STATE OF SOUTH CAROLINA COUNTY OF CHEROKEE	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Brian McGill, #362046, Applicant, v. State of South Carolina, Respondent.	Case No. 2021-CP-11-0650 **ORDER OF DISMISSAL**

This matter is before this Court by way of the third application for post-conviction relief ("PCR") filed by Applicant Brian McGill (hereafter the "Applicant") after initially entered a guilty plea. Applicant's first PCR application was dismissed without prejudice because it was filed concurrent with the filing of a direct appeal. The direct appeal was dismissed by the Court of Appeals by State v. McGill, App. Case No. 2014-002437 (S.C. Ct.App. Filed Dec. 8, 2015). Applicant's second PCR was dismissed by Applicant with prejudice during an evidentiary hearing that was held on September 21, 2017. Applicant's third PCR was filed on October 5, 2021, by Applicant's current PCR Counsel, Tommy Thomas, based on alleged newly discovered evidence to support Appellant's defense of self-defense.

On April 18, 2023, an evidentiary hearing was conducted before this Court at the Spartanburg County Courthouse. Applicant and attorney Thomas were present. Respondent the State of South Carolina was represented by Assistant Attorneys General Andrew N. Cole and Blake Kennedy, both with the South Carolina Attorney General's Office. Applicant, two alleged after-discovered witnesses, Bridgette Tessner and Ricky Austin, and defense trial counsel, N. Douglas Brannon and Fletcher N. Smith, Jr., testified at the evidentiary hearing.

Prior to the hearing, this Court thoroughly reviewed the record of materials that were

supplied to it ahead of time, which materials included: (1) three applications for PCR and the three corresponding returns; (2) prior PCR disposition orders; (3) materials from Cherokee County; (4) hearing transcript from November 3-4, 2014 (56 pages); (5) appellate court documents; and (6) a handwritten note signed by Applicant dated October 24, 2014. Based on the record, along with the testimony and evidence presented at the evidentiary hearing, this Court finds Applicant has failed to establish any constitutional violations or deprivations entitling him to relief and, accordingly, denies and dismisses this action with prejudice. Specific findings of fact and conclusions of law as required pursuant to S.C. Code Ann. § 17-27-80 are set forth below

PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections, Lieber Correctional Institution (Ridgeville, SC), pursuant to orders of commitment from the Cherokee County Clerk of Court. During its July 2013 term, the Cherokee County Grand Jury indicted Applicant for one count of murder and one count of possession of a firearm during the commission of a violent crime (2013-GS-11-0729). Douglas Brannon, Esquire, and Fletcher Smith, Esquire, represented Applicant. On November 3, 2014, Applicant pled guilty to the lesser included offense of voluntary manslaughter and possession of a firearm during the commission of a violent crime. Sentencing was conducted the following day so that Applicant's family members could address the Court. Therefore, on November 4, 2014, the Honorable Roger L. Couch sentenced Applicant to confinement for twenty-three (23) years for voluntary manslaughter and five (5) years for possession of a firearm during the commission of a violent crime. The sentences were without negotiations or recommendations from the State. The sentences run concurrently.

Applicant filed a timely notice of appeal on November 20, 2015. An appeal was perfected by Robert Dudek, Esquire. The South Carolina Court of Appeals dismissed Applicant's appeal

for failure to provide sufficient explanation for appealing. State v. McGill, App. Case No. 2014-002437 (S.C. Ct. App. filed Dec. 8, 2015). The remittitur was returned on January 7, 2016.

Applicant filed multiple Applications for Post-Conviction Relief. The first PCR application was filed October 30, 2015 (2015-CP-11-00806) but subsequently dismissed without prejudice on November 24, 2015, because the direct appeal was still pending. The Second PCR application was filed September 28, 2016 (2016-CP-11-00680). Applicant renewed the same claims for ineffective assistance of counsel and abuse of discretion regarding sentencing that were raised in the first PCR application. Applicant voluntarily withdrew this second PCR application with prejudice at the evidentiary hearing that was conducted on September 21, 2017, at the Spartanburg County Courthouse. Applicant was represented at that time by Rodney W. Richey, Esquire, and the State was represented by Valerie Garcia Giovanoli, Esquire, with the South Carolina Attorney General's Office. The order dismissing the second PCR application with prejudice was subsequently issued by the Honorable Grace Gilchrist Knie on September 22, 2017.

On October 5, 2021, Thomas Thomas, Esquire, filed the third Application for Post-Conviction Relief (2021-CP-11-00650) for Applicant based on a claim