. 152, ll. 19 - 23. Instead of continuing pursuit, the officer secured the car. App. 160, ll. 1 - 18. Roy Wiggins was inside the car. App. 162, ll. 7 - 14. Also in the car were lottery tickets, a cell phone, and a case of beer. App. 176, ll. 13 - 22.

A K-9 unit arrived at the scene. App. 163, ll. 9 - 21. A K-9 unit led the officers to a man sleeping under some bushes. App. 166, ll. 3 - 13. The sleeping man was wearing a white t-shirt and dark pants and was armed. App. 169, ll. 5 - 170, l. 9. The original officer on the scene identified him as the same person who fled from the store. App. 170, ll. 10 - 17. However, on cross-examination, the officer admitted that he did not see the face of the man who exited the store and could not identify him. App. 183, ll. 14 - 16. The man found sleeping under the bush was taken into custody and later identified as petitioner. App. 284, ll. 13 - 22. No fingerprints were found on the gun. App. 302, l. 25 - 303, l. 4.

Anthony could not see either man's face. App. 140, ll. 18 - 19. She was never able to identify either robber. App. 140, ll. 20 - 22. In court, Anthony testified that she did not recognize petitioner. App. 140, ll. 25 - 141, l. 1. Anthony gave a statement immediately after the incident in which she said the gunman was wearing blue jeans and a light colored or white shirt. App. 143, l. 19 - 144, l. 8. This statement did not mention the dark color of the gunman's pants. App. 143, l. 19 - 144, l. 8.

Roy Wiggins testified that he and his friend, Anthony Morris, had been to a party on the night of the robbery. App. 310, ll. 16 - 23. Wiggins and Morris had known each other for

approximately four years. App. 307, ll. 6 – 10. Wiggins had never met White before the party. App. 311, ll. 17 – 19. Wiggins claimed that he and Morris were told by White to pull into the parking lot of the convenience store. App. 317, l. 20 – 318, ll. 3. Wiggins claimed that White got out of the car with a gun and then put on a ski mask. App. 321, ll. 19 – 22. Wiggins said that he waited in the car while Morris and White went into the store. App. 322, l. 20 – 323, l. 3. Wiggins said that, “[Morris] got to the car first and I told him he just needed to run. So I just turned the car off. And Gary came next and then they just started running.” App. 323, ll. 19 – 21. Wiggins was then arrested. App. 338, ll. 14 – 16.

Wiggins gave a sworn statement to the police following his arrest. App. 345, ll. 3 – 5. He admitted that he lied in the statement. App. 346, ll. 7 – 17. He originally told the police that he did not know the identity of Morris and only gave the police Morris’s nickname, “Amp.” App. 346, ll. 7 – 17. He told the police “Amp” was wearing a white shirt and blue jeans. He also said that he didn’t know whether Amp had a gun. App. 355, ll. 17 – 23.

A week later, Wiggins returned and gave another false statement to the police. App. 348, l. 19 – 349, l. 16. He told the police that “Amp” was Anthony Morris, but said he learned Amp’s identity from his aunt. App. 349, ll. 6 – 13. He explained the reason for this fabrication was that he “felt like I was protecting myself.” App. 349, ll. 17 – 20. He admitted seeing White being booked at the jail the night of the robbery. App. 350, ll. 11 – 14. Wiggins was a college student with no prior record. App. 359, l. 18 – 360, l. 10. He was charged with the same crimes as White. App. 360, ll. 11 – 13.

Morris pled guilty to the same counts of armed robbery and kidnapping that were charged against White. App. 369, ll. 18 – 22. On May 20th, 2004, Morris gave a statement to the police. App. 373, ll. 3 – 20. Morris admitted that his first statement to the police was full of lies. App.

374, l. 11 – 376, l. 20. He admitted lying about Roy Wiggins telling him they were going to meet a girl. App. 374, l. 25 – 375, l. 3. He admitted lying about staying in the backseat of the car eating his food while Wiggins and White went into the convenience store. App. 376, ll. 1 – 6. Wiggins explained his lies:

Q. Okay. And so you were trying to protect yourself. Isn't that true Mr. Morris?

A. I mean, what I wrote in here was a lie.

Q. Okay. Everything you told Investigator Bulloch May 20th when you were arrested was a lie; isn't that true?

A. Yes, ma'am.

Q. Why did you lie to Investigator Bulloch?

A. I don't know.

Q. Were you trying to protect yourself, Mr. Morris?

A. Yes, ma'am.

Q. Were you trying to get away with this crime, Mr. Morris?

A. Yes, ma'am.

Q. So the entire 10 page statement that you gave to Investigator Bulloch is basically [rubbish]; isn't that true?

A. (Whereupon subject indicated nodding head).

THE COURT: Need to answer.

THE WITNESS: Yes, ma'am.

App. 377, ll. 2 – 20. Morris then proceeded to testify consistent with Wiggins' testimony. Morris had not been sentenced at the time of his testimony. App. 399, l. 24 – 400, l. 15. On cross-examination Morris admitted being friends with Wiggins. App. 401, ll. 7 – 10.

On July 15, 2005, after White was convicted, Morris gave a sworn statement recanting his testimony at trial. App. 686; App. 585 (version typed by White's attorney during his direct appeal). In his July statement, Morris said he "saw the videotape" and saw Wiggins' statements. App. 686; App. 585. He said he used these to "put parts together, and come up with a story." App. 686; App. 585. Morris said he "wasn't on the scene of the crime." App. 586; App. 585. Morris said that he was pressured into his false testimony at trial by his attorney and "received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either." App. 686; App. 585.

ARGUMENT

Petitioner should be granted a new trial based on the after-discovered evidence of the recantation of a key witness's testimony after petitioner's trial.

The PCR court erred by not granting petitioner a new trial based on Morris' recantation of his testimony. The PCR court improperly used the Court of Appeals' prior opinion to determine that this issue had already been decided against White. App. 692-93. However, this ruling contradicts an express statement by this Court. White, at 269 n.2, 676 S.E.2d at 686 n.2. This Court expressly stated that the question of whether petitioner is entitled to a new trial because of Morris' recantation was disposed of **without prejudice**. Id. Section 17-27-20(a)(4) of the South Carolina Code expressly grants a convicted person the right to contest his conviction in a PCR application on the ground 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." S.C. Code Ann. § 17-27-20(a)(4). Therefore, this issue was properly before the PCR court.

As an alternative sustaining ground, the PCR court ruled that petitioner could not demonstrate prejudice. App. 693. This ruling appears to be based on an incomplete discussion of the factors governing whether newly discovered evidence entitles a convicted person to a new trial. App. 693, (discussing factors listed in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)). A defendant must show the after-discovered evidence: "(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not in the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching." Hayden, at 611, 299 S.E.2d at 855.

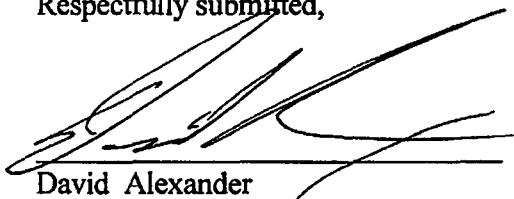
These factors show that a new trial should be granted for petitioner. First, without Morris' testimony identifying White and corroborating Wiggins' testimony, no credible positive facial identification of White before or during the robbery exists. Wiggins lied in his earlier statements to police. Without these witnesses, reasonable doubt would exist and the result of a new trial probably would be different. As to the second and third factors, petitioner could not have discovered that Morris fabricated his testimony before trial. It was only after White was convicted that Morris recanted his testimony.

As to the fourth factor, Morris' recantation affects the question of petitioner's guilt. It raises substantial questions concerning whether Morris and Wiggins, who were close friends, conspired to shift the blame for this robbery to White. Finally, this evidence is not merely impeaching or cumulative. While it certainly affects Morris' credibility, when combined with Wiggins' unreliable testimony, it leaves the State without a positive identification of White entering and robbing the store. When the testimony of Wiggins and Morris is discounted, the State's evidence against White is largely circumstantial. Therefore, a new trial is warranted under these factors. See Hayden, at 611, 299 S.E.2d at 855.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari with the ultimate relief of a new trial.

Respectfully submitted,


David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

This 12th day of September, 2012.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
L. CASEY MANNING, CIRCUIT COURT JUDGE

GARY A. WHITE,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

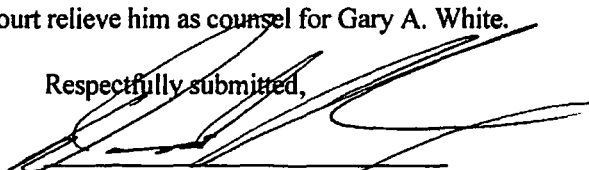
PETITION TO BE RELIEVED AS COUNSEL

Counsel for Gary A. White states:

1. He is an Appellate Defender for the South Carolina Office of Appellate Defense and was appointed to represent petitioner.
2. He has reviewed the records and transcript of petitioner's post-conviction relief hearing which was held on October 18, 2010. In his opinion seeking certiorari from the order of dismissal is without merit.
3. He has, pursuant to Johnson v. State, 294 S.C. 310, 364 S.E.2d 201 (1988), briefed the one arguable legal issue which arose during the post-conviction relief process.

Therefore, counsel requests that the Court relieve him as counsel for Gary A. White.

Respectfully submitted,


 David Alexander
 Appellate Defender
 ATTORNEY FOR PETITIONER

This 12th day of September, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

GARY A. WHITE,

PETITIONER,

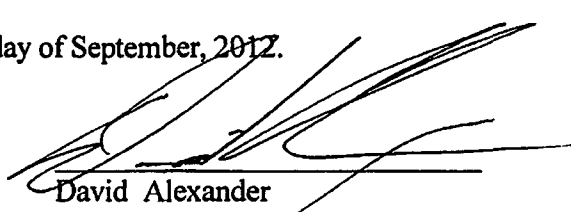
V.

STATE OF SOUTH CAROLINA,

RESPONDENT

CERTIFICATE OF SERVICE

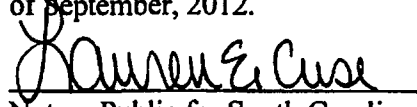
I certify that a true copy of the Johnson petition for writ of certiorari and a copy of the appendix in this case have been served on Robert D. Corney, Esquire and Gary A. White, #309726, at McCormick Correctional Institution this 12th day of September, 2012.



David Alexander
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 12th day
of September, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: August 23, 2014.

MA

The Supreme Court of South Carolina

Gary A. White, Jr., Petitioner,

v.

State of South Carolina, Respondent.

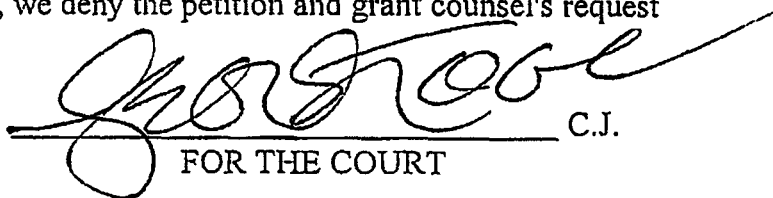
Appellate Case No. 2011-199411

ORDER

This matter is before the Court on a petition for a writ of certiorari following the denial of petitioner's application for post-conviction relief.

Petitioner's counsel asserts that the petition is without merit and requests permission to withdraw from further representation. Petitioner has not filed a *pro se* petition.

After careful consideration of the entire record as required by *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), we deny the petition and grant counsel's request to withdraw.


C.J.
FOR THE COURT

Columbia, South Carolina

December 19, 2013

cc:

Robert Daniel Corney, Esquire

David Alexander, Esquire

Gary A. White, Jr., #309726

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

GARY A. WHITE, # 309726

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PRO. SE. BRIEF
PURSUANT TO JOHNSON V. STATE

GARY A. WHITE, # 309726

M.C.I. F.4 - 229. B

386 REDEMPTION WAY

McCORMICK, SC 29899

PRO. SE. PETITIONER

RECEIVED

FEB 28 2014

S.C. Supreme Court

ISSUES PRESENTED

I. - Whether Appellate Counsel Alexander's Petition To Be Relieved As Counsel should be Denied due to a meritorious claim which PCR Court ruled on is properly preserved for Review sub judice ?

II. - Whether the PCR Court erred in denying relief on Ground 10(c), Application For Post Conviction Relief ("APCR"), where Trial Counsel Stacey Owings never testified in PCR contrary to 'Petitioner White's' testimony in PCR regarding Trial Counsel's failure to pursue Ruling on Objection claim ?

STATEMENT

Petitioner Gary A. White ("White") assents to
the STATEMENT of Appellate Counsel Alexander.

ARGUMENT I.

Appellate Counsel Alexander's Petition To Be Relieved As Counsel should be Denied due to a meritous claim which PCR Court ruled on is properly preserved for Review sub judice.

White's Appellate Counsel clearly stated that "In his opinion seeking certiorari from the order of dismissal is without merit" < see PETITION TO BE RELIEVED AS COUNSEL, no. 2 (quoted in part) >.

Presuming the validity of deference this Court may extend to Appellate Counsel's decisive opinion, in light of Johnson, *supra*, White submits that the "one bite at the apple" < see Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (S.C. 1999) > incorporating the entitlement "to the assistance of counsel in seeking review of the denial of PCR." < see Williams v. Ozmint, 380 S.C. 473, 477, 671 S.E.2d 600, 601 (S.C. 2008) (citing Bray v. State, 366 S.C. 137, 139-40, 620 S.E.2d 743 (2005)) >, cannot evince regarding White's PCR appeal, when Appellate Counsel did not brief the one claim that White testified to in PCR, which the PCR Court denied without the Respondent proffering testimony from White's Trial Attorney to contradict White's PCR testimony [see ARGUMENT II, *infra*].

It follows that, as there is a meritous claim

which this Court may review, as well as grant relief upon
 < compare Jackson v. State, 355 S.C. 568, 570, 586
 S.E.2d 562, 563 (S.C. 2003) ("... the Supreme Court
 will not uphold the findings of the PCR court if
 no probable evidence supports those findings.")
 >, Appellate Counsel Alexander's Petition To Be
 Relieved should be denied.

ARGUMENT II.

The PCR Court erred in denying relief
on Ground 10(c), APCR, where Trial
Counsel Owings never testified in PCR
contrary to White's testimony in PCR
regarding Trial Counsel's failure to
pursue Ruling on Objection claim.

Stated simply in reference to APPENDIX before
 this Court, White's APCR contained the claim that "
 Trial Counsel was ineffective by failing to pursue
 objection of Jury Charge Hand of one Hand of All"
 and "Counsel Allowed the Judge to give the Charge
 without making a ruling on objected charged" et al [
 see APPENDIX, Pg. 614 (quoted in part, originally)];

White clarified the claim during his sworn PCR testimony [APPENDIX 641, ln. 18 to 642, ln. 20], and, as Trial Counsel Owings testified in the PCR hearing [see APPENDIX 649, ln. 22 to 665, ln. 6], she did not testify contrary to White's testimony in PCR hearing noted. The PCR Court, however, held this factually-based claim to be "without merit" [APPENDIX 693, ln. 11], among other claims; White, relying on Jackson, *supra*, submits that there is no PCR record evidence contradicting his testimony to support the 'without merit' finding of PCR Court.

As South Carolina law has clearly directed that Trial Counsel should pursue rulings on objections < see State v. Pierce, 263 S.C. 23, 28-29, 207 S.E.2d 414, 417 (S.C. 1974) >, and White's Trial Counsel was not proven to have so pursued the ruling, contrary to White's testimony, the PCR Court erred in denying relief on Ground - 10(c), APCR.

CONCLUSION

Based on the above-said, White submits that this Court should Deny Appellate Counsel Alexander's Petition To Be Relieved As Counsel, and Order him to Formally draft the asserted Argument II for this Court's consideration.

Respectfully Submitted,

/s/ Gary White

Gary A. White, # 309726

McC.I. F.4 - 229 - B

386 Redemption Way

McCormick, SC 29899

2 - 24 - 2014
DATE

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

L. Casey Manning, Circuit Court Judge

GARY A. WHITE, # 309726,

PETITIONER

RECEIVED

V.

STATE OF SOUTH CAROLINA,

FEB-28-2014

RESPONDENT

S.C. SUPREME COURT

CERTIFICATE OF SERVICE

I certify in the presence of below-signed Notary Public that I have served a True & Exact Copy of my 'Pro Se Brief Pursuant To Johnson v. State' on Respondent's attorney of record, Robert D. Corney, Assistant Attorney General, P.O. Box 11549, Columbia, SC 29211, by depositing said material into custody of M.C.I. Mail Room Clerk (below Notary Public) to be immediately forwarded to address through sufficient U.S. Postage, on same date I likewise forwarded said material to South Carolina Supreme Court.

Sworn and Subscribed to
before me, this 24th

day of February, 2014.

15/ *Stephanie Marshall*
Notary Public, South Carolina

* My Commission Expires: *May 12 2021*

15/ *L. Casey Manning*

Gary A. White, # 309726

M.C.I. F. 4-229-B

386 Redemption Way
McCormick, SC 29849

GARY WHITE 309726
Mr CORMICK C.I. F4B.229
386 Redemption Way
Mr CORMICK S.C. 29849

S.C. SUPREME COURT
P.O. BOX 11330
Columbia, S.C. 29211

The Supreme Court of South Carolina

Gary A. White, Jr., Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2011-199411

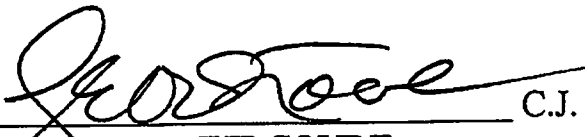
Lower Court Case No. 2009-CP-40-5549

ORDER

By Order dated, December 19, 2013, petitioner's petition for a writ of certiorari, which was filed pursuant to *Johnson v. State*, 294 S.C. 310, 364 S.E.2d 201 (1988), was denied, and counsel's request to withdraw was granted. The remittitur was sent on January 6, 2014.

This Court recalled the remittitur on January 16, 2014, and subsequently accepted petitioner's *pro se* petition.

After careful consideration of petitioner's *pro se* petition, we adhere to our previous ruling.


C.J.
FOR THE COURT
(Beatty, J., not participating)

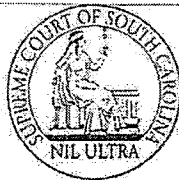
Columbia, South Carolina

May 7, 2014

cc:

David Alexander, Esquire

Megan E. Harrigan, Esquire



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

May 21, 2014

The Honorable Jeanette W. McBride
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: Gary A. White Jr. v. State
Lower Court Case No. 2009CP4005549
Appellate Case No. 2011-199411

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

Daniel E. Shearouse
CLERK

cc: David Alexander, Esquire
Megan E. Harrigan, Esquire
Gary A. White, Jr., #309726

RECEIVED

MAY 22 2014

SC OFFICE OF
APPELLATE CLERK

AO 241 (Rev. 10/07)

RECEIVED
USDC CLERK, COLUMBIA, SC

Page 2

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

JAN 26 PM 2:24

United States District Court		District: <u>SOUTH CAROLINA</u>
Name (under which you were convicted): <u>GARY A. WHITE JR</u>		Docket or Case No.:
Place of Confinement: <u>McLormick S.C.</u>		Prisoner No.: <u>309726</u>
Petitioner (include the name under which you were convicted) <u>GARY A. WHITE JR</u>		Respondent (authorized person having custody of petitioner) <u>v. ALAN WILSON & WARDEN LEROY CARTEDGE</u>
The Attorney General of the State of <u>SOUTH CAROLINA — ALAN WILSON</u>		

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:

GENERAL SESSIONS Richland County(b) Criminal docket or case number (if you know): 2004 GS 4003016-18

2. (a) Date of the judgment of conviction (if you

JUNE 16, 2005(b) Date of sentencing: JUNE 16, 2005

3. Length of sentence:
- LIFE WITHOUT PAROLE (3) CONCURRENT SENTENCES

4. In this case, were you convicted on more than one count or of more than one

☒ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:

ARMED ROBBERY, ARMED ROBBERY, KIDNAPPING.

6. (a) What was your plea? (Check one)

☒ (1)

Not guilty

☐ (3)

Nolo contendere (no contest)

☐ (2)

Guilty

☐ (4)

Insanity plea

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

NA

N	
	A

- (c) If you went to trial, what kind of trial did you have? (Check one)
- ☒ Jury ☐ Judge only
7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?
- ☒ Yes ☐ No
8. Did you appeal from the judgment of conviction?
- ☒ Yes ☐ No
9. If you did appeal, answer the following:
- (a) Name of court: SOUTH CAROLINA COURTS of APPEAL
- (b) Docket or case number (if you know): unknown
- (c) Result: DENIED
- (d) Date of result (if you know): JANUARY 16, 2007
- (e) Citation to the case (if you know): OPINION # NO. 4196
- (f) Grounds raised: 1.) Did THE TRIAL COURT ERR by denying Appellants objection to THE STATES EXPERTS WITNESS, A dog-handler WITHOUT REQUIRING THE STATE TO ESTABLISH THE underlying Reliability of dog-TRACKING AS A SCIENTIFIC OR TECHNICAL field. 2.) IS Appellant ENTITLED TO A NEW TRIAL BASED ON NEWLY-discovered EVIDENCE, WHEN HIS Co-DEFENDANT WHO TESTIFIED AGAINST HIM AT TRIAL, HAS RETRACTED HIS TESTIMONY
- (g) Did you seek further review by a higher state court? ☒ Yes ☐ No
- If yes, answer the following:
- (1) Name of court: S.C. SUPREME COURT
- (2) Docket or case number (if you know): unknown
- (3) Result: DENIED
- (4) Date of result (if you know): April 27, 2009
- (5) Citation to the case (if you know): OPINION # NO: 26642
- (6) Grounds raised: 1. THE COURT of Appeals INCORRECTLY HELD THAT dog TRACKING EVIDENCE WAS Admissible WITHOUT REQUIRING THE STATE TO DEMONSTRATE THE underlying Reliability of dog TRACKING BEFORE Admitting THE Police dog-handlers TESTIMONY INTO EVIDENCE.

FD-241 (Rev. 10/07)

2. THE COURT OF APPEALS INCORRECTLY HELD THAT PETITIONER WAS NOT ENTITLED TO A NEW TRIAL OR IN THE ALTERNATIVE TO REMAND FOR A HEARING ON THE MOTION BASED ON NEWLY-DISCOVERED EVIDENCE WHEN HIS CO-DEFENDANT, WHO TESTIFIED AGAINST HIM AT TRIAL, HAS RETRACTED HIS TESTIMONY.

Page 4

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☒ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

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

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

(a) (1) Name of court: Supreme Court

(2) Docket or case number (if you know):

(3) Date of filing (if you know): OCTOBER 19, 2005

(4) Nature of the proceeding: DIRECT APPEAL

(5) Grounds raised: MOTION TO REMAND FOR NEW TRIAL, OR, IN THE ALTERNATIVE, FOR A HEARING INTO NEW EVIDENCE.

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

☐ Yes ☒ No

(7) Result: DENIED

(8) Date of result (if you know): DECEMBER 9, 2005

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

(1) Name of court: COURT OF COMMON PLEAS

(2) Docket or case number (if you know): 2009 LP 4005549

(3) Date of filing (if you know): AUGUST 5, 2009

(4) Nature of the proceeding: P.C.R. PETITION FOR WRIT OF HABEAS CORPUS

DA-1241 (Rev. 10/07)

Page 5

(5) Grounds raised: NEWLY DISCOVERED EVIDENCE, INEFFECTIVE ASSISTANCE OF COUNSEL

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

☒ Yes ☐ No

(7) Result: DENIED

(8) Date of result (if you know): AUGUST 30, 2011

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

(1) Name of court: S.C. SUPREME COURT

(2) Docket or case number (if you know): APPELLATE CASE NO: 2011-199411

(3) Date of filing (if you know): SEPTEMBER 12, 2012

(4) Nature of the proceeding: P.L.R. Appeal

(5) Grounds raised:

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

☐ Yes ☒ No

(7) Result: DENIED

(8) Date of result (if you know): UNKNOWN

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

FD-341 (Rev. 10/07)

Page 6

(1) First petition: ☒ Yes ☐ No(2) Second: ☒ Yes ☐ No(3) Third petition: ☐ Yes ☐ No N/A

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

N	
	A

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

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

GROUND ONE: THE TRIAL COURT ERRED BY DENYING APPELLANT'S OBJECTION TO THE STATES EXPERT WITNESS, A DOG-HANDLER, WITHOUT REQUIRING THE STATE TO ESTABLISH THE UNDERLYING RELIABILITY OF DOG-TRACKING AS A SCIENTIFIC OR TECHNICAL FIELD.

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

SEE ATTACHED ARGUMENT Ground 1 A, B, C.

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

N	
	A

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

(1) If you appealed from the judgment of conviction, did you raise this issue? ☒ Yes ☐ No

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

N	
	A

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

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

☐ Yes ☒ No

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

AO 241 (Rev. 10/07)

Page 7

Type of motion or petition: N
 Name and location of the court where the motion or petition was filed: _____
 Docket or case number (if you know): _____
 Date of the court's decision: _____
 Result (attach a copy of the court's opinion or order, if available): _____
A

- (3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No N
 (4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No
 (5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the ☒ Yes ☐ No A
 (6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: N
 Docket or case number (if you know): _____
 Date of the court's decision: _____
 Result (attach a copy of the court's opinion or order, if available): _____
A

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

N

A

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground _____
N

GROUND TWO: NEWLY DISCOVERED EVIDENCE

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

SEE: App. p. 634 - p 676 Which Petitioner re-argue
SEE: A-1 - D

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

N

A

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

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



Yes



No

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

N

A

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

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



Yes



No

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

Type of motion or petition: P.T.R.

Name and location of the court where the motion or petition was filed: Common Pleas

Docket or case number (if you know): 2009 CP 400549

Date of the court's decision: August 30, 2011

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

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



Yes



No

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



Yes



No

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



Yes



No

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

Name and location of the court where the appeal was filed: S.C. Supreme Court

Docket or case number (if you know):

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Date of the court's decision: _____

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

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

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you :
have used to exhaust your state remedies on Ground Two _____

GROUND THREE: INEFFECTIVE ASSISTANCE of COUNSEL

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

SEE ATTACHED ARGUMENTS A, B, C, D ETC.

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

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

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

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

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

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

☒ Yes ☐ No

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

Type of motion or petition: P.C.R.

Name and location of the court where the motion or petition was filed: Common Pleas

Docket or case number (if you know): 2009 CP 4005549

Date of the court's decision: August 30, 2011

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

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

☒ Yes ☐ No

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

☒ Yes ☐ No

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

☒ Yes ☐ No

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

Name and location of the court where the appeal was filed: Supreme Court

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

(e) Other Remedies: Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground

Three: _____

GROUND FOUR: NEWLY DISCOVERED EVIDENCE

SEE APPENDIX P.C.R. TRANSCRIPT Pg. 635 - 676

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

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12. Refer back to Ground 2 I am Arguing Ground 2 To support Ground 4, And I further
Argue THAT due TO MARTINEZ V. RYAN 138 S.Ct 1309 P.C.R. Counsel Ineffectiveness in
failing to subpoena Co-defendant ANTHONY MORRIS And Trial Counsel LAMELLE DURANT.
(3) Ground 4 Argument(A), Ground 4 Argument(B) ETC.

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

(c) Direct Appeal of Ground Four:

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

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

(d) Post-Conviction Proceedings:

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

☒ Yes ☐ No

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

Type of motion or petition: P.C.R.

Name and location of the court where the motion or petition was filed: Common Pleas

Docket or case number (if you know): 2009 CP 4005549

Date of the court's decision: August 30, 2011

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

(3) Did you receive a hearing on your motion or petition? ☒ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☒ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the ☐ Yes ☐ No

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

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

Docket or case number (if you know): _____

Date of the court's decision: _____

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

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

- (e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

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

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

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

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

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

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

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

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

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

(a) At preliminary hearing:

(b) At arraignment and plea:

(c) At trial: Mrs. Lanelle Durant

(d) At sentencing: Mrs. Lanelle Durant

(e) On appeal: Mrs. Aileen P. Clark, Mrs. Lanelle Durant

(f) In any post-conviction proceeding: Mr. Mark Schutte

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

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

(b) Give the date the other sentence was imposed: MAY 4, 2000

(c) Give the length of the other sentence: 13 years

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

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

木

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

- (1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -
- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
- (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
- (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

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

TO BE IMMEDIATELY RELEASED
FROM STATE CUSTODY AND OR NEW P.C.R. HEARING, AND OR NEW TRIAL. AND

or any other relief to which petitioner may be entitled.

~~Signature of Attorney (if any)~~

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition

Writ of Habeas Corpus was placed in the prison mailing system on 1-21-2015 (month, date, year).

Executed (signed) on 1-21-2015 (date).


Signature of Petitioner

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


A

Ground #
Argument 1

■ The trial court erred by denying appellant's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.

The state alleged that appellant was located near the scene of the crime by a scent-tracking police dog. The state proffered the dog-handler, Officer Richard Gunter, as an expert witness. Appellant objected on the basis that the underlying scientific reliability of dog-tracking had not been established under State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). The court overruled appellant's objection after establishing that Gunter was qualified as an expert in the field of dog-tracking, without requiring proof of the field's scientific or technical validity. Tr. p. 191, l. 25 - p. 202, l. 10. This ruling was error.

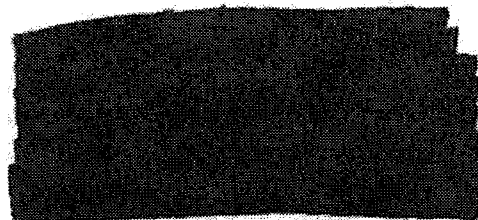
The admissibility of scientific or technical evidence should be analyzed under Rule 702, SCRE. State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999). When determining the admissibility of evidence under Rule 702, the trial court "must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should apply the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Appellant did not challenge the expertise of the witness, but the foundation of the technique. The court should have applied the Jones factors and required the state to demonstrate the reliability of dog-tracking. While dog-tracking has been used for centuries,

the reliability of many applications has not been widely or rigorously studied. See The Mythic Infallibility of the Dog, in Andrew E. Taslitz, Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup, 42 Hastings L.J. 15 (November 1990). And, historical use, alone, should not create a presumption of reliability. If challenged, the scientific basis of an "old" but untested technique should be subjected to the same scrutiny as a new technique.

Appellant's case is distinguishable from State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989). The defendant in Childs challenged the qualifications of the canine handler to testify as an expert. This Court held that the handler's experience and background was sufficient. Id. Appellant, by contrast, challenges the reliability of the entire field, and not the individual witness' qualifications. The state should have been required to present evidence showing that the fundamental bases of dog-tracking, regarding, for example, the acuity of a dog's olfactory perception and its ability to distinguish between scents, has been demonstrated by reliable, published clinical or scientific research, and not merely longtime use. At the very least, the state should have been required to submit evidence about quality control and consistency, as required under Jones. Appellant should receive a new trial.

Respectfully submitted,



Ground 1
Argument-B

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ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19; 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. White, p. 5-13, citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188

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S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v. Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation. State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition. A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. White at p. 7-8 (citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). White at p. 9-10. In Whaley, the trial court granted the state's motion to suppress the testimony of an expert in memory retention on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina. The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Court to reconsider its ruling.

Ground 1
Argument - C

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ARGUMENT

1.

The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

Petitioner argued on appeal that the lower court erred by not requiring the state to demonstrate the underlying reliability of dog tracking before admitting a police dog-handler's testimony into evidence, under Rule 702, SCRE, and State v. Jones, 273 S.E. 723, 259 S.E.2d 120 (1979). Petitioner *did not* challenge the handler's expertise in the field, but only the underlying reliability of the field itself.

As noted in the brief of the appellant, State v. Council, 335 S.C. 1, 515 S.E.2d 508 (1999), required the lower court "find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." Id. at 335 S.C. 20, 515 S.E.2d 518. To determine reliability, the court should have applied the factors from Jones, above: (1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures. Council, 335 S.C. 1, 19, 515 S.E.2d 508, 517, citing Jones and State v. Ford, 301 S.C. 485, 392 S.E.2d 781 (1990).

Respectfully, petitioner submits that dog-tracking, although it has a long history of use has never been proved reliable under modern standards in a South Carolina Court of Law. In its opinion, the Court cited several cases involving disputes over the handler's expertise. App. p. 5 – 10: White citing State v. Childs, 299 S.C. 471, 385 S.E.2d 839 (1989); State v. Jordan, 258 S.C. 340, 188 S.E.2d 780 (1972). It cited one case issuing a jury instruction on dog-handling, State v.

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Brown, 103 S.C. 103 S.C. 437, 88 S.E. 21 (1916), and one case holding that dog-handling identification testimony is not a confrontation-clause violation: State v. Bostick, 253 S.C. 205, 169 S.E.2d 608 (1969). Petitioner respectfully submits that none of these cases addressed the issue he presented on appeal. He did not challenge the handler's expertise but the underlying validity of the field itself, and not on the basis that identification by a dog violates his confrontation rights. Rather, he moved to compel the state to demonstrate the reliability of the underlying field of expertise, as he was permitted to do under Jones.

The Court cited State v. Johnson, 306 S.C. 199, 127, 410 S.E.2d 547, 552 (1991), for the proposition that dog-handling testimony is *per se* admissible in South Carolina. Johnson, however, relied on a 1913 case, State v. Brown, 103 S.C. 437, 88 S.E.2d 1 (1916), for the same proposition. A nearly hundred-year-old case may demonstrate the second Jones factor (prior application of method), but it does not prove the remaining factors. Moreover, given the constant and rapid advancements in scientific and technical knowledge, a case as old as Brown could not sufficiently prove the remaining Jones factors.

The Court cited a number of foreign cases in reaching the conclusion that dog-tracking evidence is reliable *per se*. App. p. 10 – 13.(citations omitted). Petitioner respectfully submits that, by appearances at least, the litigants in those jurisdictions were permitted to fully examine the issue. Petitioner was denied even a hearing into the reliability of dog-tracking. No evidence on the underlying reliability of dog-tracking has been placed on the record in this case because petitioner did not receive a hearing under Jones.

Finally, the Court proposed that dog-tracking was not scientifically based but is an "experienced-based" field which does not require Jones analysis under State v. Whaley, 305 S.C. 138, 406 S.E.2d 369 (1991). App. p. 13 – 17. In Whaley, the trial court granted the state's

motion to suppress the testimony of an expert (Ph.D. in psychology) in memory retention related to eyewitness reliability on the basis that the defendant had failed to demonstrate the expert's acceptance in the field. The Supreme Court reversed, holding that the disputed testimony was akin to that of other medical experts, who draw conclusions from their specialized knowledge and experience. However, the Supreme Court also ruled that the expert's testimony would have been admissible under Jones as the expert's testimony was based on established techniques and authorities. Whaley at 142.

Petitioner's case is distinguishable. As noted, petitioner did not dispute the handler's qualifications. Petitioner challenged the scientific foundation and basis of the field, which (to undersigned counsel's knowledge) has never been demonstrated in a trial in South Carolina.

The court should have applied the Jones factors and required the state to demonstrate the reliability of dog-tracking. While dog-tracking has been used for centuries, the reliability of many applications has not been widely or rigorously studied. See The Mythic Infallibility of the Dog, in Andrew E. Taslitz, Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup, 42 Hastings L.J. 15 (November 1990). And, historical use, alone, should not create a presumption of reliability. If challenged, the scientific basis of an "old" but untested technique should be subjected to the same scrutiny as a new technique.

The foundational requirements for the field must be met and they were not met in White's case. The Court wrote that the dog handler's testimony was analogous to that of the typical police officer who qualifies as an expert based on his experience with narcotics. This is in error. The typical police officer does not testify as an expert in narcotics; the dog-handler testified as an expert. Dog-tracking is not and does not resemble a medical field. Petitioner

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properly challenged the underlying reliability of the field of dog-tracking and was entitled to a hearing under Jones. He respectfully urges the Supreme Court to reconsider this ruling.

Ground 2
Argument A-1

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Richland County

James R. Barber., Circuit Court Judge

STATE OF SOUTH CAROLINA,

RESPONDENT,

V.

GARY A. WHITE,

APPELLANT.

MOTION TO REMAND FOR A NEW TRIAL,
OR, IN THE ALTERNATIVE,
FOR A HEARING INTO NEW EVIDENCE

Undersigned counsel respectfully moves to remand appellant's case for a new trial based on newly-discovered evidence. In the alternative, counsel moves to remand the case to the trial court for a hearing into the new evidence. In support of this motion, she shows the Court:

1. Richland County grand jurors indicted appellant for kidnapping, two counts of armed robbery, and possession of a weapon during the commission of a violent crime. Appellant stood trial during the June 2005 term of the Richland County Court of General Sessions before the Honorable James R. Barber and a jury. The jury found appellant guilty as charged, and he was

sentenced to life confinement without the possibility of parole under to S.C. Code § 17-25-45. He appealed his convictions and sentences. Undersigned counsel assumed his representation.

2. Appellant's co-defendant, Anthony Morris, testified against him at trial.¹ On October 12, 2005, trial counsel LaNelle Durant, of the Richland County Public Defender, contacted the undersigned and informed her that Mr. Morris had retracted his testimony. Ms. Durant provided the attached sworn statement by Mr. Morris, which reads as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy['s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I beleived [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic]to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris

3. Mr. Morris' new statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is

¹ Copies of the transcript of Mr. Morris' trial testimony and his recent affidavit are attached.

not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

4. The new statement exonerates appellant, where Mr. Morris' retracted testimony had incriminated appellant. The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility.

5. Petitioner has been convicted of very serious offenses and is serving a life sentence without the possibility of parole. In the interest of due process and fundamental fairness, this Court should grant him a new trial based Mr. Morris' affidavit. At the very least, he should receive a hearing with the opportunity to subpoena Mr. Morris to determine if his retraction warrants a new trial.

WHEREFORE, undersigned counsel respectfully moves the Court to remand appellant's case for a new trial, or, in the alternative, a hearing into the newly-discovered evidence to determine if it warrants a new trial.

Respectfully submitted,

Ground 2

Argument A-2

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A-2

2.

The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. Appellant's co-defendant, Anthony Morris, testified against him at trial. On October 12, 2005, trial counsel of the Richland County Public Defender's Office contacted the appellate attorney and informed her that Mr. Morris had retracted his testimony. Trial attorney provided the attached sworn statement by Mr. Morris, which reads as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Court house, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy[s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I beleived [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic]to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris

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Petitioner, by motion, asked the Court of Appeals to order a new trial based on the exculpatory affidavit, or, in the alternative, to remand for a hearing on the motion. The Court of Appeals denied the motion on December 9, 2005 and affirmed on the basis that the issue had not been presented to the trial court and was not preserved for appellate review. App. p. 19 – 21.

Mr. Morris' new statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

Petitioner submits that the issue was not addressed below because it involves new evidence that was not discovered until after the appeal was underway. Rule 29(b), SCRPC provides that a motion for a new trial based on after discovered evidence may not be made while the case is on appeal unless the appellate court, upon motion, has suspended the appeal and granted leave to make the motion.

The new statement exonerates appellant, where Mr. Morris' retracted testimony had incriminated appellant. The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility.

Petitioner has been convicted of very serious offenses and is serving a life sentence without the possibility of parole. In the interest of due process and fundamental fairness, this Court should

grant him a new trial based on Mr. Morris' affidavit. At the very least, he should receive a hearing with the opportunity to subpoena Mr. Morris to determine if his retraction warrants a new trial. He respectfully asks the Supreme Court to reconsider this issue.

Ground 2

Argument A-3

ARGUMENT

1. Appellant is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Appellant was accused of being one of two masked men who robbed a Columbia convenience store at gunpoint. The state arrested appellant's co-defendant, Anthony Morris, as the other man. Morris pled guilty before appellant's trial, but sentencing was deferred until after he testified against appellant. He testified that he participated in the robbery, but that appellant was the instigator and gunman. He testified that his initial statements to police, which implicated appellant and a third co-defendant, Roy Wiggins, who drove the getaway car, were not truthful. Tr. p. 369, l. 13 - p. 406, l. 5.

On October 12, 2005, trial counsel LaNelle Durant, of the Richland County Public Defender, contacted the undersigned and informed her that Morris had retracted his testimony. Ms. Durant provided the attached sworn statement by Morris, as follows:

My name is Anthony Terrell Morris, and I'm claiming this to be a true statement that I'm about to write. On June 15, 2005, I gave a statement to the Courthouse, which was a lie, but the reason why, was because I was told that if I testify on my co-defendant, I would plea to a lesser charge than what they wanted me to plea to. So being that I had [illegible] of my motion, and saw the videotape, I put parts together, and come up with a story. I also was able to see Roy[s] statements. To be truthful I wasn't on the scene of the crime. My lawyer just told me that I was now in the middle of all this, and either way it went I was gonna face some time. But if I wanted the minimum I would have to testify on a person, and a crime that I don't know anything about. This is my first time ever being in trouble with the law, so whatever my lawyer told me, I believed [sic] him. On the day it was time for me to plea, he came to the county and told me that, they were not gonna drop my charges, so I told him that I didn't wanted [sic] to testify, and I wasn't ready to plea. In return he told me that I would have to testify, and I would either have to plea, or either go to trail [sic] with my co-defendant, and would get 90 years. So being that I didn't know what

was going on, I did what I was told, and in return, I received 13 years for something I didn't do, and also got my co-defendant time, and really don't know him, or if he was on the crime scene either.

7/15/05

Anthony Morris¹

Morris' statement entitles appellant to a new trial. A motion for a new trial based on after-discovered evidence should be granted if the appellant shows that the evidence (1) probably would have changed the trial's result; (2) has been discovered since the trial; (3) could not have been discovered through the exercise of due diligence before trial; (4) is material; and (5) is not merely cumulative or impeaching. State v. Spann, 334 S.C. 618, 513 S.E.2d 98 (1999); State v. Kelly, 285 S.C. 373, 329 S.E.2d 442 (1985); Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983).

The new statement was sworn on July 15, 2005, after appellant's trial, and could not have been discovered before it was made. Mr. Morris' testimony was critical to the prosecution and bore directly on the issue of guilt and innocence, as does its retraction. It cannot be characterized as cumulative or impeaching, since it repeats no other evidence presented at trial and concerns facts at issue, and not just witness credibility. The new statement does not entirely exonerate appellant, but it does weaken a foundation of the state's case. Morris' testimony was instrumental in producing appellant's conviction and life sentence without the possibility of parole. There is a reasonable probability that the testimony was false. In the interests of fundamental fairness, appellant should receive a new trial.

¹This affidavit and argument also formed the basis for appellant's motion for a new trial, which this Court denied on December 9, 2005.

Ground 3
Arguments

~~REDACTED~~
Trial Counsel was ineffective for failure to protest Applicant's Fifth and Sixth Amendment rights. See U.S.C.A. 14th amendment.

ARGUMENT A

The Applicant contends that his conviction is in violation of the Fifth amendment, U.S. Constitution. Applicant was convicted on a non-charged offense, which violated his substantial rights to be convicted, if convicted at all on a presentment of a indictment by the Grand Jury.

The State, in its opening statement and through the evidence presented, attempted to establish that Applicant participated in indicted offenses, aiding and abetting codefendants in accomplishing crimes. The Applicant was eventually convicted on the theory of accomplice liability, by indictments charging him only with the principal offenses. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of aiding and abetting beyond a reasonable doubt on indictments charging him with the principal offenses. Under the theory of the "hand of one is the hand of all" the State first must inform Applicant of codefendants within the indictment.

The Applicant was eventually convicted on the theory of accomplice liability by indictments charging him with the principals offenses of armed robbery and kidnapping. The Fifth amendment guarantees that an individuals cannot be prosecuted for a capital or infamous offense except on presentment or indictment by a Grand Jury. The Sixth amendment provides that a defendant must be informed of the nature and cause of the accusation against him. This was a denial of Due Process, where as in order for the State to sufficiently obtain a conviction and find Applicant guilty of the above offenses beyond a reasonable doubt on an indictment charging him with the principal offenses under the theory of the "hand of one is the hand of all", the State must first charge him with knowledge of his

codefendants criminal conduct within the indictments. The alleged fatal omission was the failure to charge that the Applicant had knowledge of codefendants, this was an essential element of the offenses that needed to be established to properly inform Applicant of charges called upon to answer. The body of these indictments do not expressly set forth any of the facts regarding the participation of Applicants codefendants. The indictments only apprised Applicant of being charged as the one actually committing these crimes. Therefore, Applicant contends that the cryptic form of indictments required Applicant to proceed to trial with his alleged criminal activity undefined. An indictment must contain all of the elements of the charged offenses and fairly inform a defendant of the charges against him. In South Carolina, [i]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Gunn, 437 S.E.2d 75, 82 (1993) (Quoting State v. Cody, 186 S.E. 165 (1936)). The Supreme Court of South Carolina has held that a defendant may not ignore the plain language of an indictment merely because its caption does not precisely conform with the wording on its face. Cody v. State, 151 S.E.2d 670 (1966), by the same token, the State may not support a conviction for a offense intended to be charged by relying upon a caption to the exclusion of the language contained in the body of the indictment. State v. Tobory, 202 S.E.2d 852. A defendant's understanding of the offense is not aided by repetition of this statutory language when the statute, or even recitation of the statutory language, is not an adequate allegation for every element of an offense, for some elements require grater detail or description of the alleged conduct of a defendant. In the case at bar, look alone at the body of these indictments. It is evident that the Applicants convictions are merely being supported by the caption of these three (3) indictments, where as these indictments mention not a shed of the events regarding the involvement of any indictments therein. "The very purpose of the requirement that the Applicant

be indicted by an Grand Jury is to limit his jeopardy to offenses charged by a group of his fellow citizens, acting independently of either prosecuting Attorney or Judge." Stirone v. United States, 361 U.S. at 218, 80 S.Ct. 273. A mere citation to the applicable statute does not give the defendant notice of the nature of the offense. An indictment that must rely on a statutory citation does not "Fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished." See, Hamling v. United States, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907-08, 41 L.Ed.2d 590 (1974). Furthermore, a statutory citation does not ensure that the Grand Jury has considered and found all essential elements of the offense charged. Therefore the indictments fails to satisfy the Fifth amendment guarantee that no person shall be held to answer for an infamous crime unless on a presentment or indictment of Grand Jury, see Article I § II. Fairness and Due Process of law requires Applicant receives sufficient notice of the charges against him to enable him to properly prepare a defense. See U.S. Const. Amend. 5, S.C. Const. Art. 1, § 3. Furthermore, it is held that an indictment not framed to apprise the defendant "with reasonable certainty of the nature of the accusation against him is defective, although it may follow the language of the statute." United States v. Simmons, 96, U.S. 360, 362. It is irrefutable the defectiveness of these indictments, for its failure to plainly set forth the expressed elements intended to be charged. The indictments, noneless failed to fulfil its purpose. More importantly, the Supreme Court has held that a later jury instruction or a petit jury verdict cannot satisfy Applicants Fifth amendment right to be tried upon charges considered and found by a Grand Jury. Stirone, supra; also see, United States v. Campi, 541 F.2d 737, 740 (6th Cir. 1976).

CONCLUSION

Applicant was denied the right to a fair trial, because the indictments were not framed to inform Applicant of the ALLEGATIONS AGAINST HIM TO ENSURE THAT THE GRAND JURY HAD CONSIDERED AND FOUND FACTS REGARDING THE INDICTED OFFENSES. THEREFORE COUNSEL WAS INEFFECTIVE FOR FAILING TO

~~RECEIVED - 150505-0100~~

On Ground 10 (a) of my PCR Application, I amend that assertion to state my Trial Counsel provided "Deficient Performance" in failing to pursue a ruling on the clear objection to the "Hand of One Hand of All" instruction to be given to the jury. I move for Trial Transcript page 407, line 16-page 408, line 7, to be entered as Applicants Evidence one (1) as proof within this record that my Trial Counsel did not move for ruling on an important objection to a burden - shifting instruction.

ARGUMENT "B"

"All other reasonable attorneys here in South Carolina are aware of the law relating to contemporaneous objections and laws concerning aggrieved parties only allowed to appeal a "order, judgement, ...or decision" under SCACR Rule 201 (b). Even South Carolina Rule of Criminal Procedure 18 (a) highlights that a ruling of the court will be pronounced on an objection.

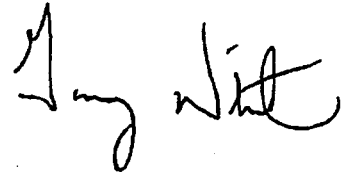
"Here, you Honor, the Deficient Performance waived any opposition to the instruction which I could have raised on Direct Appeal concerning the Trial Judge giving a burden - shifting instruction to the jury at Trial Transcript page 501, line 16-page 503, line 3. And it is the nature of the evidence which the State used in support of the "Hand of One Hand of All" instruction which turned that otherwise legal instruction into a burden - shifting instruction.

For example, the only evidence which the State submitted to support that jury instruction was the testimony of Anthony Morris. Morris committed perjury as defined by State law [§ 16-9-10, S.C. Code of Laws] where he made a statement to police implication no one, then contradicted that sworn statement by testifying to it being a lie at my trial - my proof is at Transcript Page 374, line 11-page 376, line 20, which I want entered into this record as Applicant's Evidence two (2), to prove perjured evidence was, in fact, used against me. I also want to come back to this evidence in my next Ground.

"Your honor, Strickland v. Washington, says my Trial Counsel was supposed to advocate my cause (in being free from imprisonment except upon proof beyond a reasonable doubt of every element supporting the State's charges against me). Counsel didn't do this in her failure to pursue a ruling on her objection to the "Hand of One Hand of All" instruction, so as to meet the legal requirements for appealing the Court's use of an otherwise burden - shifting jury instruction.

"Also on this point, your Honor, Counsel's deficient performance 'prejudiced' my most plausible defense to the State's charges where the 'Hand of One Hand of All' instruction is the only possible means used before the jury, and had Counsel press the Judge for a ruling on the objection, there is a chance that the Court would've reconsidered charging 'Hand of One Hand of All' to the jury or, there is a reasonable probability that if a ruling on Counsel's objection was made, that the Court of Appeals could've reversed my conviction on the burden - shifting instruction alone - because it would've been proper before them.

"Finally, your Honor, that is why I claim my Trial Counsel was ineffective for failing to pursue a ruling on the objection to that burden - shifting instruction."



~~XXXXXXXXXXXXXXXXXXXX~~

On Ground 10 (b) of my PCR Application, I amend that assertion to state that my Trial Counsel provided 'Deficient Performance' in failing to object to a material State witness committing perjury before the jury. Again, your Honor, Applicant's Evidence two (2) is State witness Anthony Morris admitting to the Court that his initial statement to police was a complete lie; here, the record shows Trial Counsel Stacey Owings did not object to Morris commission of perjury when it surfaced, nor did Owings object in her Cross Examination at Trial Transcript page 397, line 14-page 403, line 18, which I'd move to have admitted into this record as Applicant's Evidence three (3) as proof of Counsel not objecting to very damaging and prejudicial evidence against Applicant.

ARGUMENT "C"

"Your Honor, the law is clear a statement to police becomes an official document once the officer receives it from the declarant on a "document or report required by the laws of this State" [§ 16-9-10 (A) (2), S.C. Code]; and a declarant commits perjury if they either give a false statement to the police on such 'document or report' or if they've given a truthful statement to police then contradict it under oath while testifying into a Court record - that is how our Court of Appeals interpreted § 16-9-10 in State v. Stanley, 365 S.C. 24, 615 S.E.2d 455 (S.C. App. 2005).

Further, the U.S. Supreme Court has clearly stated that the "Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence" [Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed.2d 791 (1935); Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785, 17 L.Ed.2d 690 (1967)].

"Where my Trial Counsel is presumed to have conducted a factual and legal investigation into my case, I assert that my Counsel rendered Deficient Performance in not objecting to the State's material witness committing perjury.

"I also assert that Counsel's deficient performance

'Prejudiced' my defense where the State's witness was the only reason for the 'Hand of One Hand of All' being used against me. If Counsel would've objected to that witness commission of perjury, there is a reasonable probability that the Court would've suppressed the perjured testimony, and the jury could've acquitted me where nothing else 'sufficiently' connected me to the charges I am convicted of."

Ang White

ARGUMENT IV.

The PCR Court erred in denying relief on Ground 10(c), APCR, where Trial Counsel Owings never testified in PCR contrary to White's testimony in PCR regarding Trial Counsel's failure to pursue Ruling on Objection claim.

Stated simply in reference to APPENDIX before this Court, White's APCR contained the claim that "Trial Counsel was ineffective by failing to pursue objection of Jury Charge Hand of one Hand of All" and "Counsel Allowed the Judge to give the charge without making a ruling on objected charged" [sic] [see APPENDIX, Pg. 614 (quoted in part, originally)] ;

White clarified the claim during his sworn PCR testimony [APPENDIX 641, ln. 18 to 642, ln. 20], and, as Trial Counsel Owings testified in the PCR hearing [see APPENDIX 649, ln. 22 to 665, ln. 6], she did not testify contrary to White's testimony in PCR hearing noted.

The PCR Court, however, held this factually-based claim to be "without merit" [APPENDIX 693, ln. 11], among other claims ; White, relying on Jackson, supra, submits that there is no PCR record evidence contradicting his testimony to support the 'without merit' finding of PCR Court.

As South Carolina law has clearly directed that Trial Counsel should pursue rulings on objections < see State v. Pierce ; 263 S.C. 23, 28-29, 207 S.E. 2d 414, 417 (S.C. 1974) > , and White's Trial Counsel was not proven to have so pursued the ruling, contrary to White's testimony, the PCR Court erred in denying relief on Ground 10(c), APCR .

*Ground 3 continue**Ground #3*

PETITIONER ARGUES THAT THE P.L.R. COURT AND SUPREME COURT RULINGS WERE CONTRARY TO ESTABLISHED FEDERAL LAWS. SEE: STRICKLAND V. WASHINGTON 466 U.S. 668, STIRONE V. UNITED STATES 361 U.S. AT 218, 80 S.C.T. 273, HAMLING V. UNITED STATES 418 U.S. 87, 117, 94 S.C.T. 2887, 2907-08, 41 L.ED 2D 590 (1974), UNITED STATES V. SIMMONS 96, U.S. 360, 362, UNITED STATES V. CAMPI 541 F.2D 737, 740 (6TH CIR 1976), MOONEY V. HOLAHAN, 294 U.S. 103, 55 S.C.T. 34, 79 L.ED 2D 791 (1935) MILLER V. PATE 386 U.S. 1, 87 S.C.T. 785, 17 L.ED 2D 690 (1967), 5TH, 6TH, 14TH U.S.C.A.

PETITIONER ARGUES FURTHER NOT ONLY WERE THE COURTS RULINGS WAS CONTRARY, THEY WERE OBJECTIVELY UNREASONABLY REGARDING THE FACTS OF THE CASE. SEE: 28 U.S.C. SECTION 2254(D)(1)(2) WILLIAM V. TAYLOR 529 U.S. 362, CAVEY V. MUSLADIN 549 U.S. 70, FRAZER V. S.C. 430 F.2D 696, SUMMER V. MATA 449 U.S. 539, HUMPHRIES V. OZMIGT 397 F.2D 206 AND MC HONE V. POLK 392 F.2D 691 (OKEN V. CORCORAN 220 F.2D 254) WHICH FAIR MINDED JURISTS WOULD AGREE THAT THE STAFF COURTS DECISIONS WERE INCORRECT SEE RICHTER 131 S.C.T. AT 786.

PETITIONER FURTHER ARGUES THAT THE LIKELIHOOD OF A DIFFERENT RESULT IS SUBSTANTIAL AS OPPOSED TO CONCEIVABLE SEE STRICKLAND 466 AT 693. PETITIONER ALSO ARGUES THAT THE COURTS CREDIBILITY JUDGEMENTS, IS STARK AND CLEAR. THUS PETITIONER IS ENTITLED TO A FULL AND FAIR EVIDENTIARY HEARING PER 2254(E)(2) KEENEY V. TOMAYO — REYES 112 S.C.T. 1715

SEE: ALSO EXHIBITS 1, 2, 3

Ground 4 continue

Ground #4

PETITIONER ARGUES THAT P.C.R. COUNSEL WAS INEFFECTIVE FOR FAILING TO SUBPOENA CO-DEFENDANT ANTHONY TERRELL MORRIS TO AUTHENTICATE AND BE CROSS EXAMINED ABOUT RECALLED STATEMENT, FOR FAILING TO SUBPOENA 1ST CHAIR CANELLE DURANT TO TESTIFY. 2ND CHAIR STACY OWINGS WAS UNABLE TO SUFFICIENTLY GO INDEPT IN THE RECORD BEING THAT SHE WAS ASKED TO PERFORM DUTIES ON A WHIM WITHIN A WEEK OF PETITIONERS TRIAL. (SEE AT: TR TN pg. 665 LN 11-12). PETITIONER FURTHER STATES THAT P.C.R. COUNSEL WAS INEFFECTIVE FOR FAILING TO FILE THE 59(c) MOTION TO MAKE THE COURT RULE ON ALL P.C.R. ISSUES PRESENTED. PETITIONER ALSO ARGUES THAT THERE WAS NO WAY HE COULD ^{HAVE} PROVEN HIS CLAIMS WITHOUT THE AID OF P.C.R. COUNSEL. WHEN SOUTH CAROLINA HAS A RECOGNIZED PROHIBITION AGAINST HYBRID REPRESENTATION SEE: DENNISON V. STATE 639 SE2d 35, STATE V. CABRERA 569 SE2d 472, JONES V. STATE 558 SE2d 517, FOSTER V. STATE 379 SE2d 907, STATE V. STUCKEY 508 SE2d 564, MCKASKIE V. WIGGINS 465 U.S. 168. THUS THERE WAS NO WAY PETITIONER COULD HAVE SUBPOENAED THESE WITNESSES SEE: BANNISTER V. STATE 509 SE2d 809, BEAVER V. THOMPSON 93 F3d 1186, GLOVER V. STATE 458 SE2d 538. NOR GET A RULING ON ALL ISSUES RAISED AT P.C.R. SEE: MARLAK V. STATE 653 SE2d 266 BOSTICK V. STEVENSON 589 F3d 164. ALSO SEE: MARTINEZ V. RYAN.

Exhibit 4
Argument A

The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Petitioner also argued on appeal, by motion and brief, that new evidence entitles him to a new trial. He asked the Court to order a new trial based on an exculpatory affidavit attached to his motion, or, in the alternative, to remand for a hearing on the motion. The Court denied the motion and affirmed on the basis that the issue had not been presented the trial court and was not preserved for appellate review. White at p. 12-13. Petitioner respectfully submits that the issue was not addressed below because, as noted in the pleadings, it involves new evidence that was not discovered until after the appeal was underway. He respectfully asks the Court to reconsider its ruling.

ARGUMENT

Petitioner should be granted a new trial based on the after-discovered evidence of the recantation of a key witness's testimony after petitioner's trial.

The PCR court erred by not granting petitioner a new trial based on Morris' recantation of his testimony. The PCR court improperly used the Court of Appeals' prior opinion to determine that this issue had already been decided against White. App. 692-93. However, this ruling contradicts an express statement by this Court: White, at 269 n.2, 676 S.E.2d at 686 n.2. This Court expressly stated that the question of whether petitioner is entitled to a new trial because of Morris' recantation was disposed of **without prejudice**. Id. Section 17-27-20(a)(4) of the South Carolina Code expressly grants a convicted person the right to contest his conviction in a PCR application on the ground 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." S.C. Code Ann. § 17-27-20(a)(4). Therefore, this issue was properly before the PCR court.

As an alternative sustaining ground, the PCR court ruled that petitioner could not demonstrate prejudice. App. 693. This ruling appears to be based on an incomplete discussion of the factors governing whether newly discovered evidence entitles a convicted person to a new trial. App. 693, (discussing factors listed in Hayden v. State, 278 S.C. 610, 299 S.E.2d 854 (1983)). A defendant must show the after-discovered evidence: "(1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not in the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and, (5) Is not merely cumulative or impeaching." Hayden, at 611, 299 S.E.2d at 855.

These factors show that a new trial should be granted for petitioner. First, without Morris' testimony identifying White and corroborating Wiggins' testimony, no credible positive facial identification of White before or during the robbery exists. Wiggins lied in his earlier statements to police. Without these witnesses, reasonable doubt would exist and the result of a new trial probably would be different. As to the second and third factors, petitioner could not have discovered that Morris fabricated his testimony before trial. It was only after White was convicted that Morris recanted his testimony.

As to the fourth factor, Morris' recantation affects the question of petitioner's guilt. It raises substantial questions concerning whether Morris and Wiggins, who were close friends, conspired to shift the blame for this robbery to White. Finally, this evidence is not merely impeaching or cumulative. While it certainly affects Morris' credibility, when combined with Wiggins' unreliable testimony, it leaves the State without a positive identification of White entering and robbing the store. When the testimony of Wiggins and Morris is discounted, the State's evidence against White is largely circumstantial. Therefore, a new trial is warranted under these factors. See Hayden, at 611, 299 S.E.2d at 855.

DATE: 12-5-2011

Ex. 1

DEAR, MR. SCHNEE,

PLEASE BE ADVISED THAT I WOULD LIKE TO BRING TO YOUR ATTENTION: SOME OF MY VERY HIGH CONCERNS THAT I HAVE SINCE YOU WILL BE REPRESENTING ME ON MY APPEAL.

1) AS YOU KNOW SINCE YOU ALSO REPRESENTED ME ON MY P.C.R. THE P.C.R. JUDGE/ATT GEN'S ORDER OF DISMISSAL NOTED THAT MY RECENT ISSUE WAS ALSO RAISED ON MY FIRST APPEAL, AND WAS DENIED. AND

2) THE COURT NOTED THAT MORRIS ANTHONY TERRELL WAS NOT AT MY P.C.R. HEARING SEE: BANNISTER V. STATE SO9 SEAD 807. THEREBY ALSO DENYING MY ISSUE UNDER "NEWLY DISCOVERED EVIDENCE"

SO IF YOU PLAN ON RAISING THE ABOVE ISSUE MY APPEAL WILL BE FRUITLESS.

3) ON THE OTHER HAND THE ONLY MERIT ISSUES I HAVE WILL BE THE 3 ISSUES I PRESENTED.

WHICH YOU ARE AWARE OF PER MY LETTER DATED TO YOU 9-8-2011 ALSO WHAT IS THE DEAL WITH MY PENDING 59(E) MOTION TO THESE MATTERS. SIR WITH THE UTMOST RESPECT I AM RESPECTFULLY ASKING YOU TO RAISE THE ONLY REAL ISSUES I HAVE FOR REVIEW. IF YOU CAN NOT RAISE THESE ISSUES. PLEASE EXPLAIN WHY. I LOOK FORWARD TO HEARING FROM YOU VERY SOON.

Sincerely



personal file

DEAR MR. SCHWEE,

Ex. 2

FIRST I WOULD LIKE TO THINK YOU FOR YOUR HONORABLE REPRESENTATION THUS FAR. ALTHOUGH THERE IS ONE MORE VERY, VERY IMPORTANT MATTER THAT I WOULD LIKE TO BRING TO YOUR ATTENTION. ITS THE 59(e) MOTION SEE: ENCL. WHICH NEED TO BE FILED SUBSEQUENT TO YOU FILING YOUR NOTICE OF APPEAL.

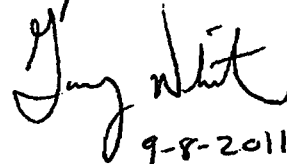
I RECEIVED THE FINAL ORDER OF DISMISSAL WHICH I NOTICE THAT THERE WAS SOME ISSUES THAT NEEDED TO BE RE-ADDRESS. IF THESE ISSUES ARE NOT RE-ADDRESSED I WILL HAVE NO WAY OF HAVING THESE CLAIMS ADJUDGED BY THE APPELLATE COURT SEE: PLYLER V. STATE 424 SE2d 477, STATE V. AORNBY 484 SE2d 869 THUS THE FEDERAL COURT WILL NOT HEAR THE ISSUE: AS WELL SEE: O'SULLIVAN V. BOERCKEL 526 U.S. 838, AND BELL V. CONE 543 U.S. 447 SCALR RULE 208 (b) (7) (B) AND (D)

THEREFORE WOULD YOU PLEASE FILE THE 59(e) MOTION UPON MY BEHALF, SUBSEQUENT TO YOU FILING YOUR NOTICE OF APPEAL SEE HUDSON V. HUDSON 349 SE2d 341, OTTEN V. OTTEN 337 SE2d 207 AND SCALP RULE 59(F).

AND WOULD YOU BE SO KIND AS TO SEND ME BACK A FILED COPY OF YOUR 59(e) MOTION.

THANKING YOU IN ADVANCE, I LOOK FORWARD TO HEARING FROM YOU VERY SOON.

Sincerely,


9-8-2011

U. Personna / file

Ex. 3

DEAR MR. SCHNEE,

SIR, I AM SURE THAT YOU ARE AWARE OF THE LETTERS THE SUPREME CLERK, MR. SHEARHOUSE SENT ME REGARDING THE HUDSON ISSUE, WITH ALL DUE RESPECT ITS APPROPRIATE IN MY CASE, BECAUSE MY MAIN ISSUE WAS NOT RULED ON PER 17-27-80 ETC AS STATED IN MY 59(e) MOTION AND THE DISMISSAL OF MY APPEAL WILL NOT PREJUDICE ANYONE.

ALSO REGARDING THE DIV. OF APPELLATE DEFENSE VS YOUR REPRESENTATIVE THUS, AS YOU ARE AWARE OF MY 59(e) ISSUE IS THE SOLE MERITORIOUS ISSUE THAT SHOULD BE ARGUED ON APPEAL, AFTER THE JUDGE MAKE HIS RULING ON MY 59(e) MOTION.

SIR IF MY CASE/ISSUES IS CAUSING YOU A CONFLICT OF INTEREST IN REPRESENTING ME PER SCALR 407. PLEASE ADVISE ME WITHIN 10 DAYS OF THIS LETTER, IF AND BEFORE I GO BEFORE THE S.C. BAK AND THE LAWYERS CONDUCT COMMITTEE. BECAUSE THERE IS NO NEED FOR ME TO HAVE TO FILE A 60(b) OR ANOTHER P.C.R. ON THESE 59(e) ISSUES WHERE I AM ENTITLED TO A RULING ON THEM NOW BEFORE MY APPEAL.

Sincerely,

Jing Whit

asand hls

McCormick Correctional Institute
386 Redemption Way
McCormick, SC 29899

GARY WHITE 309726
McCormick C.I. P4B 229
386 Redemption Way
McCormick S.C. 29899

2015 JAN 26 PM 2:24



ITEM PREPAID BY
USMC
1-26-15 *fm*

Clerk, UNITED STATES DISTRICT COURT FOR SOUTH CAROLINA
901 Richland ST
Columbia S.C. 29201

THE DEPARTMENT OF CORRECTIONS WISE 1900
INSPECTED OR OBSERVED THIS FILE THEREFORE
THE DEPARTMENT DOES NOT ASSUME RESPONSIBILITY
FOR THIS CONTENT.

MCCORMICK CORRECTIONAL INST
S.C. DEPARTMENT OF CORRECTIONS

RECEIVED

JAN 21 2015

MCCI
MAIL ROOM

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Gary A. White, Jr., #309726,	)	
	)	C/A No.: 1:15-cv-365-DCN-SVH
Petitioner,	)	
	)	RETURN AND MEMORANDUM
v.	)	OF LAW IN SUPPORT OF RESPONDENT'S
	)	MOTION FOR SUMMARY JUDGMENT
Warden Leroy Cartledge,	)	
	)	
Respondent.	)	
_____	)	

On February 5, 2015, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued an order directing Respondent to file a return or other response to the *pro se* Petition for Writ of Habeas Corpus filed by Petitioner, Gary A. White, Jr., and delivered on January 21, 2015. Respondent now submits this Return and Memorandum of Law in Support of Motion for Summary Judgment, in conjunction with a Motion for Summary Judgment filed this same day, and asserts the petition should be summarily dismissed as the record conclusively shows Petitioner is not entitled to any relief as all of Petitioner's claims are either procedurally barred and without merit or not cognizable. In making the return, and in support of the motion for summary judgment, Respondent would respectfully show the Court:

PROCEDURAL HISTORY

Petitioner is currently incarcerated in McCormick Correctional Institution pursuant to an order of commitment from the Clerk of Court of Richland County. Applicant was indicted at the July 2004 term of the Richland County Grand Jury for two counts of armed robbery (Indictment Nos. 2004-GS-40-3016, 2004-GS-40-3018) and for kidnapping (Indictment No. 2004-GS-40-3017). Attachment 1, PCR Appendix at 697–708. On June 14–16, 2005, Petitioner was tried before the Honorable James R. Barber and a jury. Attachment 1, PCR App. at 1–529. Public

Defenders Lanelle Durant and Stacey Owings represented Petitioner at trial. Attachment 1, PCR App. at 1, 19. Assistant Solicitors Vanessa Cooper and Dolly Garfield represented the State. Attachment 1, PCR App. at 1, 18. The jury found Petitioner guilty as charged. Attachment 1, PCR App. at 518–19. Judge Barber sentenced Petitioner to incarceration for life without parole for each of the convictions. Attachment 1, PCR App. at 526. Those sentences were set to run concurrently. Attachment 1, PCR App. at 526.

Direct Appeal

Trial counsel filed a notice of appeal on June 16, 2005. Attachment 2, Notice of Appeal (Direct Appeal). On October 19, 2005, Assistant Appellate Defender Aileen P. Clare with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a motion to remand for a new trial, or, in the alternative, for a hearing into new evidence. Attachment 3, Motion to Remand (Direct Appeal).

On November 16, 2005, Assistant Attorney General David A. Spencer filed a return to the motion to remand for a new trial. Attachment 4, Return to Motion to Remand (Direct Appeal).

The South Carolina Court of Appeals issued an order denying the motion to remand on December 9, 2005. Attachment 5, Order Dated Dec. 9, 2005 (Direct Appeal).

On September 7, 2006, appellate counsel filed a final brief on Petitioner's behalf. Attachment 6, Final Brief of Appellant (Direct Appeal). Appellate counsel raised the following issues:

1. Is appellant entitled to a new trial based on newly-discovered evidence, when his co-defendant, who testified against him at trial, has retracted his testimony?

2. Did the trial court err by denying appellant's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field?

Attachment 6, Final Brief at 3.

On August 23, 2006, Senior Assistant Attorney General Harold M. Coombs, Jr. filed a final brief for the State. Attachment 7, Final Brief of Respondent (Direct Appeal).

In an opinion filed January 16, 2007, the South Carolina Court of Appeals affirmed Petitioner's convictions. Attachment 1, PCR App. at 530–50, Opinion No. 4196 (Direct Appeal).

Thereafter, on January 29, 2007, appellate counsel filed a petition for rehearing on Petitioner's behalf. Attachment 1, PCR App. at 551–55. SAAG Coombs filed a return to the petition on February 8, 2007. Attachment 8, Return to Petition for Rehearing (Direct Appeal). The petition was denied by the court on March 22, 2007. Attachment 1, PCR App. at 556.

On April 23, 2007, Lanelle Durant, Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a petition for writ of certiorari. Attachment 1, PCR App. at 557–66.

SAAG Coombs filed a return on behalf of the State on May 23, 2007. Attachment 1, PCR App. at 567–74.

The South Carolina Supreme Court granted certiorari on November 19, 2007 and directed the parties to file the appendix and briefs. Attachment 9, Order Dated Nov. 19, 2007 (Direct Appeal). Thereafter, both side filed briefs. Attachment 1, PCR App. at 575–601.

The South Carolina Supreme Court heard argument on February 4, 2009, and on April 27, 2009, the court issued an opinion affirming in result the court of appeals. Attachment 1, PCR App. at 602–07.

On May 12, 2009, appellate counsel filed a petition for rehearing, Attachment 10, Petition for Rehearing (Direct Appeal), which the court denied on May 28, 2009, Attachment 11, Order Dated May 28, 2009 (Direct Appeal). The court issued a remittitur on May 28, 2009. Attachment 12, Remittitur (Direct Appeal).

Post-Conviction Relief

Petitioner filed an application for post-conviction relief (PCR) on August 5, 2009. Attachment 1, PCR App. at 608–15. In his PCR application, Petitioner raised the following claims:

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
 - (a) New Discovered Evidence
 - (b) Ineffective Assistance of Trial Counsel
 - (c) Ineffective Assistance of Trial Counsel

Attachment 1, PCR App. at 609. In an attachment to his PCR application, Petitioner explained his claims as follows:

10. State concisely and in the same order the facts which support each of the grounds set out in (9)
 - (a) Co-defendant Anthony Morris retracted his trial testimony by way of a sworn statement. The statment itself weakens the States case against Mr. White.
 - (b) Trial Counsel was ineffective by allowing the State to present evidence in case on a charge that was dismissed at the start of trial.
 - (c) Trial counsel was ineffective by failing to pursue objection of jury charge hand of one hand of all. By fail to pursue objection, counsel allowed the jury to give the charge without making a ruling on objected charged.

Attachment 1, PCR App. at 614 (errors in original).

The State made its return to the application on May 10, 2010. Attachment 1, PCR App. at 616–20. Assistant Attorney General Brian T. Petrano filed the return. Attachment 1, PCR App. at 620.

An evidentiary hearing was convened on October 18, 2010, before the Honorable L. Casey Manning. Attachment 1, PCR App. at 629–77. Petitioner was present and represented by Mark E. Schnee, Esquire, at the hearing. Attachment 1, PCR App. at 629. The State was represented by AAG Petrano. Attachment 1, PCR App. at 622. By order dated August 30, 2011, and filed August 31, 2011, Judge Manning found that Petitioner had not established any constitutional violations or deprivations and, accordingly, denied and dismissed the PCR application with prejudice. Attachment 1, PCR App. at 678–95.

In a document dated September 13, 2011, Petitioner filed a *pro se* notice of motion and motion for rehearing per. S.C.R.C.P. Rule 59(a) and Rule 59(e). Attachment 13, *Pro Se* Notice of Motion and Motion for Rehearing. The South Carolina Supreme Court took no action on the document as Petitioner was represented by counsel. Attachment 14, Letter Dated Nov. 7, 2011.

On September 15, 2011, PCR counsel filed a notice of appeal on Petitioner’s behalf. Attachment 1, PCR App. at 696. On September 12, 2012, David Alexander, an Appellate Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a *Johnson*¹ Petition for Writ of Certiorari, raising the issue, “Whether petitioner should be granted a new trial because a key witness recanted his testimony after petitioner’s trial?” Attachment 15, *Johnson* Petition for Writ of Certiorari (PCR Appeal). Along with the

¹ The Supreme Court of South Carolina “has approved the withdrawal of counsel in meritless post-conviction appeals, provided the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967), were followed.” *Johnson v. State*, 294 S.C. 310, 310, 364 S.E.2d 201, 201 (1988). The state court adheres to this requirement even though the United States Supreme Court held, in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), that such procedures are not required. *Id.*

Johnson petition, PCR appellate counsel filed a petition to be relieved as counsel as “[i]n his opinion seeking certiorari from the order of dismissal is without merit.” Attachment 15, *Johnson* Petition at 12.

In an order dated December 19, 2013, the Supreme Court of South Carolina denied the petition and granted PCR appellate counsel’s request to withdraw. Attachment 16, Order Dated Mar. 6, 2014 (PCR Appeal). The court issued a remittitur on January 6, 2014. Attachment 17, Remittitur (PCR Appeal).

Petitioner submitted a letter to the court on January 2, 2014, which the court construed as a motion to recall the remittitur. Attachment 18, Letter Dated Jan. 9, 2014 (PCR Appeal). The court granted the motion to recall the remittitur on January 16, 2014. Attachment 19, Order Dated Jan. 16, 2014 (PCR Appeal).

Thereafter, Petitioner submitted a *pro se* brief. Attachment 20, *Pro Se Johnson* Petition (PCR Appeal).

In an order dated May 7, 2014, the court indicated that “[a]fter careful consideration of petitioner’s *pro se* petition, we adhere to our previous ruling.” Attachment 21, Order Dated May 7, 2014 (PCR Appeal). The court issued the remittitur on May 21, 2014. Attachment 22, Remittitur (PCR Appeal).

Attached and incorporated by reference are the following documents:

- (1) PCR Appendix, containing:
 - (a) Index;
 - (b) Trial Transcript;
 - (c) Court of Appeals Opinion;
 - (d) Petition for Rehearing;
 - (e) Order Denying Petition for Rehearing;

- (f) Petition for Writ of Certiorari;
 - (g) Return to Petition for Writ of Certiorari;
 - (h) Brief of Petitioner;
 - (i) Brief of Respondent;
 - (j) Supreme Court Opinion;
 - (k) Application for Post-Conviction Relief;
 - (l) Return;
 - (m) Applicant's Pre-Hearing Brief;
 - (n) Post-Conviction Relief Hearing Transcript;
 - (o) Order of Dismissal;
 - (p) Notice of Appeal; and
 - (q) Clerk of Court Records;
- (2) Notice of Appeal (Direct Appeal);
 - (3) Motion to Remand (Direct Appeal);
 - (4) Return to Motion to Remand (Direct Appeal);
 - (5) Order Dated Dec. 9, 2005 (Direct Appeal);
 - (6) Final Brief of Appellant (Direct Appeal);
 - (7) Final Brief of Respondent (Direct Appeal);
 - (8) Return to Petition for Rehearing (Direct Appeal);
 - (9) Order Dated Nov. 19, 2007 (Direct Appeal);
 - (10) Petition for Rehearing (Direct Appeal);
 - (11) Order Dated May 28, 2009 (Direct Appeal);
 - (12) Remittitur (Direct Appeal);
 - (13) *Pro Se* Notice of Motion and Motion for Rehearing;
 - (14) Letter Dated Nov. 7, 2011;

- (15) *Johnson* Petition for Writ of Certiorari (PCR Appeal);
- (16) Order Dated Dec. 19, 2013 (PCR Appeal);
- (17) Remittitur (PCR Appeal);
- (18) Letter Dated Jan. 9, 2014 (PCR Appeal);
- (19) Order Dated Jan. 16, 2014 (PCR Appeal);
- (20) *Pro Se Johnson* Petition (PCR Appeal);
- (21) Order Dated May 7, 2014 (PCR Appeal); and
- (22) Remittitur (PCR Appeal).

GROUND FOR RELIEF

In his *pro se* Petition for Writ of Habeas Corpus, Petitioner makes the following claim of error:

<u>Ground One:</u>	The Trial Court Erred by denying Appellants objection to the States Expert Witness, a dog-handler, without requiring the State to Establish the Underlying Reliability of dog tracking as a scientific or technical field.
<u>Supporting Facts:</u>	See Attached Argument Ground 1 A, B, C.
<u>Ground Two:</u>	Newly discovered Evidence
<u>Supporting Facts:</u>	See: App. p. 634 – 676 which Petitioner re-argue See A-1 – D
<u>Ground Three:</u>	Ineffective Assistance of Counsel
<u>Supporting Facts:</u>	See Attached Arguments A, B, C, D Etc.
<u>Ground Four:</u>	Newly discovered Evidence (1) See Appendix P.C.R. Transcript Pg. 635 – 676
<u>Supporting Facts:</u>	(2.) Refer Back to Ground #2 I am arguing Ground 2 to support Ground 4, and I further argue that due to Martinez v. Ryan 132 S.Ct 1309 P.C.R. Counsel Ineffectiveness in failing to subpoena co-defendant Anthony Morris and Trial Counsel Lanelle Durant.

(3) Ground 4 Argument (A), Ground 4 Argument (B)
Etc.

ECF No. 7-1 at 5–10 (errors in original). The attachments to the habeas petition appear to be excerpts from various briefs filed in state court. ECF No. 7-1 at 16–46. Ground One includes the following claims of error:

Argument A. The trial court erred by denying applicant’s objection to the state’s expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.

Argument B. The Court of Appeals incorrectly held that the dog tracking evidence was not admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police do-handler’s testimony into evidence.

Argument C. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler’s testimony into evidence.

ECF No. 7-1 at 16 – 24. As “Argument A-1” to Petitioner’s Ground Two, he attached the motion to remand for a new trial, or, in the alternative, for a hearing into new evidence filed in state court. ECF No. 7-1 at 25–27. Additionally, Ground Two includes the following claims of error:

Argument A-2 The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Argument A-3 Appellant is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

ECF No. 7-1 at 28–32. Petitioner’s Ground Three includes the following claims of error:

Argument A Trial Counsel was ineffective for failure to protest Applicant's Fifth and Sixth Amendment rights. See U.S.C.A. 14th amendment.

Argument B On Ground 10(a) of my PCR Application, I amend that assertion to state my Trial Counsel provided "Deficient Performance" in failing to pursue a ruling on the clear objection to the "Hand of One Hand of All" instruction to be given to the jury. I move for Trial Transcript page 407, line 16–page 408, line 7, to be entered as Applicants Evidence one (1) as proof within this record that my Trial Counsel did not move for ruling on an important objection to a burden – shifting instruction.

Argument C On Ground 10(b) of my PCR Application, I amend that assertion to state that my Trial Counsel provided "Deficient Performance" in failing to object to a material State witness committing perjury before the jury. Again, your Honor, Applicant's Evidence two (2) is State witness Anthony Morris admitting to the Court that his initial statement to police was a complete lie; here, the record shows Trial Counsel Stacey Owings did not object to Morris commission of perjury when it surfaced, nor did Owings object in her Cross Examination at Trial Transcript page 397, line 14 – page 403, line 18, which I'd move to have admitted into this record as Applicant's Evidence three (3) as proof of Counsel not objecting to very damaging and prejudicial evidence against Applicant.

Argument D. The PCR Court erred in denying relief on Ground 10(c), APCR, where Trial Counsel Owings never testified in PCR contrary to White's testimony in PCR regarding Trial Counsel's failure to pursue Ruling on Objection claim.

ECF No. 7-1 at 33–42 (errors in original). Ground Four includes the following claims of error:

Argument A The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

Argument B Petitioner should be granted a new trial based on the after-discovered evidence of the recantation of a key witness's testimony after petitioner's trial.

ECF No. 7-1 at 43–46.

EXHAUSTION OF STATE REMEDIES

In order for the petition to be ripe for this habeas review, Petitioner must have exhausted his state remedies. In this case, Petitioner has exhausted his state remedies as required by 28 U.S.C. § 2254(b)(1)(A). The State provides two basic remedies after conviction—direct appeal and post-conviction relief. *See generally* S.C. Code Ann. § 14-3-330 (providing for appellate jurisdiction for correction of errors of law); S.C. Code Ann. § 17-27-20 (setting out cognizable claims in PCR and providing, for collateral actions, that PCR “comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them”); Rule 201(a), SCACR (recognizing right to appeal from final judgment); *see also Stewart v. Warden of Lieber Corr. Inst.*, 701 F. Supp. 2d 785, 790 (D.S.C. 2010) (“To exhaust a claim in state court, a person in custody has two primary means of attacking his conviction: filing a direct appeal and/or filing an application for relief under the South Carolina Post Conviction Procedure Act.”). Petitioner has neither of these remedies available to him.

Petitioner timely pursued his direct appeal remedies. *See generally* Rule 203(b)(2), SCACR (setting a ten (10) day limit in which to appeal after sentence). Thus, he has no direct appeal remedies still available to him.

Petitioner also pursued and exhausted his PCR remedies in his PCR action as a matter of right. *See* S.C. Code Ann. § 17-27-90 (“All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court

finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application.”); *Wade v. State*, 348 S.C. 255, 264, 559 S.E.2d 843, 847 (2002) (“An individual under PCR effectively is granted one chance to argue for relief and must do so within a year of his final appeal.”); *Gibson v. State*, 329 S.C. 37, 42, 495 S.E.2d 426, 428 (1998) (“Exhaustion [of state PCR remedies] includes filing of an application, the rendering of an order adjudicating the issues, and petitioning for, or knowingly waiving, appellate review.”). Petitioner has no further PCR remedies available to him on these matters.

Therefore, this petition should not be dismissed in order to pursue available state remedies as there are none.

SUMMARY JUDGMENT

Respondent has filed a motion for summary judgment in this matter. “Summary judgment is appropriate when ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (quoting Fed. R. Civ. P. 56). “[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, the records before the Court by way of this return and memorandum show that Petitioner is not entitled to any relief for all the reasons discussed below.

DISCUSSION

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides for restrictive review of claims presented in a federal habeas action.² A claim adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was “contrary to, or involved an unreasonable application of” clearly established federal law as decided by the United States Supreme Court, or the decision “was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.” 28 U.S.C. 2254(d); *see Harrington v. Richter*, 562 U.S. 86, 131 S. Ct. 770, 785 (2011); *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000). “A state court’s determination that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.” *Richter*, 131 S. Ct. at 786 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). “Section 2254(d) reflects the view that habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for

² The AEDPA also provides for a one-year statute of limitations. 28 U.S.C. § 2244(d)(1). By Respondent’s calculation, Petitioner filed a timely action. Petitioner’s conviction became final on Thursday, May 28, 2009, when his petition for rehearing was denied. His federal time began to run thereafter. Petitioner filed his PCR action on August 5, 2009, tolling the federal time after a lapse of sixty-eight (68) days. His time limits remained tolled until the conclusion of the PCR appeal. This would be, at the latest, May 21, 2014, when the South Carolina Supreme Court issued the remittitur in Petitioner’s PCR action, *see Wise v. S. Carolina Dept. of Corr.*, 372 S.C. 173, 174, 642 S.E.2d 551, 551 (2007) (“When the remittitur has been properly sent, the appellate court no longer has jurisdiction over the matter and no motion can be heard thereafter.”), or, at the earliest, May 7, 2014, when the court issued an order adhering to the previous denial of Petitioner’s petition for writ of certiorari, *see* 28 U.S.C. § 2244(d)(2) (providing that “[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this section” but failing to include the expiration of the time for seeking review). Petitioner delivered his petition on January 21, 2015 (pursuant to *Houston v. Lack*, 487 U.S. 266 (1988), and the mailroom stamp from the corrections facility on the petition envelope)—two hundred and forty-four (244) days after the remittitur date and two hundred and fifty-eight (258) days after the dismissal date. Using either of these dates, Petitioner filed within the one-year limit. Consequently, the action appears to be timely.

ordinary error correction through appeal.” *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 332 n.5 (1979) (Stevens, J. concurring in judgment)).

In conducting this deferential review of state court decisions, the habeas court will presume the state court factual findings to be correct. 28 U.S.C. § 2254(e)(1). The petitioner has the burden of rebutting this presumption by clear and convincing evidence. *Id.*

Preservation of the Issue for Review: Procedural Default Analysis

For the above standard to apply, however, a federal habeas petitioner first must exhaust his claims by presenting them to the highest state court with jurisdiction to decide them before seeking relief through the federal writ of habeas corpus. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States v. Barnette*, 644 F.3d 192 (4th Cir. 2011). Moreover, a petitioner must present the issue in compliance with state procedural rules so that the issue may be reviewed on the merits. *Harris v. Reed*, 489 U.S. 255, 262 (1989); *Coleman v. Thompson*, 501 U.S. 722, 735 (1991). If a petitioner fails to present a ground at all, that is also a default barring review on the merits. *Coleman*, 501 U.S. at 735 n.1. A petitioner may only overcome the default by showing cause for the default and prejudice therefrom, or that a fundamental miscarriage of justice will occur if the claim is not heard, i.e., an assertion of actual innocence. *See, e.g., Murray v. Carrier*, 477 U.S. 478, 495–96 (1986).

Claims that are not cognizable are not subject to the exhaustion requirement. “Procedural default generally occurs when a petitioner pursues all of his or her state court appeals but fails to raise *federal* claims until he or she files a federal petition, or when a petitioner fails to pursue all of his or her state appeals in a timely manner.” 39 C.J.S. Habeas Corpus § 39 (June 2013 update) (emphasis added). The requirement of proper exhaustion to preserve a claim is based on comity—to allow the state courts to consider the federal claim at issue before a petitioner comes

into federal court. *Picard v. Connor*, 404 U.S. 270, 275 (1971). It is the “alerting [the state] court to the *federal* nature of the claim” that is required. *Baldwin v. Reese*, 541 U.S. 27, 29 (2004) (emphasis added); *see also Baker v. Corcoran*, 220 F.3d 276, 289 (4th Cir. 2000) (quoting *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997)) (“Fair presentation mandates that the *federal* claim ‘be presented face-up and squarely’”) (emphasis added). Thus, exhaustion and default only apply to federal-law based claims. *See Gaddy v. McCall*, No. 8:10-1743-JFA-JDA, 2011 WL 4482592, at *5 (D.S.C. Sept. 27, 2011) (declining to accept procedural default analysis where claim based solely on state law).

Petitioner’s Ground One is not cognizable as it fails to allege any violation of federal law.

Likewise, Petitioner’s Grounds Two and Four—his newly discovered evidence claims—are not cognizable as neither alleges any violation of federal law.

Petitioner’s Ground Three is made up of a number of ineffective assistance of counsel claims. Though cognizable, these claims have been procedurally defaulted as they were not raised to and ruled upon by the PCR court. *See Bailey v. State*, 392 S.C. 422, 432–33, 709 S.E.2d 671, 676–77 (2011) (finding an issue “raised to and ruled upon by the PCR judge” preserved for appellate review); *Marlar v. State*, 375 S.C. 407, 408, 653 S.E.2d 266, 266 (2007) (“The failure to specifically rule on the issues precludes appellate review of the issues.”).³ As such, these claims were not available in the *Johnson* appeal. Petitioner has not asserted either

³ This procedural bar has been acknowledged as a “consistently” applied state-law based procedural rule for purposes of a default analysis, at least after clarification in the November 5, 2007 *Marlar* opinion. *See Bostick v. Stevenson*, 589 F.3d 160, 164 (4th Cir. 2009) (finding that the rule was not consistently applied until the Supreme Court of South Carolina clarified same in *Marlar*). Petitioner’s action, having been decided by an order dated August 30, 2011, and filed August 31, 2011, is certainly subject to this bar.

cause for the defaulted claims or prejudice that resulted therefrom, and no cause or prejudice is readily apparent.⁴

Petitioner's Trial

The South Carolina Supreme Court recited the facts of Petitioner's crimes as follows:

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

⁴ Even had Petitioner attempted to overcome the default by arguing that PCR counsel was ineffective in failing to raise these claims, Respondent submits that such an allegation would be insufficient to overcome the default as Petitioner cannot "demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez v. Ryan*, 132 S. Ct. 1309, 1318 (2012). As discussed in further detail below, these claims, even if they were properly before this Court, lack merit.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect.

Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing from the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

State v. White, 382 S.C. 265, 676 S.E.2d 684 (2009).⁵

Ground One: Alleged Error in Admission of Expert Testimony

In Petitioner's Ground One he asserts that the trial court erred in denying his objection to the State's expert witness, a dog handler, without requiring the State to establish the underlying reliability of dog tracking as a scientific or technical field. ECF No. 7-1 at 5. In support of this claim, Petitioner attached the arguments previously submitted in state court (court of appeals and supreme court) in Petitioner's direct appeal. ECF No. 7-1 at 16–24. All of Petitioner's arguments are based on the idea that Officer Gunter's testimony was not properly admitted under state law because the reliability of dog-tracking had not been established under *State v. Jones*, 273 S.E. 723, 259 S.E.2d 120 (1979). This claim is not cognizable in habeas review as it fails to allege any violation of federal law.

⁵ This opinion is included in the PCR Appendix, and this particular excerpt is found on PCR Appendix page 603.

“The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” *Wilson v. Corcoran*, 562 U.S. 1, 131 S. Ct. 13, 16 (2010) (internal quotations and citations omitted). Evidentiary rulings are generally considered state law matters. *Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) (“[A] claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas corpus relief can be granted.”). Evidentiary rulings will not be considered in federal habeas “unless [the] erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.” *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)). The only proper inquiry, if any, is whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Petitioner has raised a claim based upon state law and, therefore, has failed to allege an error upon which relief may be granted. 28 U.S.C. § 2254 (d)(1) (application shall not be granted unless the claim was based on an improper application of federal law).

To the extent this ground could be broadly construed as one that alleges a due process violation, the record well demonstrates that the trial court reasonably applied the controlling state law. Indeed, the South Carolina Supreme Court held “[t]he trial court properly discharged its gatekeeping role in assessing the dog tracking evidence under Rule 702, as to qualifications and reliability.” *White*, 382 S.C. 265, 676 S.E.2d at 689, Attachment 1, PCR App. at 607.

At any rate, the basis of the issue in Ground One is most decidedly a matter of state law. Given that federal courts sitting in habeas actions decline to consider matters of state law, this issue should be summarily dismissed as not cognizable. *Estelle*, 502 U.S. at 68 (“[I]t is not the

province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.”).

Grounds Two and Four: Alleged Newly Discovered Evidence

In Petitioner’s Ground Two and Ground Four, he makes claims based on newly discovered evidence. In particular, he argues that he is entitled to a new trial because one of his co-defendants, Morris, apparently signed a statement retracting his testimony from Petitioner’s trial. *See* Attachment 1, PCR App. at 686 (retyped at 585). This claim is not cognizable as it fails to allege any error in the application of federal law.

Relief in a federal habeas action is only available to persons “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). Thus, as outlined above with respect to Petitioner’s Ground One, issues of state law are generally not cognizable in habeas review. *Estelle, supra*. State law governs when a party is entitled to a new trial based on newly discovered evidence.⁶ And a newly discovered evidence claim, absent a constitutional violation, is not cognizable in federal habeas. “Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”

⁶ For example, South Carolina law requires that a party seeking a new trial must show that the newly discovered evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the new trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611–12, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

Herrera v. Collins, 506 U.S. 390, 400 (1993); *cf. McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (“We have not resolved whether a prisoner may be entitled to habeas relief based on a freestanding claim of actual innocence.”).⁷ Petitioner is not entitled to relief based on his Grounds Two and Four. Those grounds are not cognizable as they merely assert that the state courts erred in their interpretation of state law.

Ground Three: Alleged Ineffective Assistance of Counsel

Petitioner raises a number of claims of ineffective assistance of counsel in his Ground Three: (A) trial counsel failed to protect Petitioner’s Fifth and Sixth Amendment rights; (B) trial counsel failed to get a clear ruling on their objection to the “hand of one, hand of all” instruction; (C) trial counsel failed to object to perjury; and (D) the PCR court erred in rejecting his claim that trial counsel were ineffective for failing to pursue the objection to the “hand of one, hand of

⁷ Petitioner has not made a claim that he is actually innocent. But if he were to make such a claim, it could only serve as a way to overcome a procedural bar rather than as a stand-alone claim on which he could get habeas relief. The United States Supreme Court has held

that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations. We caution, however, that tenable actual-innocence gateway pleas are rare: “[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”

McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)). The Court has explained the requirements for a petitioner to pass through this “gateway” as follows,

[I]f a petitioner . . . presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claim.

Schlup v. Delo, 513 U.S. 298, 316 (1995). The only claims of constitutional error that Petitioner has made are his ineffective assistance of counsel claims raised in Ground Three. As explained below, these claims appear to lack merit even if they were not procedurally barred.

all” charge. All of Petitioner’s arguments have been procedurally defaulted.⁸ A review of these claims also shows that they are meritless. Accordingly, Petitioner is not entitled to habeas relief.

Standard of Review: Ineffective Assistance of Counsel

To be entitled to habeas relief on an ineffective assistance of counsel claim, Petitioner had to have shown in state court that (1) counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel’s error, the result of that proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). Thus, under the two part test of *Strickland*, a defendant must show not only that counsel’s performance was deficient, but that this deficiency prejudiced his defense.

Of course, the review of ineffective assistance of counsel claims in federal habeas is not simply a new review of the merits; rather, habeas review is centered upon whether the state court decision was reasonable. *See* 28 U.S.C. § 2254(d). Additionally, each step in the review process requires deference—deference to counsel and deference to the state court that previously reviewed counsel’s actions:

Establishing that a state court’s application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” and when the two apply in tandem, review is “doubly” so. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel’s

⁸ Respondent believes these claims have been procedurally defaulted because the only ineffective assistance of counsel claim that it appears the PCR court ruled on was the claim related to the handling of the newly discovered evidence. *See* Attachment 1, PCR App. at 685–93. While the PCR court determined whether Petitioner actually had notice of his co-defendants being a part of the State’s case (finding that he did), Attachment 1, PCR App. at 693, the court did not analyze either whether trial counsel were ineffective for failing to object to the indictment which did not mention the co-defendants (Argument A) or whether trial counsel were ineffective for failing to pursue their objection to the trial court’s “hand of one, hand of all” jury instruction (Arguments B and D).

actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Richter, 131 S. Ct. at 788 (internal citations omitted).

Argument A: Alleged Failure to Protect Fifth and Sixth Amendment Rights

Petitioner asserts that the indictments against him were defective because they did not reference his co-defendants and, therefore, did not put him on notice that he was not being tried as a principal but under the “hand of one, hand of all” theory. Petitioner argues that, by not objecting to the deficient indictments, trial counsel were ineffective. This claim was not raised to and ruled upon by the trial court and, thus, it has been procedurally defaulted. It also lacks merit.

While the PCR court did not address this issue as an ineffective assistance of counsel claim, the court did address the underlying issue of whether Petitioner was properly on notice that the State's case included co-defendants. The PCR court found Petitioner's claim to the contrary to be “without merit[,]” noting,

The Applicant had notice that the State's case included the co-defendants. The defense was well aware that the co-defendant(s) were part of the State's case. In fact, trial counsel, in pretrial matters, knew (from the discovery) that one of co-defendants [sic] might mention that that [sic] the Applicant indicated he needed to do the robbery to pay his parole fees. (Transcript p. 6 L. 20 – p. 11 L. 25).

Attachment 1, PCR App. at 693. The record supports the PCR court's conclusion that Petitioner had notice that the State's case against Petitioner included his co-defendants—prior to trial, trial counsel had received Petitioner's co-defendants' rap sheets, and they knew what the co-defendants' statements said, and trial counsel knew that co-defendant Morris had pled guilty but that his sentencing had been deferred until after he testified at Petitioner's trial. Attachment 1, PCR App. at 6–11. Petitioner clearly had actual notice of his co-defendants. The PCR court found Petitioner's testimony to the contrary to be not credible. Attachment 1, PCR App. at 688

(“Beyond his review of the undisputed procedural history, this Court finds Applicant’s testimony is not credible.”). The PCR court’s factual findings are entitled to deference in this action. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) (“[F]or a federal habeas court to overturn a state court’s credibility judgments, the state court’s error must be stark and clear.”); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (“28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.”). Petitioner may overcome this presumption of correctness of the trial court’s findings only by showing “‘clear and convincing evidence to the contrary.’” *Wilson v. Ozmint*, 352 F.3d 847, 858–59 (4th Cir. 2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 240 (2003)). Respondent submits that Petitioner has not done so in this case.

Petitioner has failed to show that because his indictment did not specifically mention his co-defendants, it was defective.⁹ “It is well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” *State v. Dickman*, 341 S.C. 293, 295, 534 S.E.2d 268, 269 (2000) (citing *State v. Leonard*, 292 S.C. 133, 136, 355 S.E.2d 270, 2727 (1987); *State v. Cox*, 258 S.C. 114, 187 S.E.2d 525 (1972); *State v. Hicks*, 257 S.C. 279, 185 S.E.2d 746 (1971); *State v. Hunter*, 79 S.C. 73, 60 S.E. 240 (1908)); *see also State v. Blackwell*, 220 S.C. 342, 349, 67 S.E.2d 684, 687 (1951) (“The fact that the State did not include in the indictment the two accomplices who were

⁹ S.C. Code Ann. § 17-19-20 provides:

Every indictment shall be deemed and judged sufficient and good in law which, in addition to allegations as to time and place, as required by law, charges the crime substantially in the language of the common law or of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood and, if the offense be a statutory offense, that the offense be alleged to be contrary to the statute in such case made and provided.

imprisoned beyond the jurisdiction is not important.”). South Carolina courts have recognized that under state law

A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, m]ere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 374 S.C. 257, 261–62, 647 S.E.2d 702, 704–05 (Ct. App. 2007) (internal quotations and citations omitted).

Moreover, Petitioner has failed to show that trial counsel’s representation was deficient for failing to object to the indictment. Petitioner has also failed to show that he was prejudiced in any way by their representation. *See Harrington v. Richter*, 131 S. Ct. 770, 791–92 (“The likelihood of a different result must be substantial, not just conceivable.”). This claim has been procedurally defaulted. Furthermore, as Petitioner has failed to show either ineffective assistance of counsel or prejudice as to this issue, he is not entitled to habeas relief based on Argument A of Ground Three.

Arguments B and D: Alleged Ineffective Assistance of Counsel for Failure to Pursue Objection to Jury Charge

In Arguments B and D of Petitioner’s Ground Two, he asserts that trial counsel was ineffective for failing to follow up with their objection to the trial court’s instruction to the jury on “hand of one, hand of all.” This claim was not preserved. Additionally, Petitioner has not met his burden of proving both ineffective assistance of counsel and resulting prejudice.

At Petitioner’s trial the State requested that the trial court charge “hand of one, hand of all.” Attachment 1, PCR App. at 407. Trial counsel objected to that charge being given.

Attachment 1, PCR App. at 407–08, 410–11. Counsel for the State explained why it requested the charge:

Just the fact that videotape and the testimony all show and the Victim’s testimony all show that Gary White was the one that held the gun to the Victim’s head. He did not take anything. And part of the elements of armed robbery is taking property from another without permission.

And so we are obligated to explain that to the jury that he’s just as guilty as Anthony Morris who actually physically took the items away from the store and as guilty as Roy Wiggins who never even entered the store.

Attachment 1, PCR App. at 411. The trial court ultimately instructed the jury on “hand of one, hand of all.” Attachment 1, PCR App. 501–02. Trial counsel did not raise an objection to that charge after the trial court instructed the jury. Attachment 1, PCR App. at 509.

Trial counsel were not ineffective for failing to pursue their objection to the “hand of one, hand of all charge” because the charge was proper. *See State v. Niles*, 400 S.C. 527, 533, 735 S.E.2d 240, 243 (Ct. App. 2012) (“If any evidence supports a jury charge, the circuit court should grant the request.” (citing *State v. Brown*, 362 S.C. 258, 262, 607 S.E.2d 93, 95 (Ct. App. 2004))). Under the “hand of one, hand of all” theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 334 S.C. 643, 648, 515 S.E.2d 98, 101 (1999). As counsel for the State explained, the “hand of one, hand of all” charge was necessary because the evidence established that Petitioner had joined with Morris to accomplish the armed robbery but that Petitioner had not taken anything himself. *See* Attachment 1, PCR App. at 78–94, 317–23. Morris, on the other hand, had taken both money and items from the convenience store. *See* Attachment 1, PCR App. at 84–90. Thus, the State asked for the “hand of one, hand of all” charge to satisfy their burden of proving all elements of the crime beyond a reasonable doubt. Since there was evidence to support the charge, the trial court had to give the “hand of one, hand

of all” instruction in accordance with state law.¹⁰ Consequently, in failing to pursue their objection, trial counsel were not ineffective according to *Strickland*. See 466 U.S. at 689 (“[C]ounsel’s function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.”).

Additionally, Respondent would note that if the charge was proper, Petitioner cannot have been prejudiced by trial counsel’s failure to pursue their objection.

Respondent maintains that this claim has been procedurally defaulted and Petitioner’s Ground Three, Arguments B and D, should be denied and dismissed. However, even if this Court finds that these arguments have been properly preserved, Petitioner is still not entitled to relief because he has failed to prove either ineffective assistance of counsel or prejudice regarding trial counsel’s failure to pursue their objection to the “hand of one, hand of all” charge.

Argument C: Alleged Ineffective Assistance of Counsel for Failure to Object to Evidence

In Argument C of Ground Three, Petitioner claims that trial counsel were ineffective for failing to object to Morris’s “perjured” testimony. This claim has been procedurally defaulted. It also lacks merit.

Morris admitted on direct examination that the statement he originally gave to police, in which he stated that he stayed in the back seat of Wiggins’s car while Petitioner and Wiggins went into the convenience store, was a lie. Attachment 1, PCR App. at 372–77. On cross-examination, Morris affirmed that his first statement to police was a lie. Attachment 1, PCR App. at 398–99. It appears that Petitioner is now arguing that trial counsel were ineffective for

¹⁰ Petitioner claims that the charge was “burden-shifting.” ECF No. 7-1 at 36–37. Respondent disagrees—the State still had the burden of proving the elements of the crime beyond a reasonable doubt, and the “hand of one, hand of all” charge did not shift any of that burden of proof or of that burden of persuasion to Petitioner.

failing to object to the perjured testimony. However, it seems clear that trial counsel used the fact that Morris had previously committed perjury (by lying in his statement to police) to undermine Morris's testimony incriminating Petitioner in the armed robbery. Trial counsel's use of the fact that Morris had previously lied to police (rather than objecting to it) was not ineffective. *See Strickland v. Washington*, 466 U.S. 668, 690–91 (1984) (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”).

To the extent this Court could construe Argument C as an assertion that trial counsel should have objected to the testimony Morris gave at trial as perjured testimony based on Morris's affidavit (the “newly discovered evidence”), Respondent submits that Petitioner has not shown that trial counsel had reason to know the testimony was perjured at the time of trial. The record reflects that trial counsel received the affidavit from Morris about a month after trial. Attachment 1, PCR App. at 650. Regardless of what objection Petitioner believes trial counsel should have made, he has not met his burden of showing deficient performance.

Nor has he shown that he was prejudiced by trial counsel's actions. The Supreme Court has provided the following guidance to courts considering the prejudice prong:

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must

ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Strickland v. Washington, 466 U.S. at 695–96. Petitioner has not met his burden on the prejudice prong—particularly in light of the strong case for guilt. Interestingly, both the South Carolina Court of Appeals and the South Carolina Supreme Court commented on the strength of the case against Petitioner. The South Carolina Supreme Court commented that there was “overwhelming evidence of guilt.” The Court of Appeals noted there was “substantial evidence of White’s guilt”:

Ample evidence linked White to the crimes charged. The testimonies of the victim, Gwen Anthony, and co-defendant, Anthony Morris, were corroborated by a surveillance videotape that recorded the crime as it unfolded. In addition, Roy Wiggins, the driver of the escape car, testified against White. Items taken from the crime scene were located in the escape vehicle. Officer Rouppasong witnessed a man carrying something in his hand and wearing dark jeans and a white shirt run from the Circle K parking lot. In pursuit, the officer lost sight of the man briefly and then came upon the escape car. The same man wearing the dark jeans and white shirt ran from the escape car toward the yard of the residence where White was eventually found. Gunter put his tracking dog on the scent at the location where the man exited the vehicle. The area in which the dog began tracking had been secured in order to preserve the evidence. The dog’s tracks led to the location where White was discovered. He appeared to be asleep and was clutching a gun in his hand. The gun matched Anthony’s description of the weapon the robber carried, and both Morris and Wiggins positively identified it as the gun White had in his possession immediately prior to the robbery.

Attachment 1, PCR App. at 47–48.

Ground Three, Argument C has been procedurally defaulted. It is also wholly without merit as there has been no showing of either ineffective assistance of counsel or prejudice as to this claim.

CONCLUSION

WHEREFORE, having made the Return, Respondent submits that the action should be summarily dismissed as the record conclusively shows, for all the foregoing reasons, Petitioner is not entitled to any relief.

Respectfully submitted,

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March 30, 2015
Columbia, South Carolina

Kaycie S. Timmons
ATTORNEY FOR RESPONDENT

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

GARY A. WHITE, JR.,	)	
	)	C/A No.: 1:15-cv-365-DCN-SVH
PETITIONER,	)	
	)	
vs.	)	MOTION FOR AN EVIDENTIARY HEARING
	)	
WARDEN LEROY CARTLEDGE,	)	
	)	
RESPONDENT.	)	
	)	

THE ABOVE NAMED PETITIONER MOVES THIS COURT FOR AN EVIDENTIARY HEARING ON THE ISSUE OF "NEWLY DISCOVERED EVIDENCE".

THIS ISSUE ARE GROUNDS TWO AND FOUR OF THE PETITIONER'S HABEAS PETITION. THE PETITIONER'S ARGUMENTS WAS DENIED BY ORDER OF THE SOUTH CAROLINA COURT OF APPEALS CONCERNING THIS ISSUE, SEE APP. P. 690. IN FOOTNOTE 2 OF THE SOUTH CAROLINA SUPREME COURT'S RULING IN THIS CASE IT STATES THAT:

"WHITE ALSO ASK THE COURT OF APPEALS TO GRANT HIM A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE. IT APPEARS THE NEW TRIAL MOTION WAS NOT PRESENTED TO THE TRIAL COURT. MOREOVER, WHITE DID NOT ASK THE COURT OF APPEALS TO REMAND THE NEW TRIAL MOTION TO THE TRIAL COURT. SEE STATE V. MERCER, 381 S.C. 149, 616S-66, 672 S.E.2D 556, 564-65 (2009)(RECOGNIZING THAT A MOTION FOR A NEW TRIAL BASED UPON AFTER DISCOVERED EVIDENCE MUST BE PRESENT TO THE TRIAL COURT IN THE FIRST INSTANCE). THE COURT OF APPEALS DECLINED TO ADDRESS THE ISSUE 'BECAUSE IT HA[D] NOT BEEN RAISED TO AND RULED ON BY THE TRIAL COURT AND [W]AS NOT PROPERLY BEFORE TH[E] COURT'. WHITE, 372 S.C. AT 387, 642 S.E.2D AT 619.

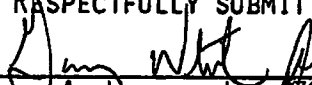
WE AFFIRM THE COURT OF APPEALS ON THIS ISSUE. RULE 220(B)(1), SCACR. THE DISPOSITION OF THIS ISSUE IS WITHOUT PREJUDICE TO WHITE SEEKING SUCH RELIEF IN THE TRIAL COURT. SEE APP. P. 691-692.

THE PCR COURT DOES NOT AGREE WITH THE SOUTH CAROLINA SUPREME COURT'S RULING ON THIS ISSUE. SEE APP. P. 692-693. ALSO, THE PCR COURT NOTES THAT: "REGARDING MORRIS' SUPPOSED RECENT. THIS COURT NOTES THAT MORRIS [MORRIS, ANTHONY TERRELL #309858] WAS NEVER PRODUCED AT THE PCR HEARING AS A WITNESS TO AUTHENTICATE AND/OR BE CROSS EXAMINED ABOUT HIS RECENT." IF PCR COUNSEL WAS NOT INEFFECTIVE FOR NOT SUBPOENAING ANTHONY MORRIS TO THE PCR HEARING, THIS ISSUE WOULD HAVE BEEN DISPOSED OF IN FAVOR OF THE PETITIONER IN STATE COURT.

THE PETITIONER HAS DILIGENTLY ATTEMPTED TO PRESENT THIS ISSUE IN HIS STATE COURT PROCEEDINGS, THERE HAS NEVER BEEN A PROPER RULING ON THIS ISSUE IN STATE COURT. SUCH DILIGENCE REQUIRES, "AT A MINIMUM SEEK[ING] AN EVIDENTIARY HEARING IN STATE COURT IN THE MANNER PRESCRIBED BY STATE LAW". WILLIAM V. TAYLOR, 529 U.S. 420, 437 (2000) (SEE ALSO, PIKE V. GUARINO 492 F.3d 61, 69 (1ST CIR. 2007)), (PETITIONER ENTITLED TO EVIDENTIARY HEARING BECAUSE HE PRESENTED EXTENSIVE EVIDENCE IN STATE COURT).

WHEREFORE, HAVING MADE THIS MOTION FOR AN EVIDENTIARY HEARING, THE PETITIONER PRAY THAT HIS MOTION IS GRANTED AS SO HE CAN PRESENT EVIDENCE TO SUPPORT HIS ASSERTION THAT HE IS INNOCENT AND WAS DENIED A FAIR TRIAL AS GUARANTEED HIM UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION.

THIS 9, DAY OF JUNE, 2015

RESPECTFULLY SUBMITTED,

 GARY A. WHITE, JR. #309726
 MCCI F-4 229-B
 386 REDEMPTION WAY
 MCCORMICK, SC 29899
 PETITIONER, PRO-SE

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

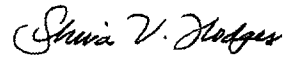
Gary A. White, Jr.,	)	C/A No.: 1:15-365-DCN-SVH
	)	
Petitioner,	)	
	)	
vs.	)	REPORT AND RECOMMENDATION
	)	
Warden Larry Cartledge,	)	
	)	
Respondent.	)	
	)	

Petitioner, proceeding pro se, brought this action requesting a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent filed a motion for summary judgment on March 30, 2015. [ECF No. 10]. As Petitioner is proceeding pro se, the court entered an order pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), on March 31, 2015, advising him of the importance of the motions for summary judgment and of the need for him to file an adequate response by May 4, 2015. [ECF No. 12]. Petitioner was specifically advised that if he failed to respond adequately, Respondent's motion may be granted, thereby ending this case. Notwithstanding the specific warning and instructions set forth in the court's *Roseboro* order, Petitioner has failed to respond to the motion.

On May 12, 2015, the court ordered Petitioner to advise by May 26, 2015, whether he wished to continue with the case. [ECF No. 14]. On May 15, 2015, Petitioner requested and was granted an extension until June 16, 2015, to file a response. Petitioner has filed no response. As such, it appears to the court that he does not oppose the motion and wishes to abandon this action. Based on the foregoing, the undersigned recommends

this action be dismissed with prejudice for failure to prosecute. *See Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); Fed. R. Civ. P. 41(b).

IT IS SO RECOMMENDED.



June 23, 2015
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

**The parties are directed to note the important information in the attached
“Notice of Right to File Objections to Report and Recommendation.”**

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

ORIGIN

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

GARY A. WHITE, JR., #309726,)
)
 PETITIONER,)
)
)
 vs.)
)
)
)
)
 WARDEN LEROY CARTLEDGE,)
)
)
)
)
 RESPONDENT.)
)

C/A No.: 1:15-365-DCN-SVH

OBJECTION TO THE MAGISTRATE'S
REPORT AND RECOMMENDATION

PETITIONER, NAMED-ABOVE, PROCEEDING PRO-SE, WOULD RESPECTFULLY OBJECT TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE IN REFERENCE TO THE ABOVE ENTITLED MATTER, DATED JUNE 23, 2015, BECAUSE THE MAGISTRATE JUDGE'S REASONS FOR THE RECOMMENDATION IN THIS CASE ARE BASED ON ERRONEOUS INFORMATION.

THE PETITIONER RECEIVED WRITTEN NOTICE OF ENTRY OF THE MAGISTRATE'S REPORT AND RECOMMENDATION ON JULY 7, 2015.

THE MAGISTRATE BASES ITS DECISION TO RECOMMEND THAT "THIS ACTION BE DISMISSED WITH PREJUDICE FOR FAILURE TO PROSECUTE" ON THE MISINFORMATION THAT THE PETITIONER NEVER RESPONDED TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, DATED MARCH 30, 2015, IN THE ALLOTTED TIME AFTER BEING GRANTED AN EXTENSION OF TIME TO RESPOND BY JUNE 16, 2015. THE PETITIONER HAS NO IDEAL HOW THE MAGISTRATE ARRIVED AT THE CONCLUSION THAT THE PETITIONER NEVER RESPONDED.

ON JUNE 9, 2015, THE PETITIONER DELIVERED AN ORIGINAL AND AN ADDITIONAL COPY OF A "RESPONSE TO MOTION FOR SUMMARY JUDGMENT" AND AN ORIGINAL AND AN

ADDITIONAL COPY OF A "MOTION FOR AN EVIDENTIARY HEARING" TO THE McCORMICK CORRECTIONAL INSTITUTION MAIL ROOM, ADDRESSED TO THE CLERK'S OFFICE FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, AND THE ADDITIONAL COPIES WERE DELIVERED FOR MAILING TO THE ATTORNEY GENERAL'S OFFICE. SEE PAGE 12 OF THE "RESPONSE TO SUMMARY JUDGMENT AND RETURN", MAILED HERewith AND MARKED AS EXHIBIT - A, PAGE 12 OF THAT DOCUMENT IS THE "AFFIDAVIT OF SERVICE", THE "MOTION FOR AN EVIDENTIARY HEARING" IS MARKED AS EXHIBIT - B, ALSO SENT HERewith.

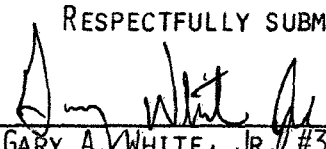
THE PETITIONER DOES OPPOSES THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DOES NOT WISH TO ABANDON THIS ACTION. PETITIONER ASK THAT THIS COURT NOT DISMISS THIS ACTION AND ORDER FURTHER BRIEFING AS TO THE MERITS OF THE RESPONSE TO THE MOTION FOR SUMMARY JUDGMENT, ALSO, PETITIONER ASK THAT THIS COURT GRANT HIM AN EVIDENTIARY HEARING.

CONCLUSION

PETITIONER PRAY THAT THIS COURT DOES NOT DISMISS THIS PETITION BECAUSE OF THIS OBVIOUS COMMUNICATIONS GAP BETWEEN HIM AND THE COURT SYSTEM.

RESPECTFULLY SUBMITTED,

THIS 10 DAY OF July, 2015


 GARY A. WHITE, JR. #309726
 MCCI #4 229-B
 386 REDEMPTION WAY
 McCORMICK, SC 29899
 PETITIONER, PRO-SE

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

GARY A. WHITE, JR., #309726,

PETITIONER,

VS.

WARDEN LEROY CARTLEDGE,

RESPONDENT.

C/A No.: 1:15-365-DCN-SVH

AFFIDAVIT OF SERVICE

THE ABOVE-NAMED PETITIONER CERTIFY THAT ON THIS DAY HE HAS SERVED A COPY
THE OBJECTION TO THE MAGISTRATE'S REPORT AND RECOMMENDATION ON THE RESPONDENT
BY DELIVERING A COPY OF SAME TO THE MCCORMICK CORRECTIONAL INSTITUTION MAIL
ROOM, WITH SUFFICIENT POSTAGE PREPAID, AND ADDRESSED AS FOLLOWS:

DONALD J. ZELENSKA
ASSISTANT ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SC 29211-1549

THIS 10 DAY OF July, 2015

SWORN TO AND SUBSCRIBED BEFORE ME THIS

10 DAY OF July, 2015

[Signature]
NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES 12-16-2019

[Signature]
GARY A. WHITE, JR. #309726
McCI F-4 229-B
386 REDEMPTION WAY
McCORMICK, SC 29899
PETITIONER, PRO-SE

Exhibit - A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

GARY A. WHITE, #309726,

PETITIONER,

vs.

WARDEN LEROY CARTLEDGE,

RESPONDENT.

C/A No.: 1:15-cv-365-DCN-SVH

RESPONSE TO SUMMARY JUDGMENT AND RETURN

COMES NOW THE ABOVE NAMED PETITIONER WHO SUBMITS THIS RESPONSE TO SUMMARY JUDGMENT AND RETURN TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, DATED MARCH 30, 2015. THE PETITIONER WILL SHOW THAT THE RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

PROCEDURAL HISTORY

THE PETITIONER, FOR THE SAKE OF THIS "RESPONSE", AGREES WITH THE RESPONDENT'S PROCEDURAL HISTORY OF THIS CASE AS STATED ON PAGES 1-8, OF THE MEMORANDUM OF LAW, THAT LED UP TO THE PETITIONER FILING HIS PRO-SE PETITION FOR WRIT OF HABEAS CORPUS IN THE UNITED STATES DISTRICT COURT IN REFERENCE TO THIS MATTER.

GROUND'S FOR RELIEF

ALL THE GROUND'S FOR RELIEF RAISED IN THE PETITIONER'S ORIGINAL PETITION WILL BE DISCUSSED INFRA.

EXHAUSTION OF STATE REMEDIES

THE RESPONDENT DOES NOT DISPUTE THAT THE PETITIONER HAS EXHAUSTED HIS STATE REMEDIES ON ALL OF THE ISSUES RAISED IN HIS ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS FILED IN THE UNITED STATES DISTRICT COURT IN REFERENCE TO THIS CASE. SEE PAGES 11-12 OF THE RESPONDENT'S MEMORANDUM OF LAW FILED IN THIS MATTER.

SUMMARY JUDGMENT

"[A] PARTY SEEKING SUMMARY JUDGMENT ALWAYS BEARS THE INITIAL RESPONSIBILITY OF INFORMING THE DISTRICT COURT OF THE BASIS FOR ITS MOTION, AND IDENTIFYING THOSE PORTIONS OF 'THE PLEADINGS, DEPOSITIONS, ANSWER TO INTERROGATORIES, AND ADMISSIONS ON FILE, TOGETHER WITH AFFIDAVITS, IF ANY,' WHICH IT BELIEVES DEMONSTRATE THE ABSENCE OF GENUINE ISSUE OF MATERIAL FACT." CELOTEX CORP. v. CATRETT, 477 U.S. 317, 323 (1986). IN THE INSTANT CASE, PETITIONER'S RESPONSE, MOTION FOR AN EVIDENTIARY HEARING AND AFFIDAVIT WILL SHOW THAT THE RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW.

GROUND ONE

IN GROUND ONE THE PETITIONER ARGUES THAT THE TRIAL COURT ERRED IN DENYING HIS OBJECTION TO THE STATE'S EXPERT WITNESS, A DOG HANDLER, WITHOUT REQUIRING THE STATE TO ESTABLISH THE UNDERLYING RELIABILITY OF DOG TRACKING AS A SCIENTIFIC OR TECHNICAL FIELD.

THE PETITIONER PRESENTED THIS ISSUE TO THE SOUTH CAROLINA COURT OF APPEAL AND THE SOUTH CAROLINA SUPREME COURT. THE RESPONDENT ASSERTS THAT THIS ISSUE IS NOT COGNIZABLE IN THIS HABEAS CORPUS PROCEEDING BECAUSE THE PETITIONER HAS NOT ALLEGED A VIOLATION OF ANY FEDERAL LAW. THE PETITIONER RETORT IS THAT HIS DUE PROCESS RIGHT UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION HAS BEEN VIOLATED BECAUSE THE ADMISSION OF THE DOG TRACKING EVIDENCE "SO INFECTED THE ENTIRE TRIAL THAT THE RESULTING CONVICTION VIOLATED DUE PROCESS". SEE ESTELLE V. MCGUIRE, 502 U.S. 62, 72 (1991).

IN THE INSTANT CASE, THE TRIAL COURT ALLOWED THIS EVIDENCE IN EVEN THOUGH THERE WAS NO TESTIMONY THAT THE DOG HANDLER HAD ANY TYPE OF MATERIAL THAT THE PETITIONER MAY HAVE HANDLED AND LEFT HIS SCENT ON TO ENABLE THE DOG TO FORM SOME TYPE OF INDICATION OF WHAT SCENT HE WAS FOLLOWING. THE DOG WAS ALLOWED TO SNIFF AROUND UNTIL HE FOUND THE PETITIONER, ONCE THAT WAS DONE, THERE WAS NO OTHER ATTEMPT BY THE DOG HANDLER TO GO ANY FURTHER TO DETERMINE IF ANYONE ELSE WAS IN THE AREA. THE FACT THAT THE PETITIONER WAS FOUND SLEEPING IN SOME BUSHES SHOULD NOT HAVE ENDED THE DOG HANDLER'S INVESTIGATION OF THE AREA THAT AN ALLEGED ARMED ROBBERY SUSPECT HAD RAN IN.

THE RESPONDENT'S MOTION TO DISMISS SHOULD BE DENIED BECAUSE THE FOURTEENTH AMENDMENT GUARANTEES A DEFENDANT A FAIR TRIAL, HOWEVER, IN THIS

CASE, THE PETITIONER'S ASSERTION IS THAT THE ERRONEOUS EVIDENTIARY RULING WAS SO EXTREME THAT AT TRIAL HE WAS DENIED A CONSTITUTIONALLY FAIR PROCEEDING. BARBE V. MCBRIDE, 521 F.3d 443, 452 (4TH CIR. 2008)(QUOTING BURKET V. ANGELONE, 208 F.3d 172, 186 (4TH CIR. 2000)).

THE DECISIONS MADE BY THE SOUTH CAROLINA COURT OF APPEALS AND THE SOUTH CAROLINA SUPREME COURT WERE "BASED ON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN THE STATE COURT PROCEEDINGS". 28 U.S.C. 2254(d).

FOR THE REASONS STATED ON THIS ISSUE, THE PETITIONER BELIEVES THAT THE RESPONDENT IS NOT ENTITLED TO SUMMARY JUDGMENT.

GROUND TWO AND FOUR

NEWLY DISCOVERED EVIDENCE

IN GROUND TWO AND FOUR, AS NOTED ON PAGE 19 OF THE RESPONDENT'S RETURN, CONCERNS NEWLY DISCOVERED EVIDENCE, WHICH INVOLVES ONE OF THE PETITIONER'S CO-DEFENDANTS RECANTING HIS TRIAL TESTIMONY AND ADMITTING THAT HE LIED WHEN HE WAS UNDER OATH TO RECEIVE A LENIENT SENTENCE.

THE RESPONDENTS ARGUES THAT THE PETITIONER IS NOT ENTITLED TO RELIEF ON THIS ISSUE BECAUSE HE FAILED TO ALLEGE ANY ERROR IN THE APPLICATION OF FEDERAL LAW.

PETITIONER HAS MADE EVERY ATTEMPT POSSIBLE IN HIS STATE COURT PROCEEDINGS, THE SOUTH CAROLINA COURT OF APPEALS, THE SOUTH CAROLINA SUPREME COURT AND THE PCR COURT, TO DEVELOPE THE FACTS ON THIS ISSUES, THEREFORE, HE WILL SEEK TO HAVE AN EVIDENTIARY HEARING ON THIS ISSUE IN FEDERAL COURT.

GROUND THREE

ARGUMENT - A

PETITIONER ASSERTED DURING HIS PCR PROCEEDINGS THAT THE INDICTMENTS AGAINST HIM FOR THE ARMED ROBBERY CHARGES WERE DEFECTIVE BECAUSE THEY FAILED TO PUT HIM ON NOTICE THAT HE WAS NOT BEING TRIED AS A PRINCIPAL BUT UNDER THE "HAND OF ONE, HAND OF ALL" THEORY. PETITIONER'S CONTENTION THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DEFICIENCY OF THE INDICTMENTS REMAINS, IN FACT, THE PETITIONER CONTENDS THAT HE WAS PREJUDICED IN THAT HE WAS TRIED FOR THE ARMED ROBBERY IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE HE WAS INDICTED, TRIED AND CONVICTED FOR THE SAME OFFENSE TWICE.

THE PETITIONER WAS CONVICTED OF TWO-COUNTS OF ARMED ROBBERY FOR THE A SINGLE EVENT THAT ALLEGEDLY OCCURRED AT A CIRCLE K CONVENIENCE STORE IN COLUMBIA, SOUTH CAROLINA AFTER MIDNIGHT ON APRIL 19, 2004.

IN SOUTH CAROLINA ARMED ROBBERY, A STATUTORY OFFENSE DEFINED AS "ROBBERY WHILE ARMED WITH A PISTOL ... OR OTHER DEADLY WEAPON". S.C. CODE ANN. §16-11-330(A). "ROBBERY IS DEFINED AS THE FELONIOUS OR UNLAWFUL TAKING OF MONEY, GOODS OR OTHER PERSONAL PROPERTY OF ANY VALUE FROM **THE PERSON OF ANOTHER OR IN HIS/HER PRESENCE** BY VIOLENCE OR BY PUTTING SUCH **PERSON IN FEAR.**" STATE V. BULLARD, 560 S.E.2d 436 (S.C. App. 2002)(CITING STATE V. BLAND, 318 S.C. 315, 317, 457 S.E.2d 611, 612 (1995); SEE ALSO STATE V. SCIPIO, 283 S.C. 124, 126, 322 S.E.2d 15, 16 (1984)(STATING ROBBERY REQUIRES THE FELONIOUS TAKING AND CARRYING AWAY OF THE GOODS OF **ANOTHER** AGAINST HIS WILL OR WITHOUT CONSENT). ROBBERY IS NOT DEFINED IN SECTION 16-11-330. (EMPHASIS ADDED).

THE DEFINITION FOR ARMED ROBBERY IN SOUTH CAROLINA CLEARLY STATES THAT THAT OFFENSE OCCURS WHEN SOMEONE ARMED WITH A DEADLY WEAPON TAKES VALUABLES FROM THE PERSON OR PRESENCE OF ANOTHER WHILE PUTTING THAT PERSON IN FEAR. WELL, IN THE INSTANT CASE, THE ALLEGED VICTIM, J. GWEN ANTHONY, TESTIFIED THAT SHE WAS PUT IN FEAR FOR HER LIFE ONLY ONCE, THAT WAS WHEN SHE ALLEGED THAT ONE ROBBER HELD A GUN TO HER NECK WHILE THE OTHER ROBBER TOOK HER MONEY, WALLET AND/OR KEYS, SEE APP. P. 697, AND STOLE US CURRENCY, LOTTERY TICKETS AND/OR ALCOHOLIC BEVERAGES ALLEGEDLY BELONGING TO THE CIRCLE K. THIS WAS ALL A SINGLE ACT.

THE SOLICITOR IN THIS CASE APPLIED HIS/HER OWN INTERPRETATION OF THE ARMED ROBBERY STATUTE TO TRY AND CONVICT THE PETITIONER ON MULTIPLE OFFENSES FOR A SINGLE EVENT. IN SOUTH CAROLINA, FIRST AND FOREMOST, PENAL STATUTES MUST BE CONSTRUED STRICTLY AGAINST THE STATE AND IN FAVOR OF THE DEFENDANT. WILLIAMS V. STATE, 306 S.C. 89, 91, 410 S.E.2d 563, 564 (1991). "THE RULE THAT PENAL LAWS ARE TO BE CONSTRUED STRICTLY ... IS FOUNDED ... ON THE PLAIN PRINCIPLE THAT THE POWER OF PUNISHMENT IS VESTED IN THE LEGISLATURE, NOT THE JUDICIAL DEPARTMENT. IT IS THE LEGISLATURE, NOT THE COURT, WHICH IS TO DEFINE A CRIME, AND ORDAIN ITS PUNISHMENT...." ID. (QUOTING UNITED STATES V. WILTBERGER, (18 U.S.) 5 WHEATON 76, 95-96, 5 L.ED. 37, 42 (1820)).

THE COURT'S PRIMARY FUNCTION IN INTERPRETING STATUE IS TO ASCERTAIN THE INTENTION OF THE LEGISLATURE. STATE V. BLACKMON, 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991). WHEN THE TERMS OF A STATUTE ARE CLEAR AND UNAMBIGUOUS, THE COURT MUST APPLY THEM ACCORDING TO THEIR LITERAL MEANING. ID. FURTHERMORE, "IN CONSTRUING A STATUTE, WORDS MUST BE GIVEN THEIR PLAIN AND ORDINARY MEANING WITHOUT RESORT TO SUBTLE OR FORCED CONSTRUCTION TO LIMIT OR EXPAND THE STATUTE'S OPERATION." ID.

LOOKING AT THE CLEAR AND UNAMBIGUOUS TERMS OF THE ARMED ROBBERY STATUTE IN SOUTH CAROLINA, THE LEGISLATURE DID NOT INTEND MULTIPLE PROSECUTIONS FOR A SINGLE ACT OF ROBBERY INVOLVING ONLY ONE VICTIM WHO WAS PUT IN FEAR OF HIS/HER LIFE DURING THE COURSE OF A ROBBERY AND SOME OF THE PROPERTY TAKEN DID NOT BELONG TO THE PERSON BEING ROBBED. THE PETITIONER SHOULD HAVE BEEN CHARGED FOR THE SINGLE EVENT THAT OCCURRED IN THIS INCIDENT, EVEN THOUGH HE'S INNOCENT.

FOR THE FOREGOING REASONS THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT WAS VIOLATED AND THE PETITIONER'S RIGHT TO DUE PROCESS OF LAW WAS ALSO VIOLATE BECAUSE OF THE PROSECUTOR'S ACTIONS IN THIS MATTER, THE PETITIONER WAS DENIED A FAIR TRIAL.

PCR COUNSEL NEVER ARGUED THE DOUBLE JEOPARDY ISSUE, THE PETITIONER BELIEVES THAT THIS IS RELEVANT TO THE DEFECTS IN THE INDICTMENTS, IF NEED BE, THIS ISSUE CAN BE HEARD AT THE EVIDENTIARY HEARING THAT THE PETITIONER HAS REQUESTED.

GROUND THREE

ARGUMENT - B & D

IN THE PETITIONER'S ARGUMENTS B&D OF HIS PETITION, HE ARGUES THAT TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PURSUE OBJECTION TO THE CHARGE ON THE "HAND OF ONE IS THE HAND OF ALL" THEORY. THE RESPONDENT, ON PAGE 24 OF THE RETURN, ARGUES THAT THIS ISSUE IS NOT PRESERVED FOR REVIEW BY THIS COURT. THE PETITIONER ASSERTS THAT IF THAT IS THE CASE, HE HAS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING HIS PCR PROCEEDINGS. SEE MARTINEZ V. RYAN, 132 S.Ct. 1309 (2012). THIS IS A MERITORIOUS ISSUE BECAUSE THE JUDGE'S JURY INSTRUCTIONS ON THE "HAND OF ONE IS THE HAND OF ALL" ISSUE WAS PREJUDICIAL

BECAUSE THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY WAS CONFUSING AS TO WHAT IS A "PRINCIPLE" IN A CRIME, THE TRIAL JUDGE INSTRUCTED THE JURY THAT, "GUILT AS A **PRINCIPLE** IS SHOWN BY ACTUAL OR CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF PRIOR ARRANGEMENT, THEREFORE, A FINDING OF PRIOR ARRANGED PLAN OR COMMON SCHEME IS NECESSARY FOR THE FINDING OF GUILT". "A **PRINCIPLE** IN A CRIME IS ONE WHO EITHER ACTUALLY COMMITS THE CRIME **OR WHO IS PRESENT AIDING, ABETTING, OR ASSISTING IN COMMITTING THE CRIME**". SEE APP. P. 502, LINES 15-22. (EMPHASIS ADDED). THE JUDGE'S INSTRUCTIONS LED THE JURY TO BELIEVE THAT ANYONE WHO AIDS OR ABETS DURING THE COMMISSION OF A CRIME CAN BE THE PRINCIPLE WHICH RELIEVES THE PROSECUTION OF THE BURDEN OF PROVING WHAT ROLE ANYONE PLAYED IN THIS INCIDENT.

THE SOLICITOR EXPLAINED THAT THE "HAND OF ONE IS THE HAND OF ALL" CHARGE WAS NECESSARY BECAUSE VIDEO TAPE SHOWED THAT THE ROBBER WHO HELD THE ALLEGED VICTIM DIDN'T TAKE ANYTHING. TRIAL COUNSEL NEVER OBJECTED TO THE PREJUDICIAL PORTION OF THE JUDGE'S JURY INSTRUCTION, TRIAL COUNSEL ONLY OBJECTED TO THE CHARGE OF THE "HAND OF ONE IS THE HAND OF ALL" THEORY CHARGE BEING GIVEN.

THE TRIAL JUDGE'S INSTRUCTIONS TO THE JURY INDICATES THAT THE PERSON WHO ALLEGEDLY SAT IN THE CAR DURING THE COURSE OF THIS ALLEGED ARMED ROBBERY CAN BE THE **PRINCIPLE** ACTOR IN THIS INCIDENT.

A **PRINCIPLE** IN A CRIME CANNOT BE DEEMED AN **AIDER OR ABETTER** BECAUSE TO BE LIABLE AS AN **AIDER OR ABETTER** THE PARTICIPANT MUST BE CHARGEABLE WITH KNOWLEDGE OF THE **PRINCIPLE'S** CRIMINAL CONDUCT. SEE STATE V. MARTIN, OPINION No.: 25093 (2000) CITING STATE V. LEONARD, 292 S.C. 133, 355 S.E.2d 270 (1987). HERE, THE TRIAL JUDGE HAS THE JURY BELIEVING THAT AN **AIDER OR ABETTER** IS THE SAME AS THE **PRINCIPLE**.

THE RESPONDENT'S CONTENTION THAT THE PETITIONER WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TRIAL JUDGE'S JURY INSTRUCTIONS ON "THE HAND OF ONE IS THE HAND OF ALL" THEORY IS UNFOUNDED BECAUSE THE JUDGE'S INSTRUCTIONS FREED THE JURY FROM DETERMINING WHETHER THE PROSECUTION MET ITS BURDEN OF PROVING WHO WAS THE **PRINCIPLE**.

THE TRIAL JUDGE'S JURY INSTRUCTIONS ON THE "HAND OF ONE IS THE HAND OF ALL" THEORY WAS IMPROPER AND CONFUSING AND WAS SUBJECT TO AN OBJECTION. TRIAL COUNSEL WAS INEFFECTIVE ON THIS ISSUE FOR FAILING TO OBJECT TO THE JURY INSTRUCTIONS.

IN THIS INSTANCE, THE PETITIONER WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND HIS RIGHT TO DUE PROCESS OF LAW AS GUARANTEED HIM UNDER BOTH THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

GROUND THREE

ARGUMENT - C

THE PETITIONER ARGUED IN "ARGUMENT - C" THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO OBJECT TO PERJURED TESTIMONY. THE RESPONDENT'S RETORT IS THAT THIS CLAIM HAS BEEN PROCEDURALLY DEFAULTED.

THE PETITIONER CONTENDS THAT THIS IS A MERITORIOUS ISSUE BECAUSE ITS CLEAR FROM THE RECORD THAT MORRIS IS A PERJURER. PRIOR TO TRIAL MORRIS MADE THE SELF-SERVING STATEMENT TO POLICE THAT HE STAYED IN THE BACK SEAT WHILE THE PETITIONER AND WIGGINS WENT INTO THE CONVENIENCE STORE, HE ADMITTED AT TRIAL THAT THAT WAS A LIE. APP. PP. 372-377. AT TRIAL MORRIS'S TESTIMONY IMPLICATED THE PETITIONER IN THE ALLEGED CRIMES. THEN AFTER TRIAL HE AGAIN ADMITTED THAT

HE LIED DURING HIS TRIAL TESTIMONY, WHICH IS THE TESTIMONY THAT CONVICTED THE PETITIONER. THE FACT THAT PCR COUNSEL FAILED TO PRESERVE THIS ISSUE FOR APPELLATE REVIEW RENDERS PCR COUNSEL INEFFECTIVE. SEE MARTINEZ V. RYAN, 132 S.Ct. 1309 (2012).

THE FACT THAT MORRIS IS A PERJURER IS CLEAR FROM THE RECORD, IN SOUTH CAROLINA, THE STATE'S HIGH COURTS HAS FOUND THAT "IT IS UNLAWFUL FOR A PERSON TO GIVE FALSE, OR INCOMPLETE TESTIMONY TESTIMONY, UNDER OATH IN ANY COURT OF RECORD, JUDICIAL, ADMINISTRATIVE OR REGULATORY PROCEEDINGS IN THIS STATE". STATE V. STANLEY, 615 S.E.2d 445 (2005). GIVING FALSE TESTIMONY AT TRIAL CONSTITUTES THE FELONY OF PERJURY AND SUBJECTS THE PERJURER TO A FINE AND/OR UP TO FIVE YEARS IMPRISONMENT. COLLINS V. DOE, 539 S.E.2d 62 (Ct. App. 2000).

THE THIRD STATEMENT GIVEN BY MORRIS AFTER TRIAL IS THE FOCUS OF THE PETITIONER'S MOTION FOR AN EVIDENTIARY HEARING. THE PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL, AND PCR COURT, ALLOWED MORRIS TO GET AWAY WITH PERJURY WITHOUT AN OBJECTION BY TRIAL COUNSEL, AND PCR COUNSEL ALLOWING THE MATTER TO BE PROCEDURALLY DEFAULTED, WHICH RENDERED PCR COUNSEL INEFFECTIVE. SEE MARTINEZ V. RYAN, SUPRA.

THE SOLICITOR KNEW, AS WELL AS TRIAL COUNSEL, THAT MORRIS WAS COMMITTING PERJURY DURING TRIAL. THE PERJURY, AS SHOWN HERE, WAS PERMITTED BY THE SOLICITOR, HAD TRIAL COUNSEL OBJECTED TO THE FALSE TESTIMONY, REVERSAL WOULD HAVE BEEN VIRTUALLY AUTOMATIC. SEE UNITED STATES V. STOFKY, 572 F.2d 237, 243 (2ND CIR. 1975)(CITING NAPUE V. ILLINOIS, 360 U.S. 264, 269, 79 S.Ct. 1137, 1177, 3 L.Ed.2d 1271 (1959), CERT. DENIED, 429 U.S. 819, 97 S.Ct. 66, 50 L.Ed. 2d 80 (1976).

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

GARY A. WHITE, JR., #309726,

PETITIONER,

VS.

WARDEN LEROY CARTLEDGE,

RESPONDENT.

C/A No.: 1:15-cv-365-DCN-SVH

AFFIDAVIT OF SERVICE

THE ABOVE NAMED PETITIONER CERTIFY THAT ON THIS DAY HAS SERVED A COPY OF THE "RESPONSE TO SUMMARY JUDGMENT AND RETURN" AND THE "MOTION FOR AN EVIDENTIARY HEARING" ON THE RESPONDENT BY DELIVERING A COPY OF SAME TO THE MCCORMICK CORRECTIONAL INSTITUTION MAIL ROOM, WITH SUFFICIENT POSTAGE PREPAID, AND ADDRESSED AS FOLLOWS:

DONALD J. ZELENKA
SENIOR ASSISTANT ATTORNEY GENERAL
POST OFFICE BOX 11549
COLUMBIA, SC 29211-1549
ATTORNEY FOR RESPONDENT

THIS 9 DAY OF JUNE, 2015

SWORN TO AND SUBSCRIBED BEFORE ME THIS

9th DAY OF JUNE, 2015

Penny G. Morton
NOTARY PUBLIC OF SOUTH CAROLINA

MY COMMISSION EXPIRES Feb 28, 2018

Gary A. White, Jr.
GARY A. WHITE, JR. #309726
MCCY F-4 229-B
386 REDEMPTION WAY
MCCORMICK, SC 29899
PETITIONER, PRO-SE

Exhibit B

GARY A. WHITE, JR. #309726

McCI F-4 229-B
386 REDEMPTION WAY
McCORMICK, SOUTH CAROLINA 29899

JUNE 9, 2015

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
JURY ADMINISTRATION
901 RICHLAND STREET
COLUMBIA, SOUTH CAROLINA 29201

RE: GARY A. WHITE, JR., PETITIONER V. LEROY CARTLEDGE, WARDEN, RESPONDENT
RESPONSE TO SUMMARY JUDGMENT AND RETURN, MOTION FOR AN EVIDENTIARY HEARING
CASE No.: 1:15-cv-365-DCN-SVH

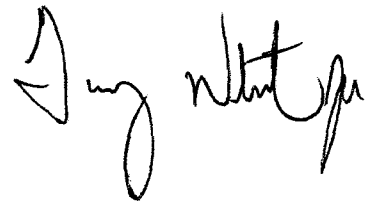
DEAR CLERK:

ENCLOSED FOR FILING IN REFERENCE TO THE ABOVE ENTITLED MATTER ARE THE
"RESPONSE TO SUMMARY JUDGMENT AND RETURN", THE MOTION FOR AN EVIDENTIARY
HEARING ALONG WITH CERTIFICATE OF SERVICE.

PLEASE RETURN TO ME A CLOCK-STAMPED COPY OF THE ENCLOSED DOCUMENTS AT
YOUR EARLIEST CONVENIENCE.

THANK YOU FOR YOUR TIME AND ATTENTION IN THIS VERY IMPORTANT MATTER.

SINCERELY,



CC: ATTORNEY GENERAL'S OFFICE

PERSONAL FILE

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

Gary A. White, Jr.,	)	C/A No.: 1:15-cv-0365 DCN SVH
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
Warden Larry Cartledge,	)	
	)	
Respondent.	)	
_____	)	

This matter is before this court pursuant to petitioner's Objection to the Report and Recommendation of the Magistrate Judge. This objection was filed on July 13, 2015. In the Magistrate Judge's Report and Recommendation, she recommends dismissing with prejudice the this action for failure to prosecute. In his objection, petitioner includes a copy of his response to the motion for summary judgment dated June 9, 2015, along with a copy of the affidavit of service on respondent dated June 9, 2015. It is therefore

ORDERED that the Report and Recommendation be reversed and the case be remanded to the Magistrate Judge for consideration of petitioner's response to respondent's motion for summary judgment, which is included as a supporting document in his objections filed July 13, 2015.

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

July 15, 2015
Charleston, South Carolina

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

Gary A. White, Jr., #309726,	)	C/A No.: 1:15-365-DCN-SVH
	)	
Petitioner,	)	
	)	
vs.	)	REPORT AND RECOMMENDATION
	)	
Warden Leroy Cartledge,	)	
	)	
Respondent.	)	
	)	

Petitioner Gary A. White, Jr., is an inmate at the McCormick Correctional Institution of the South Carolina Department of Corrections who filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civ. Rule 73.02(B)(2)(c) (D.S.C.) for a Report and Recommendation on Respondent's motion for summary judgment and return. [ECF Nos. 10, 11]. Pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent's motion by May 4, 2015. [ECF No. 12]. After Petitioner failed to file a response, the court issued an order on May 12, 2015, directing Petitioner to advise by May 26, 2015, whether he wished to continue with the case. [ECF No. 14]. On May 15, 2015, Petitioner requested and was granted an extension until June 16, 2015, to file a response. [ECF No. 18]. After Petitioner failed to file a response, the court issued a report and recommendation ("R&R") on June 23, 2015, recommending the case be dismissed for Petitioner's failure to prosecute. [ECF No. 20]. On July 13, 2015, Petitioner filed an objection to the R&R [ECF No. 22] and a motion for

a hearing [ECF No. 23]. On July 15, 2015, the court reversed the R&R and remanded for consideration of Petitioner's response to the motion for summary judgment. [ECF No. 24]. The matter having been fully briefed, it is ripe for disposition. Having carefully considered the parties' submissions and the record in this case, the undersigned recommends that Respondent's motion for summary judgment be granted.

I. Factual and Procedural Background

The South Carolina Supreme Court recited the facts of Petitioner's crimes as follows:

This case arises from an armed robbery of a convenience store in Columbia, South Carolina. After midnight on April 19, 2004, Gary White and Anthony Morris were riding in a car driven by Roy Wiggins. As Wiggins drove past a convenience store, White told Wiggins to turn around and go back to the store. Wiggins complied. Wiggins drove to the store and parked behind it. White and Morris exited the car, with Wiggins staying behind in the driver's seat. White was carrying a gun.

White and Morris entered the convenience store. Gwen Anthony, the store manager, was restocking the grill area when White and Morris entered suddenly. Anthony described the robbers' entry as a "flash."

White, armed with the gun, grabbed Anthony, put his arm around her, and pointed the gun to her neck. Morris moved through the store stealing cash, lottery tickets and an 18-pack of beer while White continued to hold Anthony at gunpoint. While Morris was at the beer cooler, White, while standing up, apparently lost consciousness.

Anthony testified that White's head fell to her shoulder, and the gun dropped from her neck. Although he was unconscious for only a few seconds, Anthony observed that White's breath smelled like alcohol, his gun was black with a silver top, and his jeans were baggy and dark in color. With the 18-pack of beer in hand, Morris ran up the aisle toward the door and screamed at White, waking him. White, still holding Anthony, returned the gun to her neck and began to move toward the door, forcing her to accompany him. As they exited the store, White pushed Anthony away and

ran in the opposite direction. At that very moment, Officer Rouppasong of the Columbia Police Department pulled into the store parking lot on a routine break.

Upon his arrival on the scene, Officer Rouppasong saw two people: Anthony, waving and flagging him down and another person running away from the store. Rouppasong described the man he saw running as a black male, wearing a white t-shirt and dark colored pants, holding or carrying something in one of his hands. Rouppasong remained in his vehicle and followed White. As he followed him around the corner of the store, Rouppasong saw a car parked on the street. Rouppasong saw a black male (later identified as White) exit the car on the passenger side and flee. Rouppasong did not give chase; instead, he stayed with the vehicle and Wiggins. Officer Gunter, with the K9 unit, was called to the scene to search for the suspect.

Officer Gunter arrived on the scene approximately thirty minutes after the robbery. Once there, Rouppasong relayed the necessary information that allowed Gunter to know where to initiate the track. Gunter and his tracking dog, Aurie, began tracking and soon found White nearby sleeping next to some bushes, gun in hand. Rouppasong testified that the man he saw lying by the bushes, asleep, was the same man he saw exiting the store and fleeing from the crime scene. There were two other in-court eyewitness identifications of White. Wiggins testified that White left his car with a gun, returned to his car a short time later, and then fled when police arrived. The second identification came from Morris.

[ECF No. 11-3 at 105]. *State v. White*, 676 S.E.2d 684, 685 (S.C. 2009).

Petitioner was indicted by the Richland County Grand Jury during the July 2004 term of court for two counts of armed robbery (2004-GS-40-3016, -3018) and for kidnapping (2004-GS-40-3017). [ECF No. 11-3 at 204, 206, 208]. Public Defenders Lanelle Durant and Stacey Owings represented Petitioner at a jury trial on June 14–16, 2005, before the Honorable James R. Barber, Circuit Court Judge. [ECF No. 11-1 at 3 *et seq.*]. The jury found Petitioner guilty as charged [ECF No. 11-3 at 20–21], and Judge

Barber sentenced Petitioner to concurrent terms of life without parole on each of the convictions [ECF No. 11-3 at 28].

Petitioner appealed his convictions and sentences to the South Carolina Court of Appeals (“Court of Appeals”) and on appeal was represented by Aileen P. Clare, Esq., Assistant Appellate Defender, of the South Carolina Commission on Indigent Defense, Division of Appellate Defense. Attorney Clare filed a motion to remand for a new trial, or in the alternative, for a hearing into new evidence. On December 9, 2005, the Court of Appeals issued an order denying the motion to remand. On September 7, 2006, Attorney Clare filed a merits brief raising the following issues:

1. Is appellant entitled to a new trial based on newly-discovered evidence, when his co-defendant, who testified against him at trial, has retracted his testimony?
2. Did the trial court err by denying appellant’s objection to the state’s expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field?

[ECF No. 11-8 at 4]. On January 16, 2007, the Court of Appeals filed an unpublished decision affirming the convictions. [ECF No. 11-3 at 32–52]. On March 22, 2007, the Court of Appeals denied Petitioner’s January 29, 2007, petition for rehearing [ECF Nos. 11-3 at 53–57 (petition); 58 (order)]. On April 23, 2007, Attorney Durant filed a petition for writ of certiorari [ECF No. 11-3 at 59–68], raising the following issues:

1. The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler’s testimony into evidence.

2. The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

[ECF No. 11-3 at 61]. The South Carolina Supreme Court granted certiorari on November 19, 2007, and directed the parties to file the appendix and briefs. [ECF No. ECF No. 11-11]. Thereafter, both side filed briefs. [ECF No. 11-3 at 77–103]. After hearing argument on February 4, 2009, the South Carolina Supreme Court issued an opinion on April 27, 2009, affirming in result the Court of Appeals. [ECF No. 11-3 at 104–109]. On May 28, 2009, the court denied Petitioner’s May 12, 2009, petition for rehearing. [ECF Nos. 11-12; 11-13]. The remittitur was issued on May 28, 2009. [ECF No. 11-14].

On August 5, 2009, Petitioner filed an application for post-conviction relief (“PCR”), raising claims of ineffective assistance of counsel and newly-discovered evidence. [ECF No. 11-3 at 110–117]. On October 18, 2010, a PCR evidentiary hearing was held before the Honorable L. Casey Manning, Circuit Court Judge, at which Petitioner and his counsel, Mark E. Schnee, Esq., appeared. *Id.* at 131–179. On August 31, 2011, Judge Manning filed an order of dismissal. *Id.* at 180–197.

On September 13, 2011, Petitioner filed a pro se Rule 59(a) and (e), SCRCP, motion for rehearing. [ECF No. 11-15]. The South Carolina Supreme Court took no action on the document, as Petitioner was represented by counsel. [ECF No. 11-16].

On September 15, 2011, PCR counsel filed a notice of appeal on Petitioner’s behalf. [ECF No. 11-3 at 198]. On September 12, 2012, David Alexander, an Appellate

Defender with the South Carolina Commission on Indigent Defense, Division of Appellate Defense, filed a *Johnson*¹ petition for writ of certiorari, raising the following issue: “Whether petitioner should be granted a new trial because a key witness recanted his testimony after petitioner’s trial?” [ECF No. 11-17]. Attorney Alexander sought to be relieved as counsel. *Id.* at 12.

The South Carolina Supreme Court denied the petition on December 19, 2013, and granted counsel’s request to withdraw. [ECF No. 11-18]. The remittitur was issued on January 6, 2014. [ECF No. 11-19].

Petitioner submitted a letter to the court on January 2, 2014, which the court construed as a motion to recall the remittitur. [ECF No. 11-20]. The court granted the motion to recall the remittitur on January 16, 2014. [ECF No. 11-21]. Thereafter, Petitioner submitted a brief. [ECF No. 11-22]. In an order dated May 7, 2014, the court indicated that “[a]fter careful consideration of petitioner’s petition, we adhere to our previous ruling.” [ECF No. 11-23]. The remittitur was issued on May 21, 2014. [ECF No. 11-24].

¹ *Johnson v. State*, 364 S.E.2d 201 (S.C. 1988) (applying the factors of *Anders v. California*, 386 U.S. 738 (1967), to post-conviction appeals). *Anders* requires that counsel who seeks to withdraw after finding the “case to be wholly frivolous” following a “conscientious examination” must submit a brief referencing anything in the record that arguably could support an appeal, furnish a copy of that brief to the defendant, and after providing the defendant with an opportunity to respond, the reviewing court must conduct a full examination of the proceedings to determine if further review is merited. *Anders*, 386 U.S. at 744.

Petitioner filed this petition for writ of habeas corpus on January 21, 2015. [ECF No. 1-2 at 2].²

II. Discussion

A. Federal Habeas Issues

Petitioner now asserts he is entitled to a writ of habeas corpus on the following claims:

Ground One: The Trial Court Erred by denying Appellants objection to the States Expert Witness, a dog-handler, without requiring the State to Establish the Underlying Reliability of dog tracking as a scientific or technical field.

Supporting facts:

A) The trial court erred by denying applicant's objection to the state's expert witness, a dog-handler, without requiring the state to establish the underlying reliability of dog-tracking as a scientific or technical field.

B) The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

C) The Court of Appeals incorrectly held that the dog tracking evidence was admissible without requiring the state to demonstrate the underlying reliability of dog tracking before admitting the police dog-handler's testimony into evidence.

² The petition was received by the court on January 26, 2015, and docketed on January 27, 2015. [ECF No. 1]. However, because Petitioner is incarcerated, he benefits from the "prison mailbox rule." *Houston v. Lack*, 487 U.S. 266 (1988). The envelope containing the petition was deposited in the prison mailing system on January 21, 2015. [ECF No. 1-2 at 2].

Ground Two: Newly discovered EvidenceSupporting facts:

A-1) Petitioner incorporates his state court motion to remand for a new trial, or in the alternative, for a hearing into new evidence.

A-2) The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

A-3) Appellant is entitled to a new trial based on newly-discovered evidence because his co-defendant, who testified against him at trial, has retracted his testimony.

Ground Three: Ineffective Assistance of CounselSupporting facts:

A) The Applicant contends that his conviction is in violation of the Fifth amendment, U.S. Constitution. Applicant was convicted on a non-charged offense, which violated his substantial rights to be convicted, if convicted at all on a presentment of a indictment by the Grand Jury.

B) On Ground 10(a) of my PCR Application, I amend that assertion to state my Trial Counsel provided “Deficient Performance” in failing to pursue a ruling on the clear objection to the “Hand of One Hand of All” instruction to be given to the jury. I move for Trial Transcript page 407, line 16–page 408, line 7, to be entered as Applicants Evidence one (1) as proof within this record that my Trial Counsel did not move for ruling on an important objection to a burden-shifting instruction.

C) On Ground 10(b) of my PCR Application, I amend that assertion to state that my Trial Counsel provided ‘Deficient Performance’ in failing to object to a material State witness committing perjury before the jury. Again, your Honor, Applicant’s Evidence two (2) is State witness Anthony Morris admitting to the Court that his initial statement to police was a complete lie; here, the record shows Trial Counsel Stacey Owings did not object to Morris

commission of perjury when it surfaced, nor did Owings object in her Cross Examination at Trial Transcript page 397, line 14 – page 403, line 18, which I’d move to have admitted into this record as Applicant’s Evidence three (3) as proof of Counsel not objecting to very damaging and prejudicial evidence against Applicant.

D) The PCR Court erred in denying relief on Ground 10(c), APCR, where Trial Counsel Owings never testified in PCR contrary to White’s testimony in PCR regarding Trial Counsel’s failure to pursue Ruling on Objection claim.

Ground Four:

Newly discovered Evidence (1) See Appendix P.C.R. Transcript Pg. 635–676. Ineffective Assistance of Counsel for failing to subpoena co-defendant Anthony Terrell Morris to authenticate and be cross examined about recanted statement, for failing to subpoena 1st Chair Lanelle Durant to testify. 2nd Chair Stacy Owings was unable to sufficiently go indept in the record being that she was asked to preform duties on a whim within a week of petitioners trial. (See at: Tr Tn ph. 665 Ln 11–12). Petitioner further states that P.C.R. counsel was ineffective for failing to file the 59(e) motion to make the court rule on all P.C.R. issues presented. Petitioner also argues that there was no way he could have proven his claims without the aid of P.C.R. counsel. When South Carolina has a recognized prohibition against hybrid representation See: *Dennison v. State* 639 S.E.2d 35, *State v. Cabrera* 569 S.E.2d 472, *Jones v. State* 558 S.E.2d 517, *Foster v. State* 379 S.E.2d 907, *State v. Stuckey* 508 S.E.2d 564, *McKaskie v. Wiggins* 465 U.S. 168. Thus there was no way petitioner could have subpoenaed these witnesses See: *Bannister v. State* 509 S.E.2d 809, *Beaver v. Thompson* 93 F3d 1186, *Glover v. State* 458 S.E.2d 538. Nor get a ruling on all issues raised at P.C.R. See: *Marlar v. State* 653 S.E.2d 266, *Bostick v. Stevenson* 589 F.3d 164. Also see *Martinez v. Ryan*.

A) The Court of Appeals incorrectly held that petitioner was not entitled to a new trial or in the alternative to remand for a hearing on the motion based on newly-discovered evidence when his co-defendant, who testified against him at trial, has retracted his testimony.

B) Petitioner should be granted a new trial based on the after-discovered evidence of the recantation of a key witness’s testimony after petitioner’s trial.

[ECF No. 1 at 5–10; 1-1 (errors in original)].

B. Standard for Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[S]ummary judgment will not lie if the dispute about a material fact is ‘genuine,’ that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.* At the summary judgment stage, the court must view the evidence in the light most favorable to the non-moving party and draw all justifiable inferences in its favor. *Id.* at 255. However, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Id.* at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. *See* Fed. R. Civ. P. 56(e).

C. Habeas Corpus Standard of Review

1. Generally

Because Petitioner filed his petition after the effective date of the AEDPA, review of his claims is governed by 28 U.S.C. § 2254(d), as amended. *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. § 2254(d)(1)(2); *see Williams v. Taylor*, 529 U.S. 362, 398 (2000). “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” *Id.* at 411. Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

2. Procedural Bar

Federal law establishes this court’s jurisdiction over habeas corpus petitions. 28 U.S.C. § 2254. This statute permits relief when a person “is in custody in violation of the Constitution or laws or treaties of the United States[,]” and requires that a petitioner

present his claim to the state's highest court with authority to decide the issue before the federal court will consider the claim. *Id.* The separate but related theories of exhaustion and procedural bypass operate in a similar manner to require a habeas petitioner to first submit his claims for relief to the state courts. A habeas corpus petition filed in this court before the petitioner has appropriately exhausted available state-court remedies or has otherwise bypassed seeking relief in the state courts will be dismissed absent unusual circumstances detailed below.

a. Exhaustion

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

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court, shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

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

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

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

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

presented.

28 U.S.C. § 2254.

The statute requires that, before seeking habeas corpus relief, the petitioner first must exhaust his state court remedies. 28 U.S.C. § 2254(b)(1)(A). In South Carolina, a person in custody has two primary means of attacking the validity of his conviction: (1) through a direct appeal, or (2) by filing an application for PCR. State law requires that all grounds be stated in the direct appeal or PCR application. Rule 203 SCACR; S.C. Code Ann. § 17-27-10, et seq.; S.C. Code Ann. § 17-27-90; *Blakeley v. Rabon*, 221 S.E.2d 767 (S.C. 1976). If the PCR court fails to address a claim as is required by S.C. Code Ann. § 17-27-80, counsel for the applicant must make a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCR. Failure to do so will result in the application of a procedural bar by the South Carolina Supreme Court. *Marlar v. State*, 653 S.E.2d 266 (S.C. 2007).³ Furthermore, strict time deadlines govern direct appeal and the filing of a PCR in the South Carolina courts. A PCR must be filed within one year of judgment, or if there is an appeal, within one year of the appellate court decision. S.C. Code Ann. § 17-27-45.

The United States Supreme Court has held that “state prisoners must give the state

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

Because the South Carolina Supreme Court has held that presentation of certain claims to the South Carolina Court of Appeals without more is sufficient to exhaust state remedies, a claim is not procedurally barred from review in this court for failure to pursue review in the South Carolina Supreme Court after an adverse decision in the South Carolina Court of Appeals.

b. Procedural Bypass

Procedural bypass, sometimes referred to as procedural bar or procedural default, is the doctrine applied when a petitioner who seeks habeas corpus relief as to an issue failed to raise that issue at the appropriate time in state court and has no further means of bringing that issue before the state courts. In such a situation, the person has bypassed his state remedies and, as such, is procedurally barred from raising the issue in his federal habeas petition. Procedural bypass of a constitutional claim in earlier state proceedings forecloses consideration by the federal courts. *See Smith v. Murray*, 477 U.S. 527, 533 (1986). Bypass can occur at any level of the state proceedings if the state has procedural rules that bar its courts from considering claims not raised in a timely fashion.

The South Carolina Supreme Court will refuse to consider claims raised in a second appeal that could have been raised at an earlier time. Further, if a prisoner has failed to file a direct appeal or a PCR and the deadlines for filing have passed, he is barred from proceeding in state court. If the state courts have applied a procedural bar to a claim because of an earlier default in the state courts, the federal court honors that bar. As the Supreme Court explains:

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

Reed v. Ross, 468 U.S. 1, 10–11 (1984).

However, if a federal habeas petitioner can show both (1) “‘cause’ for noncompliance with the state rule[.]” and (2) “‘actual prejudice resulting from the alleged constitutional violation[.]’” the federal court may consider the claim. *Smith v. Murray*, 477 U.S. at 533 (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)). When a petitioner has failed to comply with state procedural requirements and cannot make the required showing of cause and prejudice, the federal courts generally decline to hear the claim. *Murray v. Carrier*, 477 U.S. 478, 496 (1986), *superseded by statute on other grounds* (AEDPA).

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

3. Cause and Actual Prejudice

Because the requirement of exhaustion is not jurisdictional, this court may consider claims that have not been presented to the states courts in limited circumstances in which a petitioner shows sufficient cause for failure to raise the claim and actual prejudice resulting from the failure, *Coleman*, 501 U.S. at 750, or that a “fundamental miscarriage of justice” has occurred. *Murray*, 477 U.S. at 495–96. A petitioner may prove cause if he can demonstrate ineffective assistance of counsel relating to the default, show an external factor which hindered compliance with the state procedural rule, or demonstrate the novelty of a particular claim. *Id.* Absent a showing of “cause,” the court is not required to consider “actual prejudice.” *Turner v. Jabe*, 58 F.3d 924 (4th Cir. 1995). However, if a petitioner demonstrates sufficient cause, he must also show actual prejudice in order to excuse a default. *Murray*, 477 U.S. at 492. To show actual prejudice, the petitioner must demonstrate more than plain error.

4. Ineffective Assistance of Counsel Claims

To prevail on his ineffective assistance of counsel claims, Petitioner must show (1) that his trial counsel’s performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that but for counsel’s error, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The court must apply a “strong presumption” that trial counsel’s representation fell within the “wide range of reasonable professional assistance,” and the errors must be “so serious that counsel was not functioning as the counsel guaranteed the defendant by

the Sixth Amendment.” *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011). This is a high standard that requires a habeas petitioner to show that counsel’s errors deprived him “of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. That the outcome would “reasonably likely” have been different but for counsel’s error is not dispositive of the prejudice inquiry. Rather, the court must determine whether the result of the proceeding was fundamentally unfair or unreliable. *Harrington*, 131 S.Ct. at 787–88; *Strickland*, 466 U.S. at 694.

The United States Supreme Court has cautioned that “[s]urmounting Strickland’s high bar is never an easy task[,]’ . . . [e]stablishing that a state court’s application of Strickland was unreasonable under § 2254(d) is all the more difficult.” *Harrington*, 131 S.Ct. at 788 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010)). When evaluating an ineffective assistance of counsel claim, the petitioner must satisfy the highly deferential standards of 28 U.S.C. § 2254(d) and *Strickland* “in tandem,” making the standard “doubly” more difficult. *Harrington*, 131 S.Ct. at 788. In such circumstances, the “question is not whether counsel’s actions were reasonable,” but whether “there is any reasonable argument that counsel satisfied Strickland’s deferential standards.” *Id.* The unreasonableness of the state court determination must be “beyond any possibility of fairminded disagreement.” *Id.* at 787. “If this standard is difficult to meet, that is because it was meant to be.” *Id.* at 786. Section 2254(d) codifies the view that habeas corpus is a “guard against extreme malfunctions in the state criminal justice system,” not a substitute for ordinary error correction through appeal.” *Id.*, quoting *Jackson v. Virginia*,

443 U.S. 307, 332 n. 5 (1979)).

D. Analysis

Respondent argues that Petitioner's claims are either not cognizable in habeas or are procedurally defaulted. The undersigned agrees.

1. Ground One

Petitioner's claim in Ground One is not cognizable as it fails to allege any violation of federal law. In Ground One, Petitioner alleges the state courts erred in admitting the testimony of Officer Gunter, a dog handler, without requiring the state to establish the underlying reliability of dog tracking as a scientific or technical field. Because this claim fails to allege any violation of federal law, it is not cognizable in habeas review. Evidentiary rulings are generally considered state law matters. *Spencer v. Murray*, 5 F.3d 758, 763 (4th Cir. 1993) (“[A] claim about the admissibility of evidence under state law rarely is a claim upon which federal habeas corpus relief can be granted.”). Evidentiary rulings will not be considered in federal habeas ““unless [the] erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding.”” *Barbe v. McBride*, 521 F.3d 443, 452 (4th Cir. 2008) (quoting *Burket v. Angelone*, 208 F.3d 172, 186 (4th Cir. 2000)). The only proper inquiry, if any, is whether the admission of the evidence itself so infected the entire trial that the resulting conviction violated due process. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (“[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether

a conviction violated the Constitution, laws, or treaties of the United States.”). Petitioner has raised a claim based upon state law and, therefore, has failed to allege an error upon which relief may be granted. 28 U.S.C. § 2254 (d)(1) (application shall not be granted unless the claim was based on an improper application of federal law).

2. Grounds Two and Four

Similarly, Petitioner’s claims in Ground Two and Four are not cognizable, as they fail to allege any violation of federal law. In Ground Two, Petitioner alleges he is entitled to a new trial because one of his codefendants signed a statement retracting his trial testimony, and in Ground Four, Petitioner claims the Court of Appeals erred in failing to grant him a new trial based on the newly-discovered evidence. Because Petitioner does not allege any error in the application of federal law, these claims are not cognizable. Petitioner’s arguments for a new trial are based on state law, which dictates when a party is entitled to a new trial based on newly-discovered evidence. However, newly-discovered evidence, absent a constitutional violation, is not cognizable in federal habeas. *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (“Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”).

3. Grounds Three and Four

a. Procedural default

In Grounds Three and Four, Petitioner alleges the following claims of ineffective

assistance of counsel by trial and PCR counsel:

- (1) trial counsel failed to protect Petitioner's Fifth and Sixth Amendment rights;
- (2) trial counsel failed to obtain a clear ruling on objection to the "hand of one, hand of all" instruction;
- (3) trial counsel failed to object to codefendant Morris's perjury;
- (4) the PCR court erred in rejecting his claim that trial counsel were ineffective for failing to pursue the objection to the "hand of one, hand of all" charge;
- (5) trial counsel failed to subpoena codefendant Morris to authenticate and be cross examined about his recanted statement; and
- (6) PCR counsel failed to subpoena 1st Chair Lanelle Durant to testify; failed to file a 59(e) motion to address all issues.

However, the PCR court did not rule upon them, rendering them procedurally defaulted.

Petitioner has not shown sufficient cause and prejudice to excuse the default of these claims. In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claim is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. Petitioner has failed to meet this burden. Thus, his claims are procedurally barred from consideration by this court and should be dismissed. *See* 28 U.S.C. § 2254; *Rodriguez v. Young*, 906 F.2d 1153, 1159 (7th Cir. 1990) ("Neither cause without prejudice nor prejudice without cause gets a defaulted claim into Federal Court."); *Mazzell v. Evatt*, 88 F.3d 263, 269 (4th Cir. 1996) (holding that to show prejudice, a petitioner must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different); *Wainwright*, 433 U.S. at 88-91; *Murray*, 477 U.S. at 496;

Rodriguez, 906 F.2d at 1159 (holding a fundamental miscarriage of justice occurs only in extraordinary cases, “where a constitutional violation has probably resulted in the conviction of one who is actually innocent”) (*citing Murray*).

The existence of cause must ordinarily turn on whether the prisoner can show some objective factor external to the defense impeded counsel’s or his efforts to comply with the state’s procedural rule. *Murray*, 477 U.S. at 488. Petitioner argues that he filed a pro se Rule 59(e) motion after the PCR court’s order dismissed his PCR application, alerting the state court to the failure of the PCR court to rule on all the issues he raised. The South Carolina Supreme Court did not take any action on the pro se motion because Petitioner was represented by counsel.

Liberal-construed, Petitioner contends that a recent Supreme Court case entitles him to a review of his claims of ineffective assistance of PCR counsel, citing *Martinez v. Ryan*, — U.S. —, 132 S.Ct. 1309, 1315 (2012) (“[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner’s procedural default of ineffective assistance at trial.”). In *Trevino v. Thaler*, — U.S. —, 133 S.Ct. 1911, 1917–18 (2013), the Supreme Court held that its *Martinez* decision provided

that a “narrow exception” should “modify the unqualified statement in *Coleman* that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.” *Martinez*, 566 U.S. at, 132 S.Ct. at 1315. [F]or three reasons. First, the “right to the effective assistance of counsel at trial is a bedrock principle in our justice system. . . . Indeed, the right to counsel is the foundation for our adversary system.” *Id.* — at —, 132 S.Ct. at 1317.

Second, ineffective assistance of counsel on *direct appellate review* could amount to “cause,” excusing a defendant’s failure to raise (and thus

procedurally defaulting) a constitutional claim. *Id.* — at —, 132 S.Ct. at 1316, 1317. But States often have good reasons for initially reviewing claims of ineffective assistance of trial counsel during state collateral proceedings rather than on direct appellate review. *Id.* at, 132 S.Ct. at 1317–1318. That is because review of such a claim normally requires a different attorney, because it often “depend[s] on evidence outside the trial record,” and because efforts to expand the record on direct appeal may run afoul of “[a]bbreviated deadlines,” depriving the new attorney of “adequate time . . . to investigate the ineffective-assistance claim.” *Id.* at, 132 S.Ct. at 1318.

Third, where the State consequently channels initial review of this constitutional claim to collateral proceedings, a lawyer's failure to raise an ineffective assistance of counsel claim during initial-review collateral proceedings, could (were *Coleman* read broadly) deprive a defendant of any review of that claim at all. *Martinez, supra* at, 132 S.Ct. at 1316.

We consequently read *Coleman* as containing an exception, allowing a federal habeas court to find “cause,” thereby excusing a defendant's procedural default, where (1) the claim of “ineffective assistance of trial counsel” was a “substantial” claim; (2) the “cause” consisted of there being “no counsel” or only “ineffective” counsel during the state collateral review proceeding; (3) the state collateral review proceeding was the “initial” review proceeding in respect to the “ineffective-assistance-of-trial-counsel claim”; and (4) state law *requires* that an “ineffective assistance of trial counsel [claim] ... be raised in an initial-review collateral proceeding.” *Martinez, supra* 1309 at —, 132 S.Ct. at 1318–1319, 1320–1321.

Trevino v. Thaler, — U.S. —, — — —, 133 S.Ct. 1911, 1917–18 (2013); *see also Gray v. Pearson*, 2013 WL 2451083 at * 2 (4th Cir. June 7, 2013) (“The Supreme Court had previously held in *Coleman* that because a habeas petitioner has no constitutional right to counsel in state postconviction proceedings, the ineffectiveness of post-conviction counsel *cannot* establish “cause” to excuse a procedural default.” *Coleman*, 501 U.S. at 757. The Court established an exception to that rule in *Martinez*.”).

Therefore, because, under South Carolina law, a claim of ineffective assistance of

trial counsel is raised in a PCR application; *cf. State v. Felder*, 290 S.C. 521, 351 S.E.2d 852 (S.C.1986); *Bryant v. Reynolds*, No. 12–1731, 2013 WL 4511242, at * 19 (D.S.C. Aug. 23, 2013); *Gray*, 2013 WL 2451083, at *4, fn.*, the undersigned considers Petitioner’s claim of ineffective assistance of PCR counsel as “cause” for his default below under the revised standard of *Martinez* and *Trevino*.

b. Merits analysis

In Grounds Three and Four, Petitioner alleges the following claims of ineffective assistance of counsel by trial and PCR counsel:

- (1) trial counsel failed to protect Petitioner’s Fifth and Sixth Amendment rights;
- (2) trial counsel failed to obtain a clear ruling on objection to the “hand of one, hand of all” instruction and the PCR court erred in rejecting his claim that trial counsel were ineffective for failing to pursue the objection to the “hand of one, hand of all” charge;
- (3) trial counsel failed to object to codefendant Morris’s perjury and failed to subpoena codefendant Morris to authenticate and be cross-examined about his recanted statement; and
- (4) newly discovered evidence: PCR counsel failed to subpoena Anthony Morris and trial counsel Lanelle Durant to testify.

(1) Failure to Protect Petitioner’s Fifth and Sixth Amendment Rights

Petitioner asserts the indictments against him were defective because they did not reference his codefendants and, therefore, did not put him on notice that he was not being tried as a principal, but under the “hand of one, hand of all” theory. Petitioner argues that trial counsel was ineffective in failing to object to the indictments.

Although the PCR court did not address this issue as an ineffective assistance of counsel claim, it did address whether Petitioner was properly on notice that the State's case included codefendants, noting:

The Applicant had notice that the State's case included the co-defendants. The defense was well aware that the co-defendant(s) were part of the State's case. In fact, trial counsel, in pretrial matters, knew (from the discovery) that one of co-defendants [sic] might mention that that [sic] the Applicant indicated he needed to do the robbery to pay his parole fees. (Transcript p. 6 L. 20–p. 11 L. 25).

[ECF No. 11-3 at 195]. The record supports the PCR court's conclusion that Petitioner had notice that the State's case against Petitioner included his codefendants, to wit: prior to trial, trial counsel had received the codefendants' rap sheets and their statements and knew that Morris's post-plea sentencing was deferred pending his testimony at Petitioner's trial. [ECF No. 11-1 at 8–13]. The PCR court found Petitioner had actual notice of his codefendants and that his testimony to the contrary was not credible. [ECF No. 11-3 at 190]. The PCR court's factual findings are entitled to deference in this action. *Cagle v. Branker*, 520 F.3d 320, 324 (4th Cir. 2008) (citing 28 U.S.C. § 2254(e)(1)) (“[F]or a federal habeas court to overturn a state court's credibility judgments, the state court's error must be stark and clear.”); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (“28 U.S.C. § 2254(d) gives federal habeas courts no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them.”). Petitioner may overcome this presumption of correctness of the trial court's findings only by showing “‘clear and convincing evidence to the contrary.’”

Wilson v. Ozmint, 352 F.3d 847, 858–59 (4th Cir. 2003) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 240 (2003)).

Independently, Petitioner has failed to show that the indictment was defective for not specifically mentioning his codefendants, as it is “well-settled that a defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense.” *State v. Dickman*, 534 S.E.2d 268, 269 (S.C. 2000). South Carolina courts have recognized that:

A defendant may be convicted on a theory of accomplice liability pursuant to an indictment charging him only with the principal offense. [However, mere presence and prior knowledge that a crime was going to be committed, without more, is insufficient to constitute guilt. [Rather,] presence at the scene of a crime by pre-arrangement to aid, encourage, or abet in the perpetration of the crime constitutes guilt as a principal.

State v. Thompson, 647 S.E.2d 702, 704–05 (S.C. Ct. App. 2007) (internal quotations and citations omitted).

Petitioner has failed to show that trial counsel’s representation was deficient for failing to object to the indictment or that he was prejudiced in any way. *See Harrington v. Richter*, 131 S. Ct. 770, 791–92 (“The likelihood of a different result must be substantial, not just conceivable.”). Petitioner’s claim should be dismissed.

(2) Failure to Pursue Objection to Jury Charge and Court Error in Rejecting Claim

Petitioner asserts that trial counsel was ineffective for failing to follow up with an objection to the trial court’s “hand of one, hand of all” jury instruction that the State requested and that the PCR court erred in rejecting this claim. [ECF No. 11-2 at 158].

During the charge conference, trial counsel objected to the charge being given, *id.* at 158–59, 161–62, and the State explained why it requested it:

Just the fact that videotape and the testimony all show and the Victim’s testimony all show that Gary White was the one that held the gun to the Victim’s head. He did not take anything. And part of the elements of armed robbery is taking property from another without permission.

And so we are obligated to explain that to the jury that he’s just as guilty as Anthony Morris who actually physically took the items away from the store and as guilty as Roy Wiggins who never even entered the store.

Id. at 162. The trial court ultimately instructed the jury on “hand of one, hand of all.” [ECF No. 11-3 at 3–4]. Trial counsel did not renew its objection once the jury was charged. *Id.* at 11.

Trial counsel was not ineffective for failing to pursue the objection to the “hand of one, hand of all charge” because the charge was proper. *See State v. Niles*, 735 S.E.2d 240, 243 (S.C. Ct. App. 2012) (“If any evidence supports a jury charge, the circuit court should grant the request.”). Under the “hand of one, hand of all” theory, one who joins with another to accomplish an illegal purpose is criminally liable for everything done by his accomplice incidental to the execution of the common plan. *State v. Langley*, 515 S.E.2d 98, 101 (S.C. 1999). As counsel for the State explained, the “hand of one, hand of all” charge was necessary because the evidence established that Petitioner had joined with Morris to accomplish the armed robbery, but that Petitioner had not taken anything himself. [ECF Nos. 11-1 at 80–96; 11-2 at 68–74]. Morris, on the other hand, had taken both money and items from the convenience store. *Id.* at 86–92. Thus, the State asked for the “hand of one, hand of all” charge to satisfy its burden of proving all elements of the

crime beyond a reasonable doubt. Because there was evidence to support the charge, the trial court was correct in giving the “hand of one, hand of all” instruction in accordance with state law. Because the charge was proper, Petitioner cannot have been prejudiced by trial counsel’s failure to pursue the objection.

(3) Failure to Object to Evidence

Petitioner claims that trial counsel was ineffective for failing to object to Morris’s “perjured” testimony. Morris admitted on direct examination that he lied to police in his original statement, which claimed that he stayed in the back seat of Wiggins’s car while Petitioner and Wiggins went into the convenience store. [ECF No. 11-2 at 123–28]. On cross-examination, Morris admitted that his statement to police was a lie. *Id.* at 149–50. Petitioner now argues that trial counsel was ineffective for failing to object to the perjured testimony. Instead of objecting, trial counsel attempted to undermine Morris’s testimony incriminating Petitioner in the armed robbery by noting that Morris had previously committed perjury by lying to the police. Trial counsel’s strategic use of the fact that Morris had previously lied to police was not ineffective. *See Strickland v. Washington*, 466 U.S. 668, 690–91 (1984) (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”).

Independently, Petitioner has not shown that trial counsel had reason to know the

testimony was perjury at the time of trial. The record reflects that trial counsel received the affidavit from Morris confessing his lie about a month after trial. [ECF No. 11-3 at 152].

Further, Petitioner has not met his burden of showing he was prejudiced by trial counsel's actions. Both the Court of Appeals and the South Carolina Supreme Court commented on the strength of the case against Petitioner, noting "substantial evidence of White's guilt" and the "overwhelming evidence of guilt," respectively. Specifically, the Court of Appeals found:

Ample evidence linked White to the crimes charged. The testimonies of the victim, Gwen Anthony, and co-defendant, Anthony Morris, were corroborated by a surveillance videotape that recorded the crime as it unfolded. In addition, Roy Wiggins, the driver of the escape car, testified against White. Items taken from the crime scene were located in the escape vehicle. Officer Rouppasong witnessed a man carrying something in his hand and wearing dark jeans and a white shirt run from the Circle K parking lot. In pursuit, the officer lost sight of the man briefly and then came upon the escape car. The same man wearing the dark jeans and white shirt ran from the escape car toward the yard of the residence where White was eventually found. Gunter put his tracking dog on the scent at the location where the man exited the vehicle. The area in which the dog began tracking had been secured in order to preserve the evidence. The dog's tracks led to the location where White was discovered. He appeared to be asleep and was clutching a gun in his hand. The gun matched Anthony's description of the weapon the robber carried, and both Morris and Wiggins positively identified it as the gun White had in his possession immediately prior to the robbery.

[ECF No. 11-1 at 49–50].

Therefore, Petitioner's claim should be dismissed.

- (4) PCR counsel failed to subpoena Anthony Morris and trial counsel Lanelle Durant to testify.

Petitioner argues that PCR counsel failed to subpoena Morris to authenticate and be cross-examined about his recanted statement and failed to subpoena trial counsel Lanelle Durant to testify. Because these witnesses did not testify at the evidentiary hearing, any discussion regarding what they would have testified about at trial is purely speculative. *See Bannister v. State*, 509 S.E.2d 807, 809 (S.C. 1998) (the South Carolina Supreme Court “has repeatedly held a PCR applicant must produce the testimony of a favorable witness or otherwise offer the testimony in accordance with the rules of evidence at the PCR hearing in order to establish prejudice from the witness’s failure to testify at trial.”). Petitioner has not identified how the testimony of these witnesses would have helped his claims of ineffective assistance of counsel. This court finds Petitioner failed to meet his burden of proving PCR counsel was ineffective in not subpoenaing Morris or Durant.

III. Conclusion and Recommendation

For the foregoing reasons, the undersigned recommends that Respondent’s motion for summary judgment [ECF No. 10] be granted and the petition be dismissed with prejudice. Petitioner’s request for an evidentiary hearing [ECF No. 23] should be denied.

IT IS SO RECOMMENDED.

Shiva V. Hodges

January 29, 2016
Columbia, South Carolina

Shiva V. Hodges
United States Magistrate Judge

**The parties are directed to note the important information in the attached
“Notice of Right to File Objections to Report and Recommendation.”**

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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

Gary A. White, Jr., #309726,	)	C/A No.: 1:15-365-DCN--SVH
	)	
Petitioner,	)	
	)	
vs.	)	OBJECTIONS TO THE MAGISTRATE'S
	)	REPORT AND RECOMMENDATION
	)	
Warden Leroy Cartledge,	)	
	)	
Respondent.	)	
	)	

Petitioner, named-above, proceeding pro-se, would respectfully object to the Magistrate's Report and Recommendation, filed January 29, 2016, in reference to the above entitled matter, for the following reasons:

Summary Judgment Standard

The United States Magistrate Judge has recommended that this Court grant summary judgment to the Respondent in this matter, however, summary judgment is granted only "if the movant shows that there is no genuine dispute as to any material fact and the maovant is entitled to judgment as a matter of law". Fed. R. Civ. P. 56(a).

The Petitioner will show that the Respondent has no legal ground for this Court to grant summary judgment in its favor, there are disputed facts in this matter and the Petitioner is entitled to habeas corpus relief.

Federal Habeas Review

The Petitioner's case occurred after the effective date of the Antiterrorism Effect Death Penalty Act of 1996, therefore, review of his habeas claims are governed by 28 U.S.C. §2254(d), as amended. Lindh v. Murphy, 521 U.S. 320 (1997); Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998). Under the AEPDA Petitioner believes that he is entitled to habeas corpus relief because, in this federal proceeding, the underlying state adjudication: (1) resulted in a decision that was contrary to, and involved an unreasonable application of clearly established federal law, as determined by the United States Supreme Court; the state court decisions also (2) resulted in a decision that was based on an unreasonable application of the facts in light of the evidence presented at the state court proceeding. 28 U.S.C. §2254(d)(1)(2); see Williams v. Taylor, 529 U.S. 362, 398 (2000). Petitioner is aware that "[a] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable". Id. at 411. Since the state court factual determinations are presumed to be correct and the Petitioner knows that he can meet the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. §2254(e)(1).

Ineffective Assistance of Counsel

The Petitioner alleged ineffective assistance of counsel in his federal habeas corpus petition. To achieve relief on a claim of ineffective assistance of counsel, Petitioner has shown (1) that his trial counsel's

performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 694 (1984). This Court must apply a "strong presumption" that trial counsel's representation fell within the "wide range of reasonable professional assistance", and the errors must be "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment". Harrington v. Richter, 131 S.Ct. 770, 787 (2011). The Petitioner objects to the Magistrate's contentions that the Petitioner had not overcome this high standard because, the Petitioner has shown in his prior pleadings that counsel's errors deprived him "of a fair trial, a trial whose result is reliable". Strickland, 466 U.S. at 687.

The Petitioner objects to the Magistrate's recommendation that the Respondent should receive summary judgment on this issue because Petitioner has shown that the result of the state court proceedings were "fundamentally unfair and unreliable". Harrington, 131 S.Ct. at 787-88; Strickland, 466 at 694.

Objections to the Analysis made by the Magistrate on Grounds Presented

Petitioner objects to the Magistrate's agreement with the Respondent that the "Petitioner's claims are either not cognizable in habeas or are procedurally defaulted", for the following reasons:

Ground One

On page 19 of the R&R, the Magistrate states that "Petitioner's claim in

Ground One is not cognizable as it fails to allege any violation of federal law". The federal law that is evident in this ground that was violated is the Fourteenth Amendment of the United States Constitution, which states: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, **liberty**, or property, without due process of law; nor deny to any person within its jurisdiction **the equal protection of the laws**". (emphasis added).

The Fourteenth Amendment applies to the rights of citizens in State court. In South Carolina, in criminal cases, the error of the admission of evidence must be harmless beyond a reasonable doubt. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), rehearing granted, (August 31, 1992), cert. denied, 507 U.S. 927, 113 S.Ct. 130 (1993); Yates v. Evatt, 500 U.S. 391, 111 S.Ct. 1884 (1991). The Petitioner objects to the R&R of the Magistrate because, the requirement that harmlessness of federal constitutional error be clear beyond a reasonable doubt embodies a standard requiring reversal if there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992), rehearing granted, (August 31, 1992), cert. denied. 507 U.S. 927, 113 S.Ct. 130 (1993). This means that the reviewing court must make a judgment about the significance to reasonable jurors of the improper evidence, when measured against the other evidence considered by those jurors independently of the improper evidence. Arnold v. State, 309 S.C. 157, 420 S.E.2d 834, cert.

denied, 507 U.S. 927, 113 S.Ct. 130 (1993)(1992), rehearing granted, (August 31, 1992), cert. denied, 507 U.S. 927, 113 S.Ct. 130 (1993). This involves two distinct steps: first, the court must ask what evidence the jury actually considered in reaching its verdict; and second, the court must weigh the probative force of the evidence as against the probative force of the presumption standing alone. Arnold v. State, 309 S.C. 157, 420 S.E2d 834 (1992), rehearing granted, (August 31, 1992), cert. denied, 507 U.S. 927, 113 S.Ct. 130 (1993).

The fact that the State court admitted testimony of Officer Gunter, a dog handler, without requiring the State to establish the underlying reliability of dog tracking as a scientific or technical field denied the Petitioner his federally guaranteed right to due process of law. Officer Gunter's testimony was erroneously admitted and the Petitioner objects to the Magistrate recommending that Respondent receive summary judgment on this ground.

Ground Two and Four

On page 20 of the R&R, the Magistrate states that the Respondent is entitled to summary judgment on these grounds because these grounds "are not cognizable". The Petitioner objects to this contention.

As Petitioner has argued in previous pleadings, he has made every attempt possible in his State court proceedings, the South Carolina Court of Appeals, the South Carolina Supreme Court, to develop the facts of these issues, he failed, now, he moves this Court for an evidentiary hearing on these grounds because the Petitioner will show that (1) the factual predicate could not have

been discovered through the exercise of due diligence. See 28 U.S.C. §2254(e)(2)(A)(ii); see also Conway v. Polk, 453 F.3d 567, 590 (4th Cir. 2006), where the Court found that petitioner entitled to evidentiary hearing because he did not have the opportunity to develop claim in state court due to external causes, despite due diligence. (2) "The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error no reasonable factfinder would have found the petitioner guilty of the underlying offense. See Kelly v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1337 (11th Cir. 2004). The Petitioner did not have a fair trial in light of the fact that his co-defendant testified untruthfully, had he done so, no jury would have found him guilty.

For the foregoing reasons, the Petitioner believes that he is entitled to an evidentiary hearing on these grounds because he was denied a fair trial, which is guaranteed to him through the due process clause of the United States Constitution.

Grounds Three and Four

The Report of the Magistrate states that Grounds Three and Four are procedurally barred because the "PCR court did not rule upon them". The Petitioner was represented by court-appointed counsel during his PCR proceedings, counsel was aware of the procedural rule in relations to a final PCR order that does not address issues raised in the PCR application and at the hearing. See Marlar v. State, 653 S.E.2d 266 (S.C. 2007), where the South Carolina Supreme Court state that an attorney is to meticulously inspect a final PCR order to determine if any issues raised during the proceeding are

addressed in the final order, if not, then counsel is required to file a Rule 59(e) motion asking the PCR court to address the omitted grounds, if the issues are address, or not addressed, it would be preserved for review by a federal habeas court. The issues of ineffective assistance of counsel are substantial grounds and the Petitioner was prejudiced thereby. Since Petitioner's PCR counsel was ineffective for failing to pursue the non-addressed issues as required by Marlar, supra, then he is required meritorious review of these issues in this habeas proceedings because he received ineffective assistance of PCR counsel. See Martinez v. Ryan, 132 S.Ct. 1309 (2012). Therefore, the Petitioner objects to the Magistrate's contention that the Petitioner has procedurally defaulted on these issue and that the Respondent is entitled to summary judgment.

Ground Three - A

The Petitioner objects to the Magistrate's recommendation of summary judgment on this ground because the Magistrate, in the Report, does not address whether or not the State court tried and convicted the Petitioner in violation of the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution. The Petitioner addresses the Double Jeopardy violation on pages 5-7 of his "Response to Summary Judgment and Return".

The Petitioner was convicted of two-counts of armed robbery for a single event that allegedly occurred at a Circle K convenience store in Columbia, South Carolina after midnight on April 19, 2004.

The Double Jeopardy Clause of the Fifth Amendment clearly states that "a person is protected against multiple punishment for the same offense". Here,

the Petitioner was punished twice for one armed robbery that involved money and property allegedly being taken that belonged to the store and the store's clerk, both occurred during the course of one event.

Ground Three - B & D

The Petitioner objects to the Magistrate's conclusion that the Respondent should receive summary judgment on this issue because "trial counsel was not ineffective for failing to pursue the objection to the "hand of one, hand of all charge" because the charge was proper". The Petitioner contends that the trial judge's charge was not proper because it was confusing in that the trial judge's jury instructions failed to properly instruct the jury as to what a "principle" in a crime is. The trial judge told the jury in his instructions that "a principle in crime is one who either actually commits the crime or 'who is present aiding, abetting, or assisting in committing the crime'". The Magistrate did not address this portion of the Petitioner's argument on pages 7-9 of the "Response to Summary Judgment and Return".

The Petitioner believes that the trial judge's jury instructions were prejudicial and the Petitioner should receive habeas corpus relief on this ground because he was denied due process of law due to a faulty jury instruction.

Ground Three - C

The Magistrate's recommendation that the Respondent should receive summary judgment on this issue is misplaced because, in South Carolina, "it is

unlawful for a person to give false, or incomplete testimony, under oath in any court of record, judicial, administrative or regulatory proceedings in this state". citing State v. Stanley, 615 S.E.2d 445 (2005). Giving false testimony at trial constitutes the felony of perjury and subjects the perjurer to a fine and/or up to five years imprisonment. citing Collins v. Doe, 539 S.E.2d 62 (Ct. App. 2000). Morris admitted he (lied) committed perjury.

This claim should not be dismissed.

Ground Four

Petitioner contends that he was denied due process of law on this ground because "PCR counsel failed to subpoena Anthony Morris and trial counsel Lanelle Durant to testify". Counsel knew Morris would have testified to information he wrote in his statement recanting his trial testimony, as to trial counsel Lanelle Durant, that testimony was require fro trial counsel to determine whether any pretrial investigation ~~discovered~~ any evidence that related to Morris's recanting his trial testimony. This ground shows another ~~due process~~ violation and this Court should deny the Magistrate's recommendation that the Respondent should receive summary judgment on this ground.

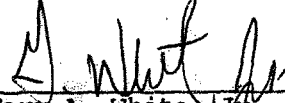
CONCLUSION

The errors complained of by the Petitioner may seem harmless, however, individual harmless errors may require reversal because of their cumulative effects. In Taylor v. Ky., 436 U.S. 478, 488 n. 15 (1978), the United States

Supreme Court ruled that cumulative errors violate due process guarantee of fundamental fairness and necessitate a new trial.

For all of the foregoing reasons, the Petitioner ask that this deny the Magistrate's Recommendations to grant summary judgment to the Respondent and grant the Petitioner's petition for writ of habeas corpus.

Respectfully submitted,



Gary A. White, Jr., #309726
McCI F-4 A-side
386 Redemption Way
McCormick, SC 29899

This 15 day of MARCH, 2016

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

Gary A. White, Jr., #309726,	)	C/A No.: 1:15-365-DCN--SVH
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
	)	AFFIDAVIT OF SERVICE
Warden Leroy Cartledge,	)	
	)	
Respondent.	)	
	)	

The above-named Petitioner certify that on this day he has served a copy of the attached Objections to he Magistrate's Report and Recommendation on the Respondent by delivering a copy of same to the McCormick Correctional Institution mail room, with sufficient postage prepaid, and addressed as follows:

Donald J. Zelenka
Assistant Attorney General
Post Office Box 11549
Columbia, SC 29211-1549
Attorney for Respondent

This 15 day of MARCH, 2016

SWORN to and subscribed before me this

15 day of MARCH, 2016

Perry G. Morton
Notary Public of South Carolina

My Commission Expires Feb 28, 2018

Gary A. White, Jr.
Gary A. White, Jr. #309726
McCI F-4 A-side
386 Redemption Way
McCormick, SC 29899

Gary A. White, Jr.,

Petitioner,

vs.

Warden Leroy Cartledge,

Respondent.

C/A No. 1:15-cv-0365 DCN

ORDER

The above referenced case is before this court upon the magistrate judge's recommendation that respondent's motion for summary judgment be granted and the petition be dismissed with prejudice. It was further recommended that petitioner's motion for an evidentiary hearing be denied.

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered, and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). However, absent prompt objection by a dissatisfied party, it appears that Congress did not intend for the district court to review the factual and legal conclusions of the magistrate judge. Thomas v. Arn, 474 U.S. 140 (1985). Additionally, any party who fails to file timely, written objections to the magistrate judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).¹ **Objections to the magistrate judge's report and**

¹In Wright v. Collins, 766 F.2d 841 (4th Cir. 1985), the court held "that a pro se litigant must receive fair notification of the consequences of failure to object to a magistrate judge's report before such a procedural default will result in waiver of the right to appeal. The notice

recommendation were timely filed on March 17, 2016.

A de novo review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is **AFFIRMED**, respondent's motion for summary judgment is **GRANTED**, and the petition is **DISMISSED** with prejudice.

IT IS FURTHER ORDERED that petitioner's motion for an evidentiary hearing is **DENIED**.

IT IS FURTHER ORDERED that a certificate of appealability is denied because petitioner has failed to make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(b)(2).

AND IT IS SO ORDERED.



David C. Norton
United States District Judge

March 21, 2016
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

The parties are hereby notified that any right to appeal this Order is governed by Rules 3 and 4 of the Federal Rules of Appellate Procedure

must be 'sufficiently understandable to one in appellant's circumstances fairly to appraise him of what is required.'" Id. at 846. Plaintiff was advised in a clear manner that his objections had to be filed within ten (10) days, and he received notice of the consequences at the appellate level of his failure to object to the magistrate judge's report.

FORM 5

STATE OF SOUTH CAROLINA)

County of RICHLAND)

IN THE COURT OF COMMON PLEAS

Gary A. White, Jr. #309726)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

2018CP4000514

APPLICATION FOR

POST-CONVICTION RELIEF

JANETTE W. MCBRIDE
C.R. 2.6.5.

2018 JUN 24 PM 12:46

RICHLAND COUNTY
FILEDINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Inst. 386 Redemption Way, McCormick, S.C. 29899
2. Name and location of Court which imposed sentence Richland County General Sessions Court, Columbia, S.C.
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2004-GS-40-3017) Kidnapping
 - (b) 2004-GS-40-3013) Armed Robbery

2004-GS-40-3018) Armed Robbery

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) **June 16, 2005, (3) current life sentences**
 (b) _____
 (c) _____
6. Check whether a finding of guilty was made:
 (a) after a plea of guilty ☒
 (b) after a plea of not guilty _____
 (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
 (a) the name of each Court to which you appealed:
 i. **S.C. Court of Appeals) Direct Appeal**
 ii. **S.C. Supreme Court**
 iii. **S.C. Court of Appeals**
 (b) the result in each such Court to which you appealed:
 i. **Affirmed**
 ii. **Denied**
 iii. **Denied**
 (c) the date of each such result:
 i. **Jan 16, 2007**
 ii. **December 9, 2005**
 iii. **March 22, 2007**
 (d) if known, citations of any written opinion or orders entered pursuant to such results:
 i. **n/a**
 ii. _____
 iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
 (a) **n/a**
 (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) ineffective assistance of counsel for not investigating
- (b) sentence enhancement.
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) according two state law conviction from Kentucky
- (b) could not be used for enhancement.
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? yes
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? no
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. PCR Application
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. Richland County Court of Common Pleas
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

Denied

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

(d) the date of each such disposition:

August 30, 2011

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

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

N/A

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

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
No

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

(a) which grounds have been presented:
n/a

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

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

n/a

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

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

didn't have the prior convictions

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

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

- (a) your arraignment and plea? **yes**
 (b) your trial, if any? **yes**
 (c) your sentencing? **yes**
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? **yes**
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?
no

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

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

i. **Lanelle Duent, Stacy Owings Esquire**
Richland County Public Defender

ii. **Ailean P. Clare**
Appellate Counsel

iii. **Lanelle Durant, Appellate Defender**

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

i. **Trial-sentencing**

ii. **Appellate Counsel**

iii. **Appellate Counsel**

19. State clearly the relief you seek in filing this application:
vacate the three life sentenced and resentence me

20. Are you now under sentence from any other court that you have not challenged?
no

STATE OF SOUTH CAROLINA)

County of **McCormick**)

VERIFICATION

I, GARY F. WHITE JR, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Gary F. White Jr

SWORN to and subscribed before me this 12
 day of January, 2018.

J. Franklin (L.S.)
 Notary Public

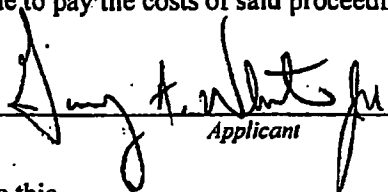
My Commission Expires: 12.16.2019

FILED
 JAN 24 PM 12:46
 JENNIFER W. MCBRIDE
 C.C.P. & G.S.

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

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

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


Applicant

SWORN or affirmed to and subscribed before me this
10 day of January, 2018.

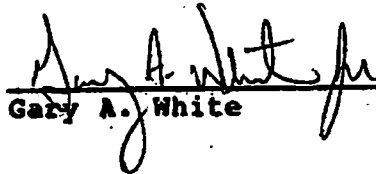

Notary Public

My Commission Expires: 12-16-2019

FILED
JANUARY 11 2018
CLERK OF COURT
CLERK W. MCBRIDE
CLERK & G.S.

CERTIFICATE OF SERVICE

The undersigned hereby certify that he mail PCR application to the Richland County Clerk of Court Office, 901 P.O. Box 2766, Columbia, S.C. 29202 this 16 day of January 2018 by depositing same in the U.S. mail.


Gary A. White

RICHLAND COUNTY
CLERK OF COURT
JAN 24 PM 12:46
JAMETTE W. MCBRIDE
C.C.P. & G.S.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.,
#309726,

Applicant,

#2018-CP-40-005

vs.

NOTICE OF MOTION
MOTION TO AMEND
APPLICATION; AND AMEND
ISSUES

State of South Carolina,
Respondents.

2020
JANETTE W. McBRIDE
C.C.P. & G.S.

NOTICE IS HEREBY GIVEN that, Gary Anthony White, Jr., #309726, pro se Applicant, pursuant to Rule 15(a) and (b), South Carolina Rules of Civil Procedure, SCRCP; Rule 71.1 SCRCP; and S.C. Code Ann. §15-13-920, seeking leave of this Court to grant the relief sought herein by permitting amendment of the current Post-Conviction Relief Application.

Rule 15(a), SCRCP, provides in pertinent part: "A party may amend his pleadings once as a matter of course at any

time ... and leave shall be freely given when justice requires."

Rule 15(b), SCRCP, provides in pertinent part: issues not raised by the pleadings.... they shall be treated all respects as if they had been raised in the pleadings; amendments of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be granted upon motion of any party at any time, even after judgment."

This Rule 15(b) broadens the court's power to allow amendments to conform the pleadings to the evidence under S.C. Code Ann. §15-13-920; and is necessary if the philosophy of the rules is to be consistent.

The issue brought forth in this amendment motion is one that has recently been disclosed and discovered through the Circuit Public Defenders Office, and is detrimental to the case now before this PCR Court. To deny this pleading, and to have these issues adjudicated, has the propensity to impede due process rights associated with these proceedings. See S.C. Code Ann. §17-27-80. (See Fn. 1). It is vital to fundamental justice in this matter that this amendment is granted in preservation to the right to appeal under the issue preservation standard.

This motion to amend is a proper vehicle mechanism, in which to be granted the relief sought here. Applicant does not present this motion in a manner that would cause undue delay, economic strains, or waste the time of any party associated herewith, to include this PCR Court. It is apparent by these issues and Exhibits, attached hereto, there exists justifiable reasons which warrant the adjudication of this PCR Court.

Applicant is of the stance and belief that all matters deserve complete adjudication and the relief granted amendment into this current PCR application. See Rule 71.1 SCRCF. (Fn. 2).

Applicant is a pro se litigant, at this time, who without appointment of counsel, and is struggling to present his issues. For the following reasons, and particulars, Applicant would demonstrate the merit of these issues. Please consider the following:

Fn. 1 - S.C. Code Ann. §17-27-80 provides in pertinent part: "The Court shall make specific findings of fact, and state explicitly its conclusion of law, relating to each issue presented."

Fn. 2 - Rule 71.1(d), SCRCF, provides in pertinent part: "Shall insure all grounds for relief are included in the application and shall amend the application if necessary."

10(b). Trial counsel(s), and initial PCR counsel demonstrated a deficient performance, in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, (and Article(s) I, §3; and I, §14, of the North Carolina Constitution), whereas, in the first instance: (1) Trial counsel(s), at a critical stage in the criminal proceedings failed to provide Applicant with any form of notice as to the existence of an [actual] conflict of interest during their representation, in relation to the criminal proceedings. Their representation of this Applicant, and co-defendant, Morris ("Morris"), would sometime at this late date be a conflict. Applicant and Morris were represented by the Circuit Public Defenders Office, and this created an [actual] conflict of interest, which was never disclosed to this Applicant recently; and (2) PCR counsel, at a critical stage in the proceedings failed in his duties to: (a) investigate the issues and matters revolving around the criminal representation in the proceedings dealing with the ineffective assistance of trial counsel(s) claims; and (b) at no time amended the issue of an [actual] conflict of interest for inclusion in the record and this is consistent with Rule 71.1(d), SCRCP; and S.C. Code §17-27-80, placing PCR counsel's representation, under due process standards, in serious jeopardy for this failure to investigate and preserve these matters in that arena.

TRIAL COUNSEL(S)

11(b). In the first instance, a criminal defense Sixth Amendment right to effective assistance of counsel includes a right to counsel "unhindered by a conflict of interest." Cuyler v. Sullivan, 446 U.S. 335, 345-50, 355 (1980) (quoting Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978)). When counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). Due to the seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicts of interests," the Strickland ineffective assistance of counsel standard is modified in actual conflict of interest cases: the defendant is not required to show prejudice. Strickland, 466 U.S. at 692 (quoting Cuyler, 446 U.S. at 350); Duncan, 281 U.S. at 438, 315 S.E.2d at 811; also Lomax v. State, 379 S.C. 93, 166 S.E.2d 164, 168 (2008).

An actual conflict of interest arises where: "a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes a duty to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is so that the attorney owes a duty to the defendant to take action that could be detrimental to his other client." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

The position that is taken in this current matter is one where, trial counsel(s) failed to disclose the fact that a "CONFLICT MEMORANDUM" had been issued, on June 25, 2004, relating to the representations of, April W. Sampson, Esquire (Assistant Circuit Public Defender)("Ms. Sampson")(who represented, Anthony Morris - co-defendant)("Morris"); and Jason Chehoski, Esquire (Assistant Circuit Public Defender)("Mr. Chehoski") represented Applicant - the other co-defendant). Applicant not provided notice as to the potentially harmful and prejudicial issue now before this PCR Court. This failure, on the part of trial counsel(s) to provide the, then, criminal defendant with the existence of an actual conflict of interest is, in itself, a fatal flaw in the rights assured this Applicant in these types of proceedings.

It must be further stated that simply because there was a replacement or re-appointment of trial counsel(s) prior to trial, the actual conflict of interest was not resolved. Applicant believes that the resolution that may be claimed at this point, was a continuous act of an actual conflict of interest. The reason for this assertion exists in statutory law. See S.C. Code Ann. §17-3-5(6) ("(6) 'Public Defender' means an attorney who is employed in a circuit public defenders office who represents an indigent person pursuant to a contract or agreement with a circuit public defenders office"). Applicant was informed by, Lanelee Durant, Esquire (first chair)("Durant"), Stacy Owings, Esquire (second chair)("Ms. Owings")(collectively, "trial counsel(s)"), that these trial counsel(s) were appointed by the Circuit Public Defenders Office for Richland County. This causes extreme concern where this Office (1) never disclosed the actual conflict of interest; and (2) such an actual conflict of

interest prejudiced Applicant's criminal case, rights, or his opportunity to be afforded the most fundamental basic

The record that is before this PCR Court clearly demonstrates that the issue of trial counsel(s) representation was tainted by an actual conflict of interest. It is believed Applicant that trial counsel(s), in face of an actual conflict of interest, convinced the prosecution that Applicant was culpable than Morris. This can be substantiated by the fact that Morris received the benefits of a guilty plea for a lesser sentence for his participation in this alleged criminal act. Edgemon v. State, 318 S.C. 3, 455 S.E.2d 500 (1995)(actual conflict of interest where counsel convinced sole petitioner's co-defendant was less culpable), When viewed in light of the data recorded in the "CONFLICT MEMORANDUM", (attached hereto and incorporated herewith a true and accurate copy of Exhibit A), it substantiated that the evidence supported both defense and prosecution culpability in this crime. It is evident by the facts and circumstances events pertaining to these representation that they are well documented.

It is apparent by this record that, Ms. Sampson convinced the prosecutor that Morris, (her client), was less culpable than Applicant when she secured a plea agreement that was extremely less harsher than the sentence meted out to Applicant. Also, we must be mindful of the fact that the Circuit Public Defenders Office was aware of this actual conflict of interest prior to, and at all critical stages of the criminal proceedings. The fact that Applicant was never placed on notice of the existence of an actual conflict of interest in any record in the Clerk's Office, Any trial counsel(s) case/manual communication with the courts, demonstrates an unknowingly, unintelligent, and unvoluntarily waiver of this right. It is believed that the fact that trial counsel(s) failed to disclose the conflict of interest

shows a "dark heart" and intent when withholding the issue and document from Applicant. This creates a stance that this clerk made his trial counsel(s) positions turn from that of an advocate to an adversary. This has caused an unintelligently, unknown and involuntarily waiver of a conflict of interest throughout the entire criminal proceedings.

Applicant is of the belief and position that, trial counsel(s) blatant and outright failure ... or refusal to disclose matter how one wishes to frame it ... to permit no opportunity in which to knowingly, intelligently and voluntarily waive the rights assured him by the Fifth, Sixth and Fourteenth Amendment to the United States Constitution. Applicant would respectfully demand that this PCR Court grant the relief sought herein as, finding that trial counsel(s) were ineffective for failure to procure a knowingly, intelligently, and voluntarily signed waiver of the conflict of interest; and/or for failure to provide notice that a potential conflict of interest existed during all stages of the criminal proceedings.

11(c). On August 5, 2009, Applicant initiated his PCR application, and was appointed Mark Schnee, Esquire, counsel"), under the case number #2009-CO-40-5549. The application sought to have all relevant issues included for the purposes of issue preservation, finally adjudicated. At no time during this PCR proceeding was the matter of an actual conflict of interest ever discussed with Applicant, nor was it made a part of the record before that PCR Court. Applicant is of the stance that this position requires great consideration, due to the fact that PCR counsel failed to investigate and preserve this issue for adjudication, as is consistent with Rule 71.1(d) South Carolina Rules of Civil Procedure, SCRCP; and Ann. §17-27-90. (See Fn. 1).

This failure on the part of PCR counsel has deprived this Applicant of due process associated with these matters. Especially in light of the fact that Applicant secured a Paralegal to assist him in the search of records and documents that related to his criminal conviction.

On November 19, 2019, after numerous attempts to obtain a copy of the case/manual file amassed during the Circuit Public Defenders Office representation in the criminal matters, Applicant would be provided a complete disclosure of the documents within that case/manual file for his inspection (Attached hereto and incorporated herewith a true and accurate copy of Exhibit [2]). When reviewing the contents of the case/manual file, it would be discovered that trial counsel had, prior to trial, knowledge of an actual conflict of interest throughout the various stages of the criminal process. Exhibit [1] had never been disclosed to Applicant, nor had it ever been secured a knowingly, intelligently or voluntarily.

signed waiver to this conflict of interest. The simple fact of the matter is that no waiver was ever procured. This presents a dangerous problem.

During all time of the representation by PCR counsel, Applicant was repeatedly assured that PCR counsel had reviewed all the records, to include, but not limited to, those amassed by trial counsel(s). Yet, as the record demonstrates, PCR counsel did not properly investigate the issues of the initial proceedings, and failed to preserve a meritorious claim for appellate review. Cf. Bray v. State, 366 S.C. 137, 620 S.E.2d 100 (2005)(counsel on appeal from denial of post-conviction is required to brief arguable issues, despite counsel's belief that appeal is frivolous, to safeguard the right to appeal); Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009)(when analyzing Rule 71.1(d) sanctions in the pcr context the Court held: "PCR actions are the only type of case which this Court mandates appellate counsel must brief the appeal is frivolous. A lawyer knowingly filing a frivolous claim in any other civil case violates Rule 71.1(d), SCRPC"). Viewing this matter under the analogy that PCR counsel may have feared sanctions, consistent with Rule 11, SCRPC, for pursuing what may have been considered by him, a "frivolous claim, relating to the actual conflict of interest, would in fact be false reliance on an incorrect application of an legal standard.

Fn. 1 - Rule 71.1(d), SCRPC, provides in pertinent part: "Counsel shall insure that all applicable grounds for relief are included in the application and shall amend the application if necessary."

We must be further mindful of the fact that, although PCR counsel is not appointed under an ineffective right, under the Sixth Amendment; Applicant does have a statutory right to appointment of pcr counsel once a hearing has been granted. Hi, Id. The failure to present or preserve the actual conflict of interest removes the fundamental fairness in the course of proceeding, thereby denying essential due process rights to all pcr applicants.

Whether the failure to discover or disclose this conflict of interest claim was intentional or inadvertent part of PCR counsel, is irrelevant, the gravamen of the claim is that Applicant was not afforded the opportunity of his "one bite at the apple", and this has caused a grave injustice to occur. It is apparent that trial counsel(s), as well as PCR counsel, have acted in the capacity as an adversary, and not in the capacity and performance of an advocate. This severely undermines the integrity of the courts and proceedings, and requires an evidentiary hearing to sort through these muddled matters.

Fn. 1 - (CONTINUED) - S.C. Code Ann. §17-27-90 provides the pertinent part: "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental or amended application."

SUCCESSIVE APPLICATION

For a pcr application to be successive, the application must have entitled Applicant to a "full and fair opportunity" to present his claims in one PCR application. Successive applications and appeals are generally disfavored because they "allow an applicant to receive more than 'one bite at the apple as it were.'" Odom v. State, 337 S.C. 256, 261, 523 S.E.2d 753, 755 (1999).

In Aice v. State, 305 S.C. 448, 409 S.E.2d 392, the Court interpreted section 17-27-90 to forbid "a successive pcr application unless an applicant can point to a 'sufficient reason' why the new grounds for relief he asserts were raised, or raised properly. Aice, 305 S.C. at 450, 409 S.E.2d 394, e.g., Washington v. State, 324 S.C. 232, 478 S.E.2d 394 (1996) (permitting successive PCR application where there are multiple procedural irregularities, including the prohibition of an applicant to the benefits of due process). The Court in Odom, however, expressly held "the contention that prior PCR counsel was ineffective is not per se a 'sufficient reason' allowing for a successive PCR application pursuant to §17-27-90." Id., Robertson v. State, 418 S.C. 505, 795 S.E.2d 20 (2016).

With the evidence presented that, on November 19, 2012, Applicant was served and had disclosed to him a complete copy of the case/manual file amassed by trial counsel(s) during his trial representations, that has or is believed to have disclosed the issue which is meritorious and will grant the relief sought herein. It is a matter of record, within these proceedings, that there has never been a disclosure of this issue, and the

FRAUD/EXTRINSIC FRAUD

Fraud upon the court has been described by commentator of the Court of Appeals as "that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 444, 46 (Ct.App. 1988)(citing H. Lightsey, J. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE, 408 (2nd ed. 1985)).

"[F]raud on the court, 'whatever else it embodies, requires a showing that one has acted with intent to deceive and defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing what can properly be characterized as a deliberate scheme to defraud before relief from a final judgment is appropriate ... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not itself a sufficient basis for setting aside a judgment for 'fraud upon the court'." United States v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002)(quoting Robinson v. Audi Aktiengesellschaft, 56 F.3d 1267 (10th Cir. 1995)). In order to secure equitable relief on basis of fraud, the fraud must be extrinsic. Bryan v. Bryan, 31 S.C. 164, 36 S.E.2d 609 (1951).

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to

extent that they are not inconsistent with the Act'). It is evident by these rules and statutes that Rule 60(b), SCRCP, has the semblance of an "extrinsic fraud" theory, should be and relief granted under these circumstances.

Trial counsel(s), as well as PCR counsel never at a position, for adjudicating purposes, relating to redisclosed documents, i.e., Exhibit [1]. This non-disclosure was kept silent, and was not presented to any party, not even the trial court. This non-disclosure, in essence, was detrimental to the due process that should have been afforded this Applicant. Its claim or allegation goes to the very core of ineffectual assistance of trial counsel(s); and the right to minimum due process as to preservation and finality in the PCR arena. It could be presumed that the extrinsic or collateral fraud, or there exists a failure to disclose, even by the prosecution, they had prior knowledge of the claim. This is a double-edged coin that was intentionally and/or deliberately covered up to advert the issue of the actual conflict of interest, by both the adversary and advocate sides of the coin. It ceased Applicant's ability to present his case in its entirety and received finality that he has the right to receive.

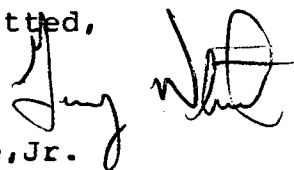
Applicant is of the belief and stance that he is entitled to relief from the judgment, where it has been shown that there exists an extrinsic fraud. The statute of limitations are inapplicable to this current circumstance, and this Court must order that the Applicant warrants the relief of relief from initial PCR order and proceedings.

CONCLUSION

WHEREFORE, Applicant prays that this PCR Court
the relief demand within the issues to be amended hereto

February 19, 2019

Respectfully Submitted,



Gary Anthony White, Jr.
Q3A113 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Gary A. White, Jr., #309726,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-0514

**RETURN AND MOTION TO DISMISS
(COUNSEL NOT REQUESTED)**

In response to Gary A. White, Jr.'s (Applicant) action for post-conviction relief commenced January 24, 2018, the State makes this return and moves to summarily dismiss the action for being untimely, successive, and it does not constitute newly discovered evidence;

I. PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Richland County Clerk of Court. In July 2004, the Richland County Grand Jury indicted Applicant for two counts of armed robbery (2004-GS-40-3016; 3018 and kidnapping (2004-GS-40-3017. Public Defenders Lanelle Durant and Stacey Owings represented Applicant. Assistant Solicitors Vanessa Cooper and Dolly Garfield prosecuted the case. On June 14-16, 2005, Applicant proceeded to trial before the Honorable James R. Barber. The jury found Applicant guilty as indicted. Judge Barber sentenced Applicant to imprisonment for life without parole.

Applicant filed a timely notice of appeal. Aileen P. Clare of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction on January 16, 2007. On January 29, 2007, appellate counsel filed a petition for rehearing on

Applicant's behalf. The Court of Appeals denied rehearing on March 22, 2007. Applicant appealed the Court of Appeals' decision.

On April 23, 2007, Appellate Defender Lanelle Durant filed a petition for writ of certiorari, in our Supreme Court. The State filed a return on May 23, 2007. The South Carolina Supreme Court granted certiorari on November 19, 2007. The South Carolina Supreme Court heard argument on February 4, 2009, and on April 27, 2009, the court issued an opinion affirming in result the court of appeals. On May 12, 2009, appellate counsel filed a petition for rehearing, which our Supreme Court denied on May 28, 2009. The case was remitted back to the circuit court on May 28, 2009.

i. First PCR (2009-CP-40-5549)

Applicant subsequently filed an application for PCR on August 5, 2009, in which he alleged the following grounds for relief:

1. New Discovered Evidence
2. Ineffective Assistance of Trial Counsel
3. Ineffective Assistance of Trial Counsel
4. Co-defendant Anthony Morris retracted his trial testimony by way of a sworn statement. The statement itself weakens the States case against Mr. White.
5. Trial Counsel was ineffective by allowing the State to present evidence in case on a charge that was dismissed at the start of trial.
6. Trial counsel was ineffective by failing to pursue objection of jury charge hand of one hand of all. By fail to pursue objection, counsel allowed the jury to give the charge without making a ruling on objected charged.

The State filed its return on May 10, 2010. An evidentiary hearing into the matter convened on October 18, 2010, at the Richland County Courthouse before the Honorable J. Mark Hayes, II. Applicant was present at the hearing and represented by Mark E. Schnee, Esquire. Assistant Attorney General Brian Petrano, of the South Carolina Attorney General's Office, represented the State. On August 31, 2011, Judge Hayes issued the order of dismissal denying Applicant's application for post-conviction relief. Applicant appealed.

Appellate Defender David Alexander perfected the appeal by filing a *Johnson* petition for a writ of certiorari on September 12, 2012. On December 19, 2013, by written order the Supreme Court of South Carolina denied the petition. The remittitur was issued on January 6, 2014. Petitioner submitted a letter to the court on January 2, 2014, which the court construed as a motion to recall the remittitur. The court granted the motion to recall the remittitur on January 16, 2014. Thereafter, Petitioner submitted a *pro se* brief. In an order dated May 7, 2014, the court indicated that “[a]fter careful consideration of petitioner’s *pro se* petition, we adhere to our previous ruling.” The court reissued the remittitur on May 21, 2014.

ii. Federal Habeas Action (1:15-cv-365-DCN-SVH)

Applicant filed a *pro se* Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 on January 21, 2015. Applicant set forth the following grounds for relief:

Ground One: The Trial Court Erred by denying Appellants objection to the States Expert Witness, a dog-handler, without requiring the State to Establish the Underlying Reliability of dog tracking as a scientific or technical field.

Supporting Facts: See Attached Argument Ground 1 A, B, C.

Ground Two: Newly discovered Evidence

Supporting Facts: See: App. p. 634 – 676 which Petitioner re-argue See A-1 – D

Ground Three: Ineffective Assistance of Counsel

Supporting Facts: See Attached Arguments A, B, C, D Etc.

Ground Four: Newly discovered Evidence

Supporting Facts: (2.) Refer Back to Ground #2 I am arguing Ground 2 to support Ground 4, and I further argue that due to Martinez v. Ryan 132 S.Ct 1309 P.C.R. Counsel Ineffectiveness in failing to subpoena co-defendant Anthony Morris and Trial Counsel Lanelle Durant.

The State filed its Return and Motion for Summary Judgment on March 30, 2015. On June 23, 2015, the Honorable Shiva V. Hodges issued the Report and Recommendation that the State’s

motion for summary judgment be granted and Applicant's petition be denied. Applicant filed his objection to the Report and Recommendation on July 10, 2015.

On July 15, 2015, the Honorable David C. Norton, United States District Judge reversed the Magistrate's Report and Recommendation granting the State's Motion for Summary Judgement and remanded the case. On January 29, 2016, the Honorable Shiva V. Hodges issued another Report and Recommendation that the State's motion for summary judgment be granted and Applicant's petition be denied. On March 15, 2016, the Applicant filed his objection to the Report and Recommendation. On March 21, 2016, the Honorable David C. Norton, United States District Judge adopted the Magistrate's Report and Recommendation granting the State's motion for summary judgement and dismissing the Applicant's petition.

II. CURRENT APPLICATION

In his second and current application for PCR, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Ineffective Assistance of Counsel for not investigating sentence enhancement
 - a. "According two state law conviction from Kentucky could not be used for enhancement"

On March 30, 2020, Applicant filed an amended application for post-conviction relief. In his amended application, Applicant raised the following additional grounds:

2. Newly discovered evidence such that "an actual conflict of interest existed and was not disclosed to [Applicant]."
 - a. Counsel was ineffective for failure to disclose this
 - b. PCR Counsel was ineffective for failure to investigate and present this claim
3. Fraud upon the court
 - a. "Sampson, Chehoski, Durant [and] Owings deliberately hid and refused to disclose the subject matter of [the conflict of interest] claim[.]"

Before this Court are the Richland County Clerk of Court records, Applicant's records from the South Carolina Department of Corrections, Applicant's prior post-conviction relief action

records, Applicant's appellate records, Applicant's federal habeas corpus action records, and the records for this post-conviction relief action.

III. MOTION TO DISMISS

The State moves for summary dismissal pursuant to section 17-27-70 of the South Carolina Code (2014) on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requests the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRPC (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). The State moves for summary dismissal for the following reasons:

i. Statute of Limitations

Applicant's allegations should be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act¹ (the Act). Specifically, the Act requires:

An application for relief filed pursuant to this chapter ***must*** be filed within ***one year after the entry of a judgment . . . or within one year after the sending of the remittitur . . .***

S.C. Code Ann. § 17-27-45(A) (emphasis added).

¹ S.C. Code Ann. § 17-27-10 to -160.

Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Here, Applicant was convicted on June 16, 2005. The remittitur from his direct appeal was issued on May 28, 2009. Therefore, a PCR application should have been filed on or before May 29, 2010. This application was filed on January 24, 2018, *almost eight years after* the requisite filing period expired. Accordingly, the allegations, except for newly discovered evidence should be summarily dismissed as being untimely.

ii. Successive

Applicant’s allegations, except for newly discovered evidence, should be summarily dismissed because this action is successive to Applicant’s prior PCR action.

Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been raised in a prior PCR action. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental, or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which

for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Pursuant to section 12-27-90, successive post-conviction relief applications are barred unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant's current allegations, except for newly discovered evidence, were or could have been raised Applicant's prior PCR actions; thus, these allegations are successive and barred under section 17-27-90. Further, Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief under the Act and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Applicant has failed to establish any sufficient reason why he could not have raised his current allegations, except for newly discovered evidence, in his previous PCR actions. Accordingly, Applicant has failed to meet his burden and the allegations, except for newly discovered evidence, should be summarily dismissed as successive.

iii. Newly discovered evidence

Applicant's assertion he is being held in custody unlawfully as a result of newly-discovered evidence, such that he should be entitled to PCR is without merit. The Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C).

In order to prevail in this new trial motion, appellant must show the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
- (3) could not in the exercise of due diligence have been discovered prior to the trial;
- (4) is material; and
- (5) is not merely cumulative or impeaching.

State v. Spann, 334 S.C. 618, 619-20, 513 S.E.2d 98, 99 (1999).

Applicant asserts that a newly discovered "Conflict Memorandum" that he obtained from trial counsel's defense file constitute grounds for being granted a new trial. Specifically, Applicant asserts the "Conflict Memorandum" shows that an actual conflict of interest existed at the time of trial: Applicant and his co-defendant were both represented by Public Defenders within the Fifth Circuit Public Defenders Office. However, Applicant's newly discovered evidence claim is without merit.

“An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's.” *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Our Supreme Court has further stated that a conflict of interest occurs when “a defense attorney places himself in a situation inherently conducive to divided loyalties.” *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993); *see also Burger v. Kemp*, 483 U.S. 776, 783 (1987)). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Here, Applicant's claim is without merit because an actual conflict did not exist between trial counsel and Applicant's co-defendant's counsel. Rather, Applicant's co-defendant, Anthony Morris, was represented by Hans Pauling, Esquire, of the private bar. Thus, no actual conflict existed because Pauling was employed outside of the Fifth Circuit Public Defender's Office.

Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. Accordingly, the State submits this matter should be summarily dismissed with prejudice.

IV. GENERAL DENIAL

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

V. CONCLUSION

WHEREFORE, the State moves to summarily dismiss the application because it is untimely, successive, and does not constitute newly discovered evidence.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

MICHAEL D. DAVIDSON
Assistant Attorney General

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ATTORNEYS FOR RESPONDENT
Office of the Attorney General
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Columbia, SC 29211

June 22nd, 2020

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Gary A. White, Jr., #309726
Applicant,

v.

State of South Carolina.
Respondent.

IN THE COURT OF COMMON PLEAS
IN THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-0514

**CONDITIONAL ORDER OF
DISMISSAL**

RICHLAND COUNTY
FILED
2020 JUN 26 AM 10:29
C.C.P., et al.

This matter comes before the Court by way of an application for post-conviction relief filed by Gary A. White, Jr. (Applicant) on January 24, 2018. The State made its Return, requesting the application be summarily dismissed.

PROCEDURAL HISTORY

Applicant is confined in the South Carolina Department of Corrections (SCDC) pursuant to orders of commitment of the Richland County Clerk of Court. In July 2004, the Richland County Grand Jury indicted Applicant for two counts of armed robbery (2004-GS-40-3016; 3018 and kidnapping (2004-GS-40-3017). Public Defenders Lanelle Durant and Stacey Owings represented Applicant. Assistant Solicitors Vanessa Cooper and Dolly Garfield prosecuted the case. On June 14-16, 2005, Applicant proceeded to trial before the Honorable James R. Barber. The jury found Applicant guilty as indicted. Judge Barber sentenced Applicant to imprisonment for life without parole.

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Court of South Carolina denied the petition. The remittitur was issued on January 6, 2014. Petitioner submitted a letter to the court on January 2, 2014, which the court construed as a motion to recall the remittitur. The court granted the motion to recall the remittitur on January 16, 2014. Thereafter, Petitioner submitted a *pro se* brief. In an order dated May 7, 2014, the court indicated that "[a]fter careful consideration of petitioner's *pro se* petition, we adhere to our previous ruling." The court reissued the remittitur on May 21, 2014.

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- Ground One: The Trial Court Erred by denying Appellants objection to the States Expert Witness, a dog-handler, without requiring the State to Establish the Underlying Reliability of dog tracking as a scientific or technical field.
Supporting Facts: See Attached Argument Ground 1 A, B, C.
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- Ground Three: Ineffective Assistance of Counsel
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CURRENT APPLICATION

In his second and current application for post-conviction relief, Applicant alleges he is being held in custody unlawfully on the following grounds:

1. Ineffective Assistance of Counsel for not investigating sentence enhancement"
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On March 30, 2020, Applicant filed an amended application for post-conviction relief. In his amended application, Applicant raised the following additional grounds:

2. Newly discovered evidence such that "an actual conflict of interest existed and was not disclosed to [Applicant]."
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3. Fraud upon the court
 - c. "Sampson, Chehoski, Durant [and] Owings . . . deliberately hid and refused to disclose the subject matter of [the conflict of interest] claim[.]"

Before this Court are the Richland County Clerk of Court records, Applicant's SCDC records, Applicant's prior post-conviction relief action records, Applicant's appellate records, Applicant's federal habeas corpus action records, and the records for this post-conviction relief action.

DISCUSSION

This Court has reviewed the pleadings and all relevant supporting documents. Based upon its review, this Court finds there is no genuine issue of material fact necessitating an evidentiary hearing; therefore, summary judgment is appropriate. Pursuant to subsection 17-27-70(b) of the South Carolina Code (2014), this Court makes the following findings of fact and conclusions of law:

Motion to Dismiss

The State moved for summary dismissal pursuant to section 17-27-70 on the basis that there is no genuine issue of material fact which would necessitate an evidentiary hearing. Because there is no question of law or fact to necessitate a hearing, the State requested the Court not appoint counsel in this matter, and instead issue a Conditional Order of Dismissal indicating the Court's intent to dismiss the application and its reasons for so doing. *See* S.C. Code Ann. § 17-27-70(b) (establishing procedure for summary disposition of PCR applications); *Leamon v. State*, 363 S.C. 432, 434, 611 S.E.2d 494, 495 (2005) (summary disposition appropriate when there is no need to develop facts and the applicant is not entitled to relief); *Re: Appointment of Counsel in Post-Conviction Relief Cases Before the Circuit Court*, S.C. Sup. Ct. Order filed October 6, 2008; Rule 71.1(d), SCRPC (providing for appointment of counsel only where there is a question of law or fact which necessitates a hearing). This Court finds the State is entitled to summary dismissal for the following reasons:

i. Statute of Limitations

This action shall be summarily dismissed for failure to comply with the filing procedures of the Uniform Post-Conviction Procedure Act¹ (the Act). Specifically, the Act requires:

¹ S.C. Code Ann. § 17-27-10 to -160.

An application for relief filed pursuant to this chapter *must* be filed within *one year after the entry of a judgment . . . within one year after the sending of the remittitur . . .*

S.C. Code Ann. § 17-27-45(A) (emphasis added).

Our Supreme Court has held the statute of limitations shall apply to all applications filed after July 1, 1996. *Peloquin v. State*, 321 S.C. 468, 470, 469 S.E.2d 606, 607 (1996). A motion for summary judgment may properly be used to raise the defense of statute of limitations. *McDonnell v. Consol. Sch. Dist. of Aiken*, 315 S.C. 487, 489, 445 S.E.2d 638, 639 (1994). Further, section 17-27-70(c) authorizes this Court to “grant a motion by either party for summary disposition of [an] application when it appears from the pleadings . . . that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.”

Here, Applicant was convicted on June 16, 2005. The remittitur from the direct appeal was issued on May 28, 2009. The application was therefore due on May 29, 2010. This application was filed on January 24, 2018, well beyond the statutory filing period. Accordingly, the allegations, except for newly discovered evidence, shall be summarily dismissed for failure to file within the time mandated by the Act.

ii. Successive

This Court further finds Applicant’s allegations, except for newly discovered evidence, must be summarily dismissed as successive to Applicant’s previous PCR action. Courts disfavor successive applications and place the burden on applicants to establish that any new ground raised in a subsequent application could not have been earlier raised in a previous application. *Foxworth v. State*, 275 S.C. 615, 274 S.E.2d 415 (1981); *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992). Section 17-27-90 of the South Carolina Code states:

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voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

Pursuant to section 12-27-90, successive post-conviction relief applications are barred unless an applicant can indicate a "sufficient reason" why new grounds for relief were not raised or were not properly raised in previous applications. *Aice v. State*, 305 S.C. 448, 409 S.E.2d 392 (1991). Any new ground raised in a subsequent application is limited to those grounds that "could not have been raised . . . in the previous application." *Id.* at 450, 409 S.E.2d at 394. If the applicant could have raised these allegations in a previous application, then the applicant may not raise those grounds in successive applications. *Id.* Applicant bears the burden of showing the allegations could not have been previously raised. *Land v. State*, 274 S.C. 243, 262 S.E.2d 735 (1980).

Here, Applicant's current allegations, except for newly discovered evidence, were or could have been raised in the proceedings based on Applicant's prior application for post-conviction relief; thus, these allegations are successive and barred under section 12-27-90. Further, Applicant's contention that he received ineffective assistance of counsel on his prior post-conviction relief application is not a ground for relief and is not a sufficient claim to warrant a successive application. There is no constitutional right to appointed counsel for collateral review of a conviction. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Sixth Amendment right to effective assistance of counsel does not extend to state post-conviction relief actions. *Coleman v. Thompson*, 501 U.S. 722 (1991).

This Court finds Applicant has failed to establish any sufficient reason why he could not have raised his current allegations, except for newly discovered evidence, in his previous

applications for post-conviction relief. Accordingly, Applicant has failed to meet his burden and the allegations, except for newly discovered evidence shall be summarily dismissed as successive.

iii. Newly Discovered Evidence

This Court finds Applicant's claim of newly discovered evidence must be summarily dismissed because Applicant has failed to make a *prima facie* showing he is entitled to relief for his claim. The Act states a person may institute a PCR action if "there exists evidence or material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice." S.C. Code Ann. § 17-27-20(A)(4). If the applicant contends there is evidence of a material fact not previously presented, under the discovery rule, the PCR application must be filed within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence. S.C. Code Ann. §17-27-45(C). In order to prevail, Applicant must show the after-discovered evidence:

- (1) is such that it would probably change the result if a new trial were granted;
- (2) has been discovered since the trial;
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State v. Spann, 334 S.C. 618, 619–20, 513 S.E.2d 98, 99 (1999).

Applicant asserts that a newly discovered "Conflict Memorandum" that he obtained from trial counsel's defense file constitute grounds for being granted a new trial. Specifically, Applicant asserts the "Conflict Memorandum" shows that an actual conflict of interest existed at the time of trial: Applicant and his co-defendant were both represented by Public Defenders within the Fifth Circuit Public Defenders Office. This Court finds Applicant's newly discovered evidence claim is without merit.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Our Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." *Lomax v. State*, 379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993); *see also Burger v. Kemp*, 483 U.S. 776, 783 (1987)). "The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction." *State v. Gregory*, 364 S.C. 150, 152-53, 612 S.E.2d 449, 450 (2005).

Here, Applicant's claim is without merit because an actual conflict did not exist between trial counsel and Applicant's co-defendant's counsel. Rather, Applicant's co-defendant, Anthony Morris, was represented by Hans Pauling, Esquire, of the private bar. Thus, no actual conflict existed because Pauling was employed outside of the Fifth Circuit Public Defender's Office.

This Court finds Applicant has failed to make a *prima facie* showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). Accordingly, Applicant's newly discovered evidence claim shall be summarily dismissed with prejudice.

CONCLUSION

Pursuant to section 17-27-70(b), this Court intends to dismiss this application with prejudice unless Applicant provides specific reasons, factual or legal, why the application should not be dismissed in its entirety. Applicant is granted twenty (20) days from the date of service of

this Order upon him to show why this Order should not become final. Applicant shall file any reasons he may have with the Richland County Clerk of Court and shall serve opposing counsel at the following address:

Office of the Attorney General
Michael Davidson, Esquire
PCR Division – Fifth Circuit
P.O. Box 11549
Columbia, South Carolina 29211

Applicant is cautioned that his response to this order must be actually received by the Richland County Clerk of Court and opposing counsel within twenty (20) days from the date of the service of this Order, and that the Court will not consider any issues raised in his response if not so timely filed and served.

AND IT IS SO ORDERED this 26th day of June, 2020.

Alison Renee Lee
ALISON RENEE LEE
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.
#309726,

Applicant,

#2018-CP-40-0514

vs.

APPLICANT'S OPPOSITION TO
CONDITIONAL ORDER OF
DISMISSAL

State of South Carolina,
Respondents.

2020 AUG 14 AM 11:55
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

RICHLAND COUNTY
FILED

This matter comes before this PCR Court where, Gary Anthony White, Jr. #309726 ("Applicant"), pro se Applicant, is filing an Opposition To Conditional Order of Dismissal Order due to this PCR Court's execution on June 26, 2020. A copy of the Conditional Order of Dismissal ("Conditional Order"), was served upon this Applicant, on July 16, 2020, via Institutional Legal Mail Services.

It is this Applicant's position that, in this Opposition motion, that this PCR Court should re-examine and reconsider the facts, evidence and standards of law that are relevant to these current matters; and, the Conditional Order should be rescinded so that an evidentiary hearing can be convened to develop the record due to there existing genuine material facts in dispute that would undermine summary dismissal.

The facts and conclusions of law support this Applicant's position in these matters, and should cause this PCR Court to alter its previous holdings, so that there may exist a fundamental fairness in these matters. Due process would demand no less.

DISCOVERY/WRITTEN INTERROGATORIES

On February 20, 2020, Applicant served, via Certified Mail, Applicant's First Set of Written Interrogatories, upon the Chief Circuit Public Defenders ("Public Defender"), seeking information relevant to the claim that recently been disclosed November 19, 2019, concerning an actual conflict of interest.

On April 20, 2020, Applicant served a Motion of Motion and Motion to Compel Chief Public Defender to Answer Written Interrogatories. The interrogatories sought information concerning the various conflicting representations; did not seek privileged or confidential information; and are not over burdensome in furnishing the information required. Furthermore, Applicant waited 60 days before seeking to compel the Public Defender to answer, object or provide the relevant information and documentation.

The rules of discovery mandate that a party served interrogatories have 30 days to respond, object or answer the interrogatories. See Rule 33(a), SCRCP ("Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be state in lieu of answer The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections, if any, within 30 days after the service of the interrogatories ..."). Applicant believes that these Public Defenders have effectively waived any objection to these served interrogatories and since this motion has been pending since April 20, 2020, it is too premature for any form of summary

dismissal. Cunningham v. Anderson County, 402 S.C. 434, 741 S.E.2d 545 (Ct.App. 2013)(summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery).

For this Conditional Order to become effective would have a devastating effect on this Applicant's case. We must mindful of the facts that there is no other avenue of redress, outside the discovery rules for Applicant to receive the information that would be supplied by the interrogatories. The very gravamen and gist of the discovery rules is not to make a party's case one of guessing games and ambush. Scott v. Greenville Housing Authority, 353 S.C. 630, 579 S.E.2d 151 (Ct.App. 2003)(Gist and gravamen of discovery rules mandate full and fair disclosure to prevent trial from becoming a guessing game or ambush for either party).

The failure to conduct an evidentiary hearing on the matter of the motion to compel is damaging to Applicant's case because it deprives him of an opportunity to fully and fairly complete discovery.

The Public Defenders Office is an adverse party in these proceedings, once Applicant filed a pcr application, that Office became a party for Respondents. See S.C. Code Ann. §17-27-130. This statute permits the Public Defender to submit or provide all statements, records, etc. even if the contained privileged or attorney-client information. For Respondents to have this full advantage, and now deprive Applicant the ability to obtain information through these tools of discovery is surely a means to cause this Applicant to be "blind sided" and his case ambushed due to the opposing party's simply ignoring the discovery request served and sought.

Applicant believes that this summary dismissal is premature and should be vacated where there is no full and fair discovery disclosure. Due to these facts, Applicant respectfully demands an evidentiary hearing to develop these matters. Especially in light of the fact that Respondents pleadings can be dismissed for failing to comply with discovery. Cf. McDonald v. Head Criminal Court Supervisors Office, 850 F.2d 121, 124-25 (2nd Cir. 1998)(affirming dismissal of pro se prisoner's complaint for failing to "play by the rules" of discovery).

A reasonable position that be taken that these Respondents, like every one else, must follow the Rules of Civil Procedure. Condon v. State, 354 S.C. 634, 583 S.E.2d 430 (2003), Attorney General, like every one else, must follow the Rule of Civil Procedure). Discovery is a civil rule and is applicable to pcr matters. Cf. Hiott v. State, 381 S.C. 622, 674 S.E.2d 491 (2009)(relying on Rule 1, SCRCF "These rules govern the procedure in all South Carolina courts in all suits of a civil nature whether recognized at law or in equity").

STATUTE OF LIMITATIONS

In this PCR Court's Conditional Order has recently accepted the Respondents position that S.C. Code Ann. §17-27-45(A) is applicable to this current circumstance. (§17-27-45(A) [as cited in the Conditional Order] provides: "An application for relief filed pursuant to this chapter must be filed within one year after the entry of a judgment ... or within one year after the sending of the remittitur ...") (emphasis added by Respondents). For this PCR Court to accept this argument by Respondents and find that the statute of limitations should be applied demonstrates that this PCR Court has not viewed the record before this PCR Court. The evidence that has been submitted and filed on February 20, 2020, shows a clear picture that the statute of limitations is inapplicable. For example:

S.C. Code Ann. §17-27-45(C) provides: "If the applicant contends there is evidence of material facts not previously presented and heard that require vacation of the conviction and sentence, the application must be filed under this chapter within one year after the date of actual discovery of the facts by the applicant or after the date when the facts could have been ascertained by the exercise of reasonable diligence." (emphasis added).

This record is replete with Applicant's testimony, and evidence, that he had no prior knowledge, nor had he been placed upon notice as to the issue of an actual conflict of interest, before, during or after the criminal proceedings when the Public Defenders Office finally complied with a formal request for

production of case/manual file amassed during this Office's representation in the criminal proceedings, on November 19, 2019. This was the first time that Applicant had been provided actual knowledge of the issue. With that mind set, Applicant is of the belief that the date this claim was actually discovered on was November 19, 2019. For the record, Applicant saw no logical reason for the filing of an additional pcr application when this one was already pending in the Court of Common Pleas. It was reasonable to amend the issue to this pcr application; especially where Rule 15, SCRCP; and Rule 71.1(d), SCRCP, provide the proper vehicles and mechanisms to have this issue included in this application in an amendment proceeding. This would insure that the matters conform to the evidence. To have reacted in any other manner would have placed this PCR Court's economics and time in wasteful jeopardy.

Applicant takes the stance that the one year period, for the statute of limitations purposes, began to run on November 19, 2019; due the actual discovery or disclosure occurred on that date. It was only logical to amend this application to conform to the evidence and to preserve the newly disclosed or discovered issue. As demonstrated, the statute of limitations is inapplicable to this current circumstance, and this matter should be scheduled upon this PCR Courts earliest docket so the issues may be brought forth.

SUCCESSIVE APPLICATION

As the record reflects, this is the second pcr application filed as relates to this conviction and sentence. Although, the initial application was filed August 5, 2009, the issues and claims presently before this PCR Court have not been previously raised in past pcr proceeding/application; nor were the claims available to Applicant during the first pcr proceedings. In order for this application to be deemed successive, there must be proof that this application is successive, not merely asserted due to the fact that it has been filed after the first pcr application. This case does not fall within the circumstances which would warrant an successive application. Cf, Aices v. State, 305 S.C. 448, 409 S.E.2d 392 (1991). In Aices, the Court recognized the fact that he was attempting to present issues, in a second pcr application, that the record demonstrated had been knowingly, voluntarily and intelligently waived in the original pcr proceedings. As the facts of that case shown the issues could have or should have been raised in the initial proceedings. Aices attempted to claim pcr counsel failed to present and preserve the issues because pcr counsel believed the issues meritless. This current circumstance differs greatly from Aices because the matters now presented could not have been raised in the first pcr proceedings. This, in itself, excludes the successive application doctrine from this case.

S.C. Code Ann. §17-27-90 provides. "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that

resulted in the conviction or sentence or any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately in the original, supplemental or amended application."

This record is replete within evidence that there has been no prior knowledge of this actual conflict of interest. This includes such times as, before, after or during the criminal proceedings, and never during the prior pcr proceedings. The actual disclosure date occurred on November 19, 2019. Taking into account this date and issue at hand, Applicant is of the belief that he is permitted to bring forth this issue and to preserve it within this proceeding due to these facts. Tilley v. State, 334 S.C. 24, 511 S.E.2d 689 (1999) (Inmate's fourth pcr application in which he challenged his guilty plea as involuntary, on ground that he did not know he would be ineligible for parole due to sequence of his sentences, was not successive; inmate learned of his ineligibility in letter from parole board, he filed his fourth application less than one month later and he could not have raised his claim in any earlier application because he was then unaware of such claims).

Applicant is of the belief and stance that he merits an evidentiary hearing into these matters; and this present pcr application does not warrant dismissal under the successive application doctrine.

MOTION TO DISMISS

According to the Conditional Order, this matter is to be, presumably, summary dismissed due to the fact that Respondents have stated in their Motion to Dismiss that there exists no issue of genuine material fact in dispute that would give cause for an evidentiary hearing. This could not be further than the facts of this case. Applicant has clearly demonstrated that the statute of limitations and successive application doctrines do not apply to this instant case. It is apparent that Respondents, nor this PCR Court, have examined the amended pleading, and all its Exhibits, that was served on February 20, 2020. It is apparent that the Conditional Order's ruling on the statute of limitations is based upon the date this case was filed, January 24, 2020, not the date the amended issue was discovered on; and successive application is meritorious due to the fact the issue had been recently discovered and could not have been raised in an earlier proceeding. An evidentiary hearing should have been ordered based on the questionability of these two doctrines alone, because of the propensity in which to abruptly end this case, and there existing evidence to the contrary to the Respondents position as the moving party.

When considering Respondents motion to summary dismiss this matter, this PCR Court must assume all facts presented by this Applicant are true and view these facts in the light most favorable to this Applicant. Wilson v. State, 348 S.C. 215, 217, 559 S.E.2d 581, 582 (2002) (citing Al-Shabazz v. State, 338 S.C. 354, 363, 528 S.E.2d 742, 727 (2000)). Likewise, the court must view the facts in the same fashion when considering the appropriateness of the dismissal. Leamon v. State, 363 S.C. 432, 434, 611 S.E.2d 494 (2005).

Applicant takes the stance that summary dismissal is inappropriate to this current circumstance, at this time, and this PCR Court should rescind the Conditional Order, and issue an Order for this case to be scheduled upon the docket in an evidentiary hearing.

ACTUAL CONFLICT OF INTEREST

Under the Sixth Amendment protections, a defendant has a right to effective assistance of trial counsel that is "unhindered by a conflict of interest." Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980)(quoting Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978)). When trial counsel is burdened by an actual conflict of interest, he "breaches the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). Due to the seriousness of the breach and the difficulty in "measure[ing] the precise effect on the defense of representation corrupted by conflicting interests," under the Strickland ineffective assistance of counsel standard, it has been modified in actual conflict of interests cases that the defendant is not required to show prejudice. Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008).

An actual conflict of interest occurs when: "a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes a duty to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013)(quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)).

The allegation as to an actual conflict of interest is not one that Applicant simply thought up to get this case before this PCR Court. The fact of the matter is, the Public Defenders

Office represented Applicant, and Morris, during the criminal proceedings; and that Office went to the extent to execute a "CONFLICT MEMORANDUM", on June 25, 2004. Respondents argued that Morris was represented by, Hans Pauling, Esquire, "or the private bar."

Applicant believes that a genuine material fact in dispute exists where there has not been established any factual basis for Mr. Pauling's purported position, as a member of the Bar at the time of these specific trial proceedings that would demonstrate such a claim. Furthermore, Applicant argues that it could be irrelevant to the matter that Mr. Pauling was a, supposedly private bar attorney. There are many attorneys who assist the various Public Defenders Office's across the State of South Carolina; or have contractual and/or statutorial ties to the Public Defenders Office. See S.C. Code Ann. §15-3-5(6) ("(6) 'Public Defender' means an attorney who is employed in the circuit defender office or who represents an indigent person pursuant to a contractual agreement with a circuit public defenders office"). This is the first that Mr. Pauling has been identified, or been provided as the attorney who purportedly represented Morris. This is an essential piece of the puzzle that now raises the question as to Mr. Pauling's relationship with the members of the circuit public defenders office; or any for[m] of contractual agreement, whether verbal or written, that associates Mr. Pauling with this Office. This only intensifies the need to develop the record for clarity, and there should be convened an evidentiary hearing to develop the record.

As an additional point, this Applicant finds it hard to believe that once this amendment raised the actual conflict of interest claim, and there was provided, for this PCR court's consideration, a document identifying the conflict, that there

was not created a genuine material fact in dispute that required this PCR Court to order an evidentiary hearing into the claim. It would seem that such an issue, which does not require a showing of prejudice where an actual conflict of interest exists, should rather demand an evidentiary hearing to establish the factual basis and develop the record so that the most minimal of due process can be adhered with. As it stands, there has arisen evidence not previously made available to this Applicant, and he has yet to have a meaningful opportunity to be heard, cross-examine and confront witnesses, present evidence, and judicial review. Outdoor Clear Channel v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565 (2007); Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998).

The most fundamental of all rights is due process. Applicant is of the stance that he has presented a prima facie showing of an actual conflict of interest and that an evidentiary hearing should be scheduled in this matter.

PCR COUNSEL'S INEFFECTIVENESS

Although there exists no Sixth Amendment right to appointment of PCR counsel, there does exist a statutory one in South Carolina. Sutton v. State, 361 S.C. 644, 606 S.E.2d 779 (2004)(relying on Rule 71.1(d), SCRCP)). The right to the representation of PCR counsel falls under the due process protections afforded this Applicant in these proceedings.

Applicant takes a position that, not only was trial counsel obligated to produce or disclose the actual conflict of interest claim, but PCR counsel had the same obligation and duties to investigate and present for the record the issue of the actual conflict of interest. Bray v. State, 366 S.C. 137, 620 S.E.2d 743 (2005)(counsel on appeal from denial of post-conviction is required to brief all arguable issues, despite counsel's belief that appeal is frivolous, to safeguard the right to appeal). When a hearing is needed appointment of PCR counsel is specifically required to develop the case. Whitehead v. State, 310 S.C. 532, 426 S.E.2d 325 (1992). To question prior PCR counsel's representation in the initial PCR proceedings, where a claim as prejudicial as this actual conflict of interest has recently been discovered, gives rise to a deprivation of due process that places initial PCR counsel's representation in jeopardy. Respondents would lead this PCR Court to believe that no such standard exists in South Carolina. Please consider the following:

Case v. State, 277 S.C. 424, 425, 289 S.E.2d 413, 414 (1982)(allowing a successive pcr application where the applicant's first pcr application was dismissed without a hearing);

=

Carter v. State, 293 S.C. 528, 530, 362 S.E.2d 20, 21-22 (1987)(authorizing a successive pcr application where the applicant did not have pcr counsel that differed from his trial counsel);

Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 ((1989)(allowing a successive pcr application where the applicant unknowingly withdrew his first petition with prejudice);

Washington v. State, 324 S.C. 323, 326, 478 S.E.2d 833, 835 (1996)(permitting successive pcr application where there existed multiple irregularities, including the prohibition of applicant to the benefits of due process).

The very theory that pcr counsels are not held to a particular standard is without validity in this specific circumstance. Applicant has demonstrated, had pcr counsel, or trial counsel, performed within their duties and obligations in pursuit of the rights of this Applicant, there would be no need for this current action presently before this PCR Court. With that mindset, Applicant demands an evidentiary hearing.

CONCLUSION

WHEREFORE, this Applicant prays this PCR Court, for the foregoing arguments and conclusions of law, rescind its original Conditional Order of Dismissal, and order that an evidentiary hearing be scheduled at this PCR Court's earliest convenience.

July 31, 2020. Respectfully Submitted,


Gary Anthony White, Jr.
Q3-A-112 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

PRO SE APPLICANT

CONFLICT MEMORANDUM**TO:** Fielding Pringle**FROM:** April W. Sampson, Jason Chehoski**RE:** Anthony Morris (April W. Sampson), Gary White (Jason Chehoski)**DATE:** June 25, 2004

CHARGES: **Anthony Morris** (Unknown): (1) Kidnapping, (2) Kidnapping, Robbery, robbery while armed or allegedly armed with a deadly weapon; **Unknown**: (1) Kidnapping, (2) Armed Robbery, robbery while armed or armed with a deadly weapon, (3) Sale or delivery of pistol to, and possession by, persons unlawful; stolen pistol, (4) Armed Robbery, robbery while armed or allegedly armed with a deadly weapon;

WARRANT NUMBERS: **Anthony Morris:** H 761308, H 761305, H 761307; **Gary White:** H 669697, H 669596, H 669698, H 669699

LOCATION: **Anthony Morris:** Alvin S. Glenn Detention Center; **Gary White:** Alvin S. Glenn Detention Center

SOLICITOR: **Anthony Morris:** Dana Pellizzari; **Gary White:** Dana Pellizzari

RELEVANT FACTS FOR ASSESSMENT: White is caught fleeing the scene. Morris is implicated by a 3rd co-defendant, who has already been conflicted out of the office due to our representation of White. Neither White nor Morris has made a statement, but White and the 3rd co-defendant match the description and the videotape while Morris does not.

1701 MAIN STREET
POST OFFICE BOX 192
COLUMBIA, SC 29201

**RICHLAND COUNTY PUBLIC DEFENDER
RICHLAND COUNTY JUDICIAL CENTER**

PHONE
FAX (803) 799-1234
TDD # (803) 799-1234

November 19, 2019

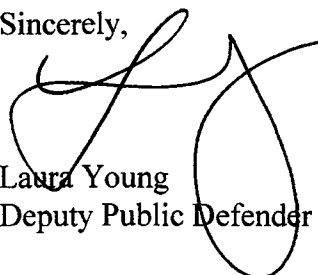
Mr. Gary A. White
Q3A112 #309726
Perry C.I.
430 Oaklawn Rd.
Pelzer, SC 29669

Dear Mr. White,

I am in receipt of your letter requesting a copy of your file from our office. Enclosed will find copies of the records you requested from us (there is a second envelope as well as the number of documents). To my knowledge, this includes everything in your file except tape that I did not copy.

Please let me know if I can be of further assistance.

Sincerely,



Laura Young
Deputy Public Defender

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.
#309726,

Applicant,

vs.

State of South Carolina,
Respondents.)

#2018-CP-40-0514

2020 AUG 14 AM 11:55
JEANNETTE W. MCBRIDE
C.C.P. & C.S.

CERTIFICATE OF SERVICE

I hereby certify that I have served the: (1) Applicant's Opposition To Conditional Order of Dismissal; (2) Exhibits; and (3) Certificate Of Service, upon Respondents counsel of record by depositing a copy of the same in the United States Mail, First Class postage affixed thereon, and addressed as follows:

CERTIFICATE OF SERVICE ADDENDUM SHEETS
PAGE [2], Gary Anthony White, Jr., #309726
July 31, 2020

SOUTH CAROLINA ATTORNEY GENERALS OFFICE
Michael D. Davidson, Esquire
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina
29211-1549;

CLERK OF COURTS OFFICE, RICHLAND COUNTY
FOR THE FIFTH JUDICIAL CIRCUIT
Jeanette W. McBride, Clerk
Post Office Box 2677
Columbia, South Carolina
29202-2677; and

ADMINISTRATIVE CIRCUIT COURT JUDGE
FOR THE FIFTH JUDICIAL CIRCUIT
Honorable Alison Lee, Judge
Post Office Box 2677
Columbia, South Carolina
29202-2677.

CERTIFICATE OF SERVICE ADDENDUM SHEETS
PAGE [3], Gary Anthony White, Jr. #309726
July 31, 2020

July 31, 2020

Respectfully Submitted,



Gary Anthony White, Jr.

Q3-A-112 #309726

Perry Correctional Institution

430 Oaklawn Road

Pelzer, South Carolina

29669

PRO SE APPLICANT

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.
#309726,

Applicant,

#2018-CP-40-0514

vs.

NOTICE OF MOTION AND
SECOND MOTION TO AMEND PCR
APPLICATION WITH ATTACHED
AMENDED ISSUES

State of South Carolina,
Respondents.)

NOTICE IS HEREBY GIVEN that, Gary Anthony White, Jr. #309726, pro se Applicant, pursuant to Rule 15(a) and (b) of the South Carolina Rules of Civil Procedures, SCRCP; Rule 71.1(d), SCRCP; and S.C. Code Ann. §17-27-90, seeks leave of this PCR Court to grant the relief sought herein by freely allowing this amendment to this currently pending PCR Application.

This motion is a proper vehicle, and mechanism, in which to preserve the attached issues so that the interest of justice may be had. This motion is not presented as a means of causing undue delay, economic strains nor waste the time of any party associated hereto, to include this PCR Court. It shall be

RICHLAND COUNTY
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JEANNETTE W. MCBRIDE
C.C.P. & G.S.

apparent to this PCR Court, after careful examination, that this issue has recently came to light; on or about June 2, 2020. (See attached hereto and incorporated herewith a true and accurate copy of Applicant's Affidavit).

Rule 15(a), SCRCP, provides: "A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served ... he may amend it at any time within 30 days after it is served Otherwise a party may amend his pleading by leave of the court ... and leave shall be freely given when justice so requires"

Rule 15(b), SCRCP, provides: " ... amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment"

S.C. Code Ann. §17-27-90, provides: "All grounds for relief available to an applicant under this chapter must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be basis for a subsequent application, **unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised** in the original, supplemental or amended application."

As this PCR Court is aware, Rule 15(b) broaden's the courts power to permit amendments to conform the pleadings to the evidence in accordance with S.C. Code ANn. §15-13-920; in which is necessary if the philosophy of the issue is to be consistent. The basis for freely permitting amendments during the litigation stages is further supported by the "plain error rule." South

Carolina appellate courts do not recognized the "plain error rule." Under which court in certain circumstances is allowed to consider and rectify an error not raised below by this Applicant. Dykemia v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); Kennedy v. S.C. Retirement System, 349 S.C. 531, 564 S.E.2d 322 (2001). "Our mandatory preservation requirements make it doubly important that litigants generally be freely allowed to file a motion to correct the deficiency within these stages." Elam v. S.C. Dep't. of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004).

The issue that is now presented to this PCR Court has recently been disclosed, and substantiated, by C. Rauch Wise, Esquire, in a phone conversation. The essence of the relationship between this Applicant, and Mr. Wise, is testified to in the attached Applicant's Affidavit. But, the issue that is now being sought to be amended to these proceedings could not have been substantiated or competently disclosed until June 2, 2020.

Applicant argues that this legislative intent, when our General Assembly promulgated and enacted §17-27-90, by including "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemented or amended application." The provision provides the necessary inclusion of any issue that failed to be properly raised, and furthermore, supports the philosophy of amending the pleading to preserve the issue. Applicant is of the belief, and stance, that this issue is meritorious and justice demands it be judicially adjudicated by this PCR Court, so that the minimum requirements of due process be adhered with.

The issue presently sought to be amended to these proceedings, and adjudicated by this PCR Court, has not been previously adequately, intelligently raised in any proceedings previously pursued. The initial PCR application that was filed August 5, 2009, and heard before the Honorable L. Casey Manning, Presiding Circuit Court Judge. (See White v. State, #2009-CP-40-5549). The issues that were purportedly raised in the original application were: (1) New Discovered evidence; (2) Ineffective assistance of trial counsel; (3) Ineffective assistance of trial counsel; (4) Co-defendant Anthony Morris retracted his trial testimony by way of a sworn statement: the statement itself weakened the States case against Mr. White; (5) Trial counsel was ineffective by allowing the State to present evidence in case on a charge that was dismissed at the start of trial; and (6) Trial counsel was ineffective by failing to pursue objection of jury charge of hand of one hand of all. By fail to pursue objection, counsel allowed the jury to give the charge without making a ruling on objected charge. On October 18, 2010, an evidentiary hearing was convened, and on August 31, 2011, the pcr action was dismissed by Order of Dismissal, and with prejudice.

During the course of the initial pcr action, Applicant is of the belief that the now sought issue to be amended to this application, and adjudicated before this PCR Court, was not adequately nor sufficiently investigated, presented or raised during those proceedings. It is now being presented in an effort to have the ends of justice met. Especially where there has now occurred a "provable", or means to substantiate Morris' original sworn statement provided in the initial pcr proceedings. This was the reasoning behind the issue being denied relief. Morris could not be found, allegedly, so that he could testify as to his statement.

Applicant respectfully makes demand that this PCR Court grant this amendment pleading, and an evidentiary hearing be convened into this matter. Applicant seeks fundamental fairness and that judicial harmony be afforded in this action. The relief sought in this amendment pleading is: (1) granting of Applicant's second amendment motion, as relates to this matter; and (2) order that an evidentiary hearing be convened, in open forum, so that these issues, arguments and applicable standards of law may be preserved for the record; and the next stage of appellate review.

FRAUD/EXTRINSIC FRAUD/FRAUD UPON THE COURT

In Evans v. Gunter, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct.App. 1988), one commentator for the Court of Appeals described "fraud upon the court" as "that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by offices of the court so that the judicial machinery cannot perform in the usual task of adjudicating cases that are presented for adjudication." (citing H. Lightsey, J. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE, 408 (2nd Ed. 1985)).

"Fraud upon the court," whatever else it embodies requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests of finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing, what can properly be characterized as a deliberate scheme to defraud, before relief from final judgment is appropriate" United State v. Buck, 281 F.3d 1336, 1342 (10th Cir. 2002)(quoting Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir. 1995). Other jurisdictions have described fraud upon the court as: "Generally speaking, only the most egregious misconduct ... fabrication of evidence by a party in which an attorney is implicated will constitute fraud on the court." Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 (5th Cir. 1978)(citing United States v. Intl. Telephone & Telegraph Corp., 349 F.Supp. 22, 29 (D.Conn. 1972). Fraud upon the court is a "serious allegation ... involving 'corruption of the judicial process itself.'" Cleveland Demolition Co, Inc. v. Azcon Scrap

Corp., 827 F.2d 984, 986 (4th Cir. 1987)(quoting In re Witney-Forbes, 770 F.2d 692, 698 (7th Cir. 1985).

This is not simply a case of a judgment obtained with the aid of a witness ... who is alleged, and admitted, to be guilty of perjury ... it is alleged that this was a deliberately planned and cleverly executed scheme to offer suborned testimony to defraud "not only the the trial court, but of all the appellate courts thereafter ... it is believed that there has arisen a tampering with the administration of justice in a manner indisputably shown here, and has the propensity in which to exceed more than a single litigant. It is a wrong against the very institute as set up to protect and safeguard the public, especially where fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public willfully demands that the courts of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997 (1944). Extrinsic fraud "induces a person not to present a case or deprives a ~~person~~ of the opportunity to be heard." Chewning v. Ford Motor Co., 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003)(citing Hilton Head Ctr. of South Carolina v. Public Servs. Comm'ns, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1981). Furthermore, there is not statute of limitations when a party seeks to set aside a judgment due to fraud upon the court. Hagy v. Pruitt, 339 S.C. 425, 529 S.E.2d 714 (2000)(court has the inherent authority to set aside a judgment on the ground of extrinsic fraud in spite of facially applicable statute of limitations). In order to secure equitable relief on the basis for fraud, the fraud must be extrinsic. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951).

Applicant is of the position that the following matter, would for good cause shown, demonstrate relief is necessary for the following justifications.

10(c). Trial counsel, and Post-Conviction Relief counsel ("PCR Counsel"), demonstrated deficient performances, in violation to the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, (and it's progeny Article(s) I, §3; and I, §14, of the South Carolina Constitution); whereas, at critical stages of the criminal proceedings, trial counsel failed to diligently and competently investigate and discover the [p]lea bargain/agreement obtained by, Anthony Morris ("Morris") (Co-defendant) that Morris benefited from due to the dismissal of pending criminal charges and allegations in exchange for Morris's perjured testimony during the course of the trial; PCR Counsel failed to investigate and uncover this claim for preservation and adjudication during the course of the original pcr proceedings.

11(c). The matter that is forthcoming in this issue is relevant to the subornation of perjurious testimony that had the propensity in which to limit or deprive trial counsel the ability to impeach this Co-defendant, Morris, under Rule 609, of the South Carolina Rules of Evidence, SCRE.

At the time that Morris testified for the Prosecution, there existed criminal allegations outstanding, that were not associated with the criminal matter now before this PCR Court. At no time during any proceeding were the disposition of the additional criminal offenses produced or disclosed prior to or after the suborned testimony was offered.

On June 2, 2020, Applicant had an opportunity to speak, personally, with, C. Rauch Wise, Esquire, via telephone communications. Mr. Wise would inform Applicant that there has occurred between Mr. Wise, and Morris, a conversation concerning the undisclosed plea agreement that had Morris entered into for his prejured testimony. The failure to disclose the this plea deal was very prejudicial and harmful to Applicant's trial. Applicant believes that, had trial counsel been more diligent as to the investigation of the former charges, and what advantages that Morris received, such as, dismissal with no disposition, nolle prosequied; as a means of ascertaining any bias that could have been used for impeachment evidence. Such lack of investigation and defense tactics caused trial counsel to waive or fail to pursue the "considerable latitude" that's allowed "to defense counsel in criminal cases" in the cross examination of the adverse witness for the purpose of testing bias." State v. Brown, 303 S.C. 169, 171, 399 S.E.2d 593, 594 (1991). Our courts have followed the "general rule" that "anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to accorded his testimony," "so that "on cross-examination, any facts may be elicited which tends to show interest, bias, or partiality' of the witness." State v. Brweington, 267 S.C. 97, 101, 226 S.E.2d 249, 250 (1986)(quoting 98 C.J.S. WITNESSES, §§ 460, 560a). "Rule 608(c), [of the South Carolina Rules of Evidence] 'prserves[this longstanding] South Carolina precedent.'" State v. Sims, 348 S.C. 16, 25, 568 S.E.2d 518, 523 (2002). (Rule 608(c), SCRE: "Bias, prejudice of any

motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise deduced)." The failure of Morris, or the prosecution to disclose the existence of a plea deal, and what occurred with the pending criminal charges that were unrelated to Applicant's criminal case, demonstrates that when Morris testified and denied that any form of plea bargain/agreement had been reached for the subornation of this testimony; especially where the prosecution had coerced Morris into falsely swearing and offering perjured testimony about the evidence and events of the case and the plea deal, creates a clear showing that there has occurred a gross miscarriage of justice that has two sides relating to this deficient performance well below Sixth Amendment principles, that cost Applicant the ability or afforded him the right to present his case in it's entirety...

The second part arises under a claim that this Prosecutor is an officer of the courts, and thereby is held to a heightened standard as to the execution of that office. Synanon Found, Inc. v. Bernstein, 503 A.2d 1254 (D.C. 1986)(attorney subornation of perjury and false statement to trial court constitute a fraud upon the court); In matter of Goodwin, 279 S.C. 274, 305 S.E.2d 578. (1983)(attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony).. As alleged, there has occurred the procurement and offering of perjured testimony during the course of this criminal trial that has prejudiced, and poisoned Applicant's rights to a fair and impartial trial.

The impact of this suborned testimony, interjected into the trial, as relates to guilt, demonstrates that without this perjured testimony it is argued that the results as relates to the outcome of the trial would have been different and justice would have been satisfied.

The presentation that occurred within the initial pcr proceedings only addressed a "retraction" of Morris' testimony that was perjuredly offered at trial. The complications that arose out of that period of time was this sworn statement was offered, Applicant's appellate/trial counsel attempted to introduce the perjured testimony at the direct appeal stage. The Court of Appeals refused to entertain the matter due to it not being raised in the lower or trial court. It had not been preserved for presentation to this court. Furthermore, Morris could not be located at the time of the initial pcr proceedings. This caused the sworn statement to be discarded due to the inability to have Morris testify as to it's validity.

The failure to raise the claim as a subornation of perjury by the prosecution, where [she] coerced Morris into admitting, falsely and fraudulently, to a criminal act that he, or Applicant, were not guilty of. Such an allegation such as this one should cause this PCR Court to examine the testimony that was given in the sworn statement not only as a basis of retraction, but as one of perjury and deceit. Such a claim raises the fundamental fairness of the proceeding and it causes a grave injustice to occur. This in essence causes prejudice and harm to this Applicant's rights to fairness and judicial impartialty. Surely such a demonstration of this allegation of fraud upon the court, that has been committed by an officer of the court, i.e., prosecutor; and where trial counsel failure to adequately and competently investigate such a claim definitely shows that trial counsels performance fell well below acceptable standards; PCR Counsel fail to investigate and include these matters depriving Applicant to the most minimal of due process protections.

OVERWHELMING EVIDENCE OF GUILT

There exists questionable facts in evidence that would demonstrate that there is no "overwhelming evidence of guilt" associating this Applicant with the allegations of an Armed Robbery. Especially where there exists facts that contradict the evidence that was before the jurors.

[In our first analogy], it is essential that we view the facts that existed at the time of trial which are relevant to this claim. There exists no video recordings which would show that Applicant brandished a weapon, i.e., hand gun, placing the victim/employee on notice that a threat or menace was occurring. The video recordings that were confiscated by Law Enforcement did not demonstrate nor establish this Applicant had a handgun to perfect the crime of Armed Robbery.

[In our second analogy], there exists several discrepancies in the Incident Reports that did not reflect the facts in evidence, which would have caused a reasonably minded person to find differently had they been presented to the jurors. In one of the arresting officers statements, Applicant was discovered asleep, or passed out, with a hand gun in his right hand. The second arresting officer stated that Applicant was discovered with a hand gun in his left hand. These were the two officers, one with the canine unit, who pursued Applicant into the wooded area and initially discovered him.

Please further note that there was no finger/palm prints on the alleged hand gun, that these two officers stated Applicant was "clutching" or had a death grip on when he was

discovered passed out. Surely, had Applicant been in possession of the alleged hand gun, there would have been forensic evidence, finger/palm prints, that would have established such an actual and/or constructive possession. Trial counsel failed to pursue and challenge the lack of forensic evidence which would ~~have~~ established custodial possession of the purported hand gun. PCR Counsel was at an advantage, in so much that, had he investigated the case/manual file, and the prosecutions trial documents, it would have been discovered that such an issue existed and should have been amended into the record for the court to review. On the part of either of these counsels, i.e., trial or pcr, to fail to procure an expert in finger/palm print evidence, to explain that it was almost impossible to clutch or handle a hand gun without leaving some form of finger/palm print ... especially when the Law Enforcement explicitly stated, and recorded, the manner in which Applicant was found in possession of the alleged weapon. Cf. Ard v. Catoe, 372 S.C. 318, 642 S.E.2d 590 (2007)(counsel was ineffective for failing to obtain an expert in Gun Shot Residue, where Applicant tested negative for GSR)(citing The American Bar Association (ABA) Guidelines For Appointment And Performance Of Defense Counsel In Death Penalty Cases, reprinted in 31 Hofstra L. Rev. 913, 1015 (2003)("counsel at every stage ~~have~~ an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty ..."); also ("with the assistance of appropriate experts, counsel should [] aggressively re-examine all of the government's forensic evidence, and conduct appropriate analysis of all other available forensic evidence"). Id., at 1020.

Applicant is of the belief that the prosecution, in a ploy to hide or confuse the evidence, had the trial court dismiss the weapons charge prior to trial, because had Applicant's trial counsel been more alert and conducted a more vigorous investigation into the forensic evidence, or lack thereof, would have made a difference as related to the evidence the prosecution presented at trial. Applicant believes that the prosecution dealt a deliberate blow by striking the weapon charge, they would have had to establish the possession of the weapon and there was nothing collected or disclosed that would have established the actual and/or constructive possession. This would have caused a "hole" in the prosecutions case that would have been favorable to this Applicant. It is the position of this Applicant that the outcome would have been different and would have been advantageous to his proving innocence.

[In our third analogy], the statement of the prosecution was that Applicant was "fleeing" or caught, fleeing from the scene. It is not disputed that Applicant fled from the automobile that Morris and his other co-defendant, which was parked in the parking lot of the store; due to the fact that, when the automobile was parked, his two purported co-defendants attempted and/or succeeded to rob Applicant. By the evidence that was confiscated by Law Enforcement, and listed in their inventory sheets, Applicant's personal property was found in the back seat of this automobile, i.e., watch, jewelry, cell phone, etc., that he had been forced to hand over before the opportunity arose where Applicant could flee from this area. These three individuals had been out on the town, at a "strip club", and had been drinking heavily. When Applicant was seen "fleeing" the scene, the observation had to have occurred in the parking lot area. Applicant resided approximately a block from the store that his co-defendants had stopped at, and in the alcoholic condition

and stupor, that he found himself in, his natural inclination was to try and get home. Yet, as was evident by his condition when discovered by Law Enforcement, Applicant was so intoxicated that he passed out. Law Enforcement did not even perform any form of sobriety test on him to determine his condition at the time. This was a fatal error on the part of trial counsel to emphasize the condition and reasoning on the part of Applicant for his actions at the time; Applicant abruptly leaving the scene as portrayed by the prosecution that night was not the only plausible explanation of the events that occurred at the time.

[In our fourth analogy], we must look to the issue as it is brought fourth. By a sworn statement that had been voluntarily provided by Morris, (See Appendix, page 585, dated July 15,2005; and Appendix, page 686, dated July 15,2005)(as recorded page 585 is a types copy of the original sworn statement of page 686)(Attached hereto and incorporated herewith a true and accurate copy marked as Exhibit(s) (A) and (B)). In this sworn statement, Morris testifies to the facts that he falsely and fraudulently testified for the prosecution concerning: (1) the plea agreement/bargain that had been reached, prior, to the testimony given at trial; and (2) about Applicant's actual innocence where Morris perjured himself, at the will of the prosecution, where Morris was not even a participant in the criminal act. The subornation of perjured testimony by coercion tactics by the prosecution is sufficient grounds in which to establish an "invidiously discriminatory act or practice" that would warrant reversal. Given the precise nature of this matter, there can be no question that this case should be held over for an evidentiary hearing, and Applicant granted the relief sought herein as a new trial.

[In a fifth analogy], there has come to light a statement that was offered by, Mark Partman #288588, that is dated Janaury 9,2013, (see attached hereto and incorporated herewith a true and accurate copy, marked Exhibit [C], with a typed copy for legibility), which provides pertinent information relating to the issue of the non-disclosure of the plea bargain/agreement and the perjured testimony, which is essential in the establishing of the facts of this case. It clearly demonstrates that there were misrepresented material facts in evidence and testimony, which constitutes fraud, or extrinsic fraud. This statement was served upon Applicant by, David Alexander, Esquire, Appellant Defender, on August 28,2020. (See attached hereto and incorporated herewith a true and accurate copy of correspondence dated August 24,2020, marked Exhibit [D]; and envelope served in dated August 28,2020, marked Exhibit [E]).

Applicant is of the impression that Mr. Alexander has had this statement for sometime, and Applicant has attempted to receive any form of information or documentation that was pertinent to the claims within this amendment pleading. The statements, and its subject matter, are relevant to this current circumstance where it has the propensity to prove by a preponderance of the evidence that the claims brought forth are due the relief sought herein.

Since this information as relates to Partman's statement, that is proof of Morris' perjured testimony, clearly establishes the necessary proof; and where Mr. Wise can verify, (as an officer of the court), about the information which Mr. Wise provided on June 2,2020, should be sufficient to have this PCR Court, in the interest of justice, grant the evidentiary hearing.

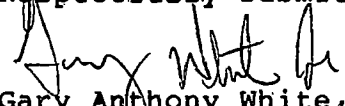
This matter should be allowed to be amended to this current application and an evidentiary hearing convened at this PCR Court's earliest convenience. Applicant believes this case warrants reversal.

CONCLUSION

WHEREFORE, Applicant prays this PCR Court freely grant leave to amend this second set of claims to be included in this application, and further, order that an evidentiary hearing be convened in these matters, where these matters are relevant to this case and its issues and been recently disclosed.

September 14, 2020

Respectfully Submitted,


Gary Anthony White, Jr.
Q3-A-112 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

PRO SE APPLICANT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND) FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.
#309726,

Applicant,

#2018-CP-40-0514

vs.

APPLICANT'S AFFIDAVIT
SUPPORT OF SECOND
TO AMEND PCR APPLICATION

State of South Carolina,
Respondents.

17 APR 11
W. MCBRIDE
P. & G. S.

PERSONALLY appeared before me, Gary Anthony White, Jr. #309726, pro se Applicant, who being duly sworn under penalty of perjury, deposes and says:

1). I am, Gary Anthony White, Jr. #309726 (hereafter, "Affiant"), the pro se Applicant to this Post-Conviction Relief ("PCR") Application, and the Affiant offering this sworn testimony.

2). As the record before this PCR Court demonstrates, On February 20, 2020, this Affiant filed a Motion to Amend, seeking to litigate and adjudicate an issue relating to actual conflict of interest. On November 19, 2019, Affiant served his case/manual file that had been amassed by the Public Defenders Office during it's representation in criminal proceedings. This is when the first disclosure occurred about and give rise under due process to have the actual conflict of interests issue included in this case for adjudication.

3). This second issue has been brought Affiant's attention due to a communication with, C. Rauch Wise Esquire, 305 Main Street, Greenwood, South Carolina 29646. This 'communique' occurred on or about June 2, 2020.

A purported relationship with Mr. Wise began around August 2018. Affiant had been of the impression that he had retained Mr. Wise to represent him during the course of pcr proceeding. For the purpose of this record, at no time has Mr. Wise given notice to this PCR Court, or filed such a notice with the Clerk of Courts Office, notified the Respondents concerning this alleged representation. Affiant executed a retainer/contract with Mr. Wise, but Mr. Wise has yet to "come on board."

It is evident by the record before this PCR Court that Affiant has been laboring pro se because when the Respondents finally answered, denied or asserted their purported affirmative defenses, on June 22, 2020, Respondents served their Return and Motion to Dismiss upon this Applicant, and not their counsel of record. And in their Return, Respondents argued that no attorney should be appointed and the matter should be summary Dismissed.

Affiant brings forth these facts in testimony in an effort to demonstrate that there has been several communiques with Mr. Wise, and the last one was the disclosure that is in this second amendment.

On June 2, 2020, Affiant had a conversation with Mr. Wise informing him that, Anthony Morris ("Morris") contacted Mr. Wise with relevant information relating to the issue now before this PCR Court. It was during this communication that Mr. Wise informed Affiant that Morris has committed perjury during Morris' testimony as related to a plea bargain/agreement. In fact, it was Mr. Wise's statement to this Affiant that Morris had been coerced into giving perjured testimony. The coercion occurred where Morris had prior arrests and charges pending which would be dismissed for Morris's testimony. At this time Mr. Wise informed Affiant that this would be good for his case. Mr. Wise informed Affiant he would be getting in touch with Morris so that an Affidavit could be obtained from Morris on this subject matter.

This was the last communication that Affiant has had with Mr. Wise, due to Affiant's belief that Mr. Wise is not operating as an advocate as is relevant to his interests in this case. Affiant would require that a subpoena be issued for Morris, and Mr. Wise so that actual testimony may be provided before this PCR Court.

4). Affiant attests that all facts and information provided in this sworn Affidavit is true and accurate, and Affiant is willing to offer testimony within an evidentiary hearing to verify and support these facts.

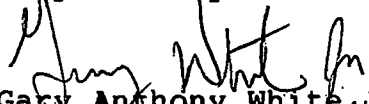
5). Affiant has recently been provided a copy of statement that was offered by, David Alexander, Esquire, Appellant Defender, relating to a conversation which took place in the Richland County Detention Center, between Anthony Moore and his cell mate, Mark Partman. It is being offered as proof of the issues and claims contained within this second amendment pleading.

6). This Affidavit is submitted pursuant to Rule 43(e) and (f), of the South Carolina Rules of Civil Procedure, SCRPC; and Rule 603, of the South Carolina Rules of Evidence, SCRE.

AFFIANT SAYETH NO FURTHER

September 14, 2020

Respectfully Submitted,


Gary Anthony White, Jr.
Q3-A-112 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

PRO SE APPLICANT

STATE OF SOUTH CAROLINA)
COUNT OF RICHLAND) IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.,
#309726,

Applicant,

#2018-CP-40-0514

vs.

CERTIFICATE OF SERVICE

State of South Carolina,
Respondents.

JEANNETTE W. MORRIS
C.C.P. & G.S.

7 AM 11:11

ED 300

I, the undersigned, hereby certify that I have served the: (1) Notice Of Motion And Second Motion To Amend PCR Application With Attached Amended Issues; (2) Exhibit(s) (A) and (B); (3) Applicant's Affidavit In Support Of Second Motion To Amend PCR Application; and (4) Certificate Of Service, up Respondents counsel of record by depositing a copy of the same the United States Mail, First Class postage affixed thereon, and addressed as follows:

CERTIFICATE OF SERVICE ADDENDUM SHEETS
PAGE [2], Gary Anthony White, Jr. #309726

~~August~~ 14, 2020

Sept.

SOUTH CAROLINA ATTORNEY GENERAL OFFICE
Micael D. Davdison, Esquire
Assistant Deputy Attorney General
Post Office Box 11549
Columbia, South Carolina
29211-1549;

CHIEF ADMINISTRATIVE CIRCUIT COURT JUDGE
FOR THE FIFTH JUDICIAL CIRCUIT
Honorable Alison Renee Lee, Judge
Post Office Box 2677
Columbia, South Carolina
29202-2677; and

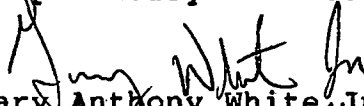
CLERK OF COURTS OFFICE, RICHLAND COUNTY
FOR THE FIFTH JUDICIAL CIRCUIT
Jeanette W. McBride, Clerk
Post Office Box 2677
Columbia, South Carolina
29202-2677.

CERTIFICATE OF SERVICE ADDENDUM SHEETS

PAGE [3], Gary Anthony, Jr. #309726
September 14, 2020

September 14, 2020

Respectfully Submitted,



Gary Anthony White, Jr.

Q3-A-1120 #309726

Perry Correctional Institution

430 Oaklawn Road

Pelzer, South Carolina

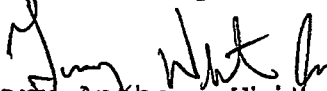
29669

PRO SE APPLICANT

CERTIFICATE OF SERVICE ADDENDUM SHEETS
PAGE [3], Gary Anthony White, Jr. #309726
August 14, 2020

~~August~~ ^{SEPT} 14, 2020

Respectfully Submitted,


Gary Anthony White, Jr.
Q3-A-112 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

PRO SE APPLICANT

Gary Anthony White, Jr.
Q3-A-112 #309726
Perry Correctional Institution
430 Oaklawn Road
Pelzer, South Carolina
29669

PRO SE APPLICANT

CLERK OF COURTS OFFICE, RICHLAND COUNTY
FOR THE FIFTH JUDICIAL CIRCUIT
Jeanette W. McBride, Clerk
Post Office Box 2677
Columbia, South Carolina
29202-2677

RE: FILING OF ENCLOSED MATTERS.
White v. State, #2018-CP-40-0514

Clerk,

Please find enclose for filing:

- 1). Notice Of Motion And Second Motion To Amend
PCR Application;
- 2). Exhibit(s) (A) and (B);
- 3). Applicant's Affidavit In Support Of ~~S-~~
Motion To Amend PCR Application; and
- 4). Certificate Of Service.

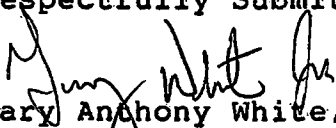
2020 SEP 17 AM 11:11
FILED
JEANNETTE W. MCBRIDE
C.C.P. & G.S.

If I may be of any further assistance to this Office, in these matters, please do not hesitate to contact me. Thank you for this Office's time and attention to these matters.

September 14, 2020

Respectfully Submitted,

rds/GAW


Gary Anthony White, Jr.

Q3-A-112 #309726

cc: FILE

Perry Correctional Institution

CLERK

430 Oaklawn Road

LEE

Pelzer, South Carolina

DAVIDSON

29669

PRO SE APPLICANT

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)

Gary A. White, Jr., # 309726)

Applicant)

v.)

State of South Carolina,)

Respondent.)

IN THE COURT OF COMMON PLEAS
 FOR THE FIFTH JUDICIAL CIRCUIT

Case No.: 2018-CP-40-0514

FINAL ORDER OF DISMISSAL

RICHLAND COUNTY
 FILED
 2021 JUL 20 AM 11:46
 C.C.P. 5.5, 5.10

This matter comes before the Court pursuant to an application for post-conviction relief filed by Applicant Gary A. White, Jr. on January 24, 2018. Respondent made its Return and Motion to Dismiss on June 19, 2020, requesting the application be summarily dismissed because it was untimely, successive, and failed to establish a *prima facie* case of newly discovered evidence.

Pursuant to this request, and after reviewing the pleadings in this matter and all of the records attached thereto, this Court issued a Conditional Order of Dismissal filed June 26, 2020, provisionally denying and dismissing this action, while giving Applicant twenty days from the date of service of said Order in which to show why the dismissal should not become final. Attached to this Final Order and incorporated herein by reference is an Affidavit of Service dated April 3, 2021, serving the above-mentioned Conditional Order of Dismissal on the Applicant.

Applicant filed response on August 14, 2020, and mailed again April 21, 2021, titled "Applicant's Opposition to Conditional Order of Dismissal." In his response, Applicant argues he served a set of written interrogatories upon the Chief Circuit Public Defender in February of 2020 seeking information relevant to the his conflict of interest claim. Applicant additionally states in April of 2020, he served a motion to compel the Chief Public Defender to answer his written interrogatories. Applicant argues the failure to conduct an evidentiary hearing on the motion to

compel is therefore damaging to his case as it deprives him his right to discovery. Applicant argues the Public Defender's office is an adverse party in his PCR proceedings.

Applicant alleges a conflict memorandum received from the Richland County Public Defender's Office constitutes newly discovered evidence of an actual conflict of interest such that an evidentiary hearing is required. This Court disagrees. An applicant requesting a new trial based on after-discovered evidence following a conviction must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had;
- (2) Has been discovered since the trial;
- (3) Could not by the exercise of due diligence have been discovered before the trial;
- (4) Is material to the issue of guilt or innocence; and,
- (5) Is not merely cumulative or impeaching.

Hayden v. State, 278 S.C. 610, 611, 299 S.E.2d 854, 855 (1983) (citing *State v. Caskey*, 273 S.C. 325, 256 S.E.2d 737 (1979)).

In his response, Applicant argues the conflict memorandum demonstrates an actual conflict of interest existed at the time of his trial and deprived him of his Sixth Amendment right to effective assistance of counsel. The conflict memorandum at issue outlines that on June 25, 2004, Applicant's co-defendant Anthony Morris was assigned to April W. Sampson, Esquire, and Applicant was assigned to Jason Chehoski, Esquire. The conflict memorandum thereafter briefly provides information of the charges, warrant numbers, locations, assigned solicitors, and relevant facts for assessment.

"An actual conflict of interest occurs where an attorney owes a duty to a party whose interests are adverse to the defendant's." *Staggs v. State*, 372 S.C. 549, 551, 643 S.E.2d 690, 692 (2007). Our Supreme Court has further stated that a conflict of interest occurs when "a defense attorney places himself in a situation inherently conducive to divided loyalties." *Lomax v. State*,

379 S.C. 93, 101, 665 S.E.2d 164, 168 (2008). Until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for a claim of ineffective assistance of counsel arising from multiple representation. *Langford v. State*, 310 S.C. 357, 359, 426 S.E.2d 793, 795 (1993); *see also Burger v. Kemp*, 483 U.S. 776, 783 (1987)). “The mere possibility defense counsel may have a conflict of interest is insufficient to impugn a criminal conviction.” *State v. Gregory*, 364 S.C. 150, 152–53, 612 S.E.2d 449, 450 (2005).

Here, the Court finds Applicant’s claim is without merit because an actual conflict of interest did not exist. This Court notes that Hans Pauling, Esquire, represented Applicant’s co-defendant during his plea, evidenced by the sentencing sheets in that matter. Applicant himself was represented by LaNelle Durant and Stacey Ownings at trial, differing from the conflict memorandum’s assignment of Jason Chehoski. The record therefore reflects that no party listed in the memorandum ultimately represented Applicant or his co-defendant. Specifically, Applicant’s trial counsel were not referenced anywhere within the memorandum. Accordingly, it is unclear exactly what Applicant alleges the actual conflict of interest was, and how the conflict memorandum is dispositive of this when none of the attorneys that represented him and his co-defendant were referenced. Ultimately, this Court finds Applicant has failed in his burden to show his attorneys actively represented conflicting interests.

Moreover, discovery of this memorandum does not constitute newly discovered evidence such that Applicant should be granted relief. As stated above, the conflict memorandum does not establish any actual conflict of interest. Additionally, the memorandum contains no information material to Applicant’s guilt or innocence, and would not likely change the result of a new trial. Before the Court will hold an evidentiary hearing, Applicant must make a *prima facie* showing he is entitled to relief. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v.*

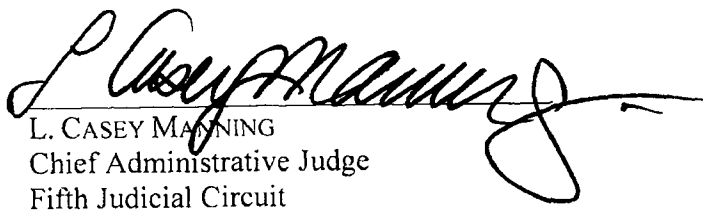
State, 245 S.C. 385, 140 S.E.2d 784 (1965). Applicant has failed to make such showing he is entitled to relief based on the information set forth above; therefore, he is not entitled to an evidentiary hearing in the matter.

This Court has reviewed Applicant's response to the Conditional Order of Dismissal in its entirety, in conjunction with the original pleadings, and finds a sufficient reason has not been shown why the Conditional Order of Dismissal should not become final.

IT IS THEREFORE ORDERED that, for the reasons set forth in this Court's Conditional Order of Dismissal, the application for post-conviction relief is hereby denied and dismissed with prejudice.

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

AND IT IS SO ORDERED this 16 day of July, 2021.


L. CASEY MANNING
Chief Administrative Judge
Fifth Judicial Circuit

Columbia, South Carolina

Deferred Sentence
J. Lloyd 6-9-05

STATE OF SOUTH CAROLINA

COUNTY OF

Richland

AKA:

Race: B Sex: M Age: 19DOB: 9/1/85 SS#: [REDACTED]Address: [REDACTED] Garners Ferry RdCity, State, Zip: Col. SC 29209DL# [REDACTED] SID# [REDACTED]

IN THE COURT OF GENERAL SESSION

INDICTMENT/CASE#:

04

-GS-

4038

AW#:

Date of Offense:

S.C. Code §:

CDR Code #:

H 7613054/19/0416-11-330161113☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Armed Robberyin violation of §16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 011319☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The pleas is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Barbara A. Scott
SolicitorAnthony Morris
DefendantWanda Paul
Attorney for DefendantWHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,for a determinate term of 13 days/months/years or ☐ under the Youthful Offender Act not to exceed yearand/or to pay a fine of \$; provided that upon the service of days/months/years and/or paymentof \$; plus costs and assessments as applicable*; the balance is suspended with probation for

months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 6-17-05☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

PTUP

 days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther:

Recipient:

*Fine: \$ \$14-1-206 (Assessments 107.5%) \$ \$14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00\$14-1-211(A)(2) (DUI Surcharge) \$100 \$ \$56-5-2995 (DUI Assessment) \$12 \$ \$35.13 (Public Def/Prob) \$500 \$ \$73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00\$33.7, 1B TP (Drug Court Surcharge) \$100 \$ \$50-21-114(BUI Breath Test Fee) \$50 \$ \$56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 3% to County (if paid in installments) \$ 2.75TOTAL \$ 128.75☐ Appointed PD or appointed other counsel, \$200

Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

2111316-17-05

Court Reporter:

R. Tracy SheppardBarbara A. ScottR. E. L. R. & C. E.

Deferred Sentence
6-9-05
J. Lloyd

987

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Richland

VS.

AKA: Anthony T. Morris

Race: 3 Sex: [REDACTED]

DOB: [REDACTED]

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

04

INDICTMENT/CASE#:

GS-

40

3850

A/W#:

H 761307

Date of Offense:

4/19/04

S.C. Code §:

16-11-330(A)

CDR Code #:

0113

☐ CASE RESTORED

SENTENCE

☒ PLEA

☐ TRIAL

In disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADS

TO: Armed Robbery

in violation of § 16-11-330(A) of the S.C. Code of Laws, bearing CDR Code # 011319

☐ NON-VIOLENT

☒ VIOLENT

☐ SERIOUS

☐ MOST SERIOUS

☐ 17-25-45

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.

The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ANVEST:

James D. Cox

Solicitor

Anthony T. Morris

Defendant

James D. Cox

Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 13 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____ months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 6-17-05

☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine:	\$
\$14-1-206 (Assessments 107.5%)	\$
\$14-1-211(A)(1) (Conv. Surcharge)	\$100 \$ 100.00
\$14-1-211(A)(2) (DUI Surcharge)	\$100 \$
\$56-5-2995 (DUI Assessment)	\$12 \$
\$ 35.13 (Public Def/Prob)	\$500 \$
\$73.3, 1B TP (Law Enforce. Funding)	\$25 \$ 25.00
\$33.7, 1B TP (Drug Court Surcharge)	\$100 \$
\$50-21-114(BUI Breath Test Fee)	\$50 \$
\$56-5-2942(J) (Vehicle Assessment)	\$40/ea \$
3% to County (if paid in installments)	\$ 3.75
TOTAL	\$ 122.75

Barbara A. Scott / PF

Clerk of Court/ Deputy Clerk

Court Reporter: Sheppard

ATTEST
A TRUE COPY

Barbara A. Scott

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ _____ beginning

\$ _____ paid to Public Defender Fund

Other:

☐ Appointed PD or appointed other counsel; \$35.13 TP Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

21113
6-17-05

Deferred Sentence

6-9-05

STATE OF SOUTH CAROLINA

COUNTY OF

STATE

VS.

AKA:

Race:

Sex:

Age:

DOB:

SS#:

Address:

City, State, Zip

DL#

SID#

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#:

A/W#:

Date of Offense:

S.C. Code §:

CDR Code #:

☐ CASE RESTORED

SENTENCE

☒ PLEA ☐ TRIALIn disposition of the said indictment comes now the Defendant who was ☐ CONVICTED OF or ☒ PLEADSTO: Kidnappingin violation of § 16-3-910 of the S.C. Code of Laws, bearing CDR Code # 0101915☐ NON-VIOLENT☒ VIOLENT☐ SERIOUS☐ MOST SERIOUS☐ 17-25-45The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury.The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Vanessa O. Corp
SolicitorAnthony T. Morris
DefendantMarva Parley
Attorney for Defendant

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center, for a determinate term of 1.3 days/months/years or ☐ under the Youthful Offender Act not to exceed years and/or to pay a fine of \$; provided that upon the service of days/months/years and/or payment of \$; plus costs and assessments as applicable*; the balance is suspended with probation for months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of which are incorporated by reference.

☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 6-17-05☒ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the Department of Corrections.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Heard, ☐ Waived, ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ set by SCDPPPS

Recipient:

*Fine: \$ §14-1-206 (Assessments 107.5%) \$ §14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00§14-1-211(A)(2) (DUI Surcharge) \$100 \$ §56-5-2995 (DUI Assessment) \$12 \$ § 35.13 (Public Def/Prob) \$500 \$ §73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00§33.7, 1B TP (Drug Court Surcharge) \$100 \$ §50-21-114(BUI Breath Test Fee) \$50 \$ §56-5-2942(J) (Vehicle Assessment) \$40/ea \$ 3% to County (if paid in installments) \$ 3.75TOTAL \$ 128.75Barbara A. Scott/PT
Clerk of Court/ Deputy ClerkCourt Reporter: R. Tracy Sheppard

A TRUE COPY

PTUP

days/hours Public Service Employment

Obtain GED

Attend Voc. Rehab. or Job Corp.

May serve W/E beginning

Substance Abuse Counseling

Random Drug/Alcohol Testing

Fine may be pd. in equal, consecutive weekly/monthly

pmts. of \$ beginning\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel, \$35.13 TP
Requires \$500 be paid to Clerk during probation.

PRESIDING JUDGE

Judge Code:

Sentence Date:

WIT

(S) INV. GLENN EULLOCK - CPD

ARREST WARRANT NUMBER

H761305

ACTION OF GRAND JURY

TRUE BILLForeperson of Grand Jury
Date:**JUL 21 2004**

VERDICT

Foreperson of Petit Jury
Date:

CKET N. 101

The State of South Carolina
County of Richland**COURT OF GENERAL SESSIONS****JULY TERM 2004****104****THE STATE**
vs.**ANTHONY MORRIS****Indictment for****ARMED ROBBERY**
SC Code: 16-11-330(A)
CDR Code: 0139
Class FEL-A(V)

After being fully advised as to my

Legal right to be heard by
to the Grand Jury.

Defendant

I Anthony Morris
hereby appear in my own proper person and plead
guilty to the within indictment or toAnthony Morris
Defendant

Witness:

C.C.C. PLS. AND G.S.

A TRUE COPY

Barbara L. Pickett
C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Anthony Morris did in Richland County on or about April 19, 2004, commit robbery by feloniously taking from the person or presence of J. Gwen Anthony by means of force or intimidation goods or monies of Circle K, such goods or monies being described as US Currency and/or Lottery tickets and/or alcoholic beverages, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

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


WARREN B. GIESE, SOLICITOR

991

WITNESSES

(S) INV. GLENN BULLOCK - CPD

ARREST WARRANT NUMBER

H761307

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date:

JUL 21 2004

VERDICT

Foreperson of Petit Jury
Date:

2004 JUL 20 03-40

The State of South Carol

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2004

104

THE STATE
vs.

ANTHONY MORRIS

Indictment for

ARMED ROBBERY

SC Code: 16-11-330(A)

CDR Code: 0139

Class FEL-A(V)

After being fully advised to my

waive p 991
to the Jury.

Defendant

I Anthony Morris
hereby appear in my own proper person and plead
guilty to the within indictment or to

Anthony Morris
Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEN
A TRUE COPY

Barbara L. Scott
C.C.C. PLS. AND G.S.

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF RICHLAND)

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

ARMED ROBBERY

That Anthony Morris did in Richland County on or about April 19, 2004, commit robbery by feloniously taking from the person or presence of J. Gwen Anthony by means of force or intimidation goods or monies of J. Gwen Anthony, such goods or monies being described as a wallet and/or keys, with the intent to deprive the owner permanently of such property, while armed with a pistol, dirk, slingshot, metal knuckles, razor, or other deadly weapon, or while alleging, either by actions or words, that he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon. All in violation of SC Code of Laws § 16-11-330(A).

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


WARREN B. GIESE, SOLICITOR

NESSES

(S) INV. GLENN BULLOCK - CFI

- ARREST WARRANT NUMBER

DP04334

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

JUL 21 2004

VERDICT

Foreperson of Petit Jury

Date:

2004-GS-4 508

The State of South Carolina

County of Richland

COURT OF GENERAL SESSIONS

JULY TERM 2004

104

THE STATE
vs.

ANTHONY MORRIS

Indictment for
KIDNAPPING

SC Code: 16-3-910

CDR Code:0095

Class FEL/A(V)

993

Being advised as to my
rights, I hereby waive presentment
to the Grand Jury.

Defendant

I, Anthony Morris
hereby appear in my own proper person and plea
guilty to the within indictment or toAnthony Morris
Defendant

Witness:

C.C.C. PLS. AND G.S.

ATTEST
A TRUE COPYBarbara C. Smith
C.C.C. PLS. AND G.S.ATTEST
A TRUE COPYBarbara C. Smith

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

INDICTMENT

At a Court of General Sessions, convened on July 21, 2004, the Grand Jurors of Richland County present upon their oath:

KIDNAPPING

That Anthony Morris did in Richland County on or about April 19, 2004, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away the victim, J. Gwen Anthony, by any means whatsoever without authority of law. All in violation of § 16-3-910, Code of Laws of South Carolina (1976) as amended.

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



Warren B. Giese, SOLICITOR

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTH JUDICIAL CIRCUIT

Gary Anthony White, Jr.,
 #309726,

Applicant,

#2018-CP-40-0514

vs.

NOTICE OF MOTION AND MOTION
 TO ALTER/AMEND JUDGMENT,
 PURSUANT TO RULE 59(e),
 SCRCP

State of South Carolina,
 Respondents.

2021 AUG 24 PM 2:00

TO: The Honorable L. Casey Manning, Circuit Court Judge for the
 Fifth Judicial Circuit; and Yasmee E. Klein, Assistant
 Deputy Attorney General for the State of South Carolina

NOTICE IS HEREBY GIVEN that, Gary Anthony White, Jr.,
 #309726, the pro se Applicant, pursuant to Rule 59(e), of the
 South Carolina Rules of Civil Procedure, SCRCP, seeks of this
 Honorable Court to alter/amend it's judgment; or in the
 alternative, reconsideration in the matters ruled upon, and not
 inclusive within the Final Order of Dismissal ("Final Order"),
 dated July 20, 2021, and served upon this Applicant, via
 Institution Legal Mail Services on August 8, 2021. There exists
 issues of law and fact within the pleadings that have not been a
 part of the Final Order, and remain pending before this Court.

STATEMENT OF THE CASE

On August 5, 2009, Applicant initiated his first Post-Conviction Relief ("PCR") Application, alleging inter alia: (1) Newly Discovered Evidence; (2) Ineffective Assistance of Trial Counsel; (3) Ineffective Assistance of Trial Counsel; (4) Co-defendants, Anthony Morris ("Mr. Morris") retracted his trial testimony by way of a sworn statement. The statement itself weakens the States case against Mr. White; (5) Trial Counsel was ineffective by allowing the State to present evidence in case on a charge that was dismissed at the start of trial; and (6) Trial counsel was ineffective by failing to pursue objection of jury charge hand of one hand of all. By fail to pursue objection, counsel allowed the judge to give the charge without making a ruling on objected charge. An evidentiary hearing was held in the Richland County Courthouse, before the Honorable J. Mark Hayes, II, Circuit Court Judge, on October 18, 2010. Applicant was represented by, Mark E. Scnee, Esquire. The Respondents were represented by, Brian Petrano, Esquire, Assistant Deputy Attorney General. An Order of Dismissal was issued on August 31, 2011, by Judge Hayes. Applicant appealed to this State's Supreme Court.

On appeal for petition for writ of certiorari and a Johnson Brief was filed by, David Alexander, Esquire, of the South Carolina Office of Indigent Defense, on September 12, 2012. On December 19, 2013, this State's Supreme Court, by written Order, denied the petition. The remittitur was issued on January 6, 2014. A correspondence was served upon the court that was construed as requesting the remittitur be recalled, and Applicant filed a pro se petition. On May 21, 2014, after careful consideration of the pro se petition, they adhered to their previous ruling.

On January 21, 2015, Applicant filed a Petition For Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, alleging inter alia: (1) The Trial Court erred by denying Applicant's objection to the State's Expert Witness, a dog-handler, without requiring the State to establish the Underlying Reliability of dog-handler as a scientific or technical filed; (2) Newly Discovered evidence; (3) Ineffective assistance of counsel; and (4) Newly Discovered evidence, relying on Martinez v. Ryan, 132 S.Ct. 1309. On June 23, 2015, the Honorable Shiva V. Hodges, United States Magistrate Judge, issued the Report and Recommendation ("R & R"), to grant the relief of summary judgment to Respondents', and Applicant's petition be denied. Applicant filed an objection to the R & R, on July 10, 2015. On March 21, 2016, the Honorable David C. Norton, United States District Court Judge, on the second R & R, granted Respondents second motion for summary judgment, thereby dismissing Applicant's petition, with prejudice.

On January 24, 2018, Applicant filed this current PCR application, alleging inter alia: (1) Ineffective assistance for not investigating sentence enhancement, (a) "According two State law conviction from Kentucky could not be used for enhancement."

On March 30, 2020, Applicant filed to amend the application for PCR, asserting additional grounds of (2) Newly Discovered evidence such that "An actual conflict of interested and was not disclosed to [Applicant]"; (a) "Counsel was ineffective for failure to disclose this ... (b) PCR counsel was ineffective for failure to investigate and present this claim ... (3) Fraud upon the court (a)"Sampson Chehosle; Durant [and] Owings ... deliberately hid and blatantly disclose the subject matter of the [conflict of interest] claim[.]"

On June 20, 2020, Respondents filed a "Return And Motion To Dismiss Counsel Not Requested". In this Return the Respondents

demanded this matter be summarily dismissed as being untimely, successive, and fails to constitute newly discovered evidence.

On April 20, 2020, Applicant filed a "Notice Of Motion And Motion To Compel Chief Circuit Public Defender To Answer Written Interrogatories." Written interrogatories were served upon the Chief Circuit Public Defenders Office, on February 19, 2020. The reason for this motion to compel rested on the fact that the Public Defenders Office totally ignore|| the sought materials and responses, and disregarded the initial interrogatories without any form of sufficient objection and/or denial.

On June 26, 2020, the Honorable Alison Renee Lee, Chief Administrative Judge for the Fifth Judicial Circuit, Richland County, filed a Conditional Order of Dismissal. This Conditional Order provided Applicant an opportunity to present issues, claims, arguments and evidence, in opposition or as a reason for not summarily dismissing this matter.

On September 14, 2020, after Applicant had spoken to, Rauch Wise, Esquire, (whom had been initially retained to represent these matters, and who received full payment, yet, never came on board as counsel of record), filed a "Notice Of Motion And Second Motion To Amend PCR Application; Exhibits; and Affidavit In Support. Noting has been judicially reviewed since the amendment of the initial pcr issue. There has been no responsive pleadings, or objections, to any motion filed herewith.

On June 29, 2021, after waiting a sufficient amount of time, Applicant filed for a Schedule Conference to have this Court review all the outstanding issues and pleadings Applicant sought to have made a part of the record. Especially the "Notice Of Motion And Motion For Default Judgment; To Strike Respondent's

Motion To Dismiss; And Procedurally Bar Pleading, w/attached Exhibits and Supporting Affidavit, which was filed on July 31,2020. Along with these pleadings, Applicant filed his Opposition Motion To The Conditional Order Of Dismissal.

On July 20,2021, the Honorable L. Casey Manning, Circuit Court Judge, issued a "Final Order of Dismissal", denying and dismissing, with prejudice, portions of the matters that had been pending before the court. This Final Order was purportedly in response to the Conditional Order that had been originally filed June 26,2020, and re-served April 3,2021. The opposition motion had been filed since July 31,2020, and the reason for the demand for the Scheduling Conference.

Applicant seeks to have this Honorable Court to reconsider it's decision in the Final Order, and to alter/amend it's judgment to permit Applicant the panoply of rights afforded under due process principles, and provide him with an evidentiary hearing where he may, in open forum, overcome default under the "plain error rule". To look past these additional claims would cause a deprivation to S.C. Code Ann. §17-27-80 (1976)("The court shall make specific findings of fact, and state expressly it's conclusions of law, relating to each issue presented"). The following should, for good cause shown, demonstrate reasoning to undermine the Respondents position which incorrectly led to the Final Order.

ISSUE #1

As the record before this Court demonstrates, there has never been a disclosure of any kind, concerning the "Actual

conflict of interest" made available to this Applicant. In failing to disclose such a claim, prior to trial, was a fatal error on the part of trial counsel. This position is taken in light of the fact that once an actual conflict in interest is demonstrated, then the part which substantiates the actual conflict of interest, is in essence the "harm" required to show that it could be reversible error. Yet, once the harm is established, the "prejudice" is automatically presumed. Lomax v. State, 379 S.C. 93, 102, 665 S.E.2d 164, 168 (2008).

An actual conflict of interest occurs when: "a defense attorney places himself in a situation inherently conducive to divided loyalties. If a defense attorney owes a duty to a party whose interests are adverse to those of the defendant, then an actual conflict of interest exists. The interests of the other client and the defendant are sufficiently adverse if it is shown that the attorney owes a duty to the defendant to take some action that could be detrimental to his other client." Jordan v. State, 406 S.C. 443, 449, 752 S.E.2d 538, 541 (2013) (quoting Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979)). As relates to this instant case, "the proof is in the pudding". Especially due to the fact that, when it has recently been disclosed that a "Conflict Memorandum" was provided to Applicant when a formal request for production of documents was served, by Certified Mail, pursuant to Rule 1.16(d), Rules of Professional Conduct, RPC. (See Rule 407, of the South Carolina Appellate Court Rules, SCACR).

Even though Applicant's codefendant (Anthony Morris) was represented by an attorney who was of the private practice does not totally foreclose there existing a conflict of interest. This presents a genuine material issue of fact in dispute

sufficient enough to warrant an evidentiary hearing. The justification for this position exists where there are many attorneys, who are in private practice, that are contractually bound to represent indigent defendants for the Public Defenders Office. See S.C. Code Ann. §15-3-5(6) ("(6) 'Public Defender' means an attorney who is employed in the circuit defender office or who represents an indigent person pursuant to a contractual agreement with a circuit public defenders office"). When looking at the provisions of this public defenders statute, it can be easily discerned that any Firm which contracts with the public defenders office, is a part of that office and can lead to the position that an actual conflict of interest exists.

Applicant respectfully demands that an evidentiary hearing be convened, as requested by the demand for a Scheduling Conference, sought prior to this Final Order. Due process would demand no more or less. Outdoor Clear Channel v. City of Myrtle Beach, 372 S.C. 230, 642 S.E.2d 565(2007)(Due process, at a minimum requires: (1) a meaningful opportunity to be heard; (2) the ability to cross-examine and confront witnesses; (3) present evidence; and (4) judicial review). It is the position of this Applicant that this stance offers the opportunity to open an already seemingly closed door. An actual conflict of interest has been established and it is within the discretion of this Court to ensure that justice be had. Applicant believes this to be a meritorious claim and demands a hearing into these matters.

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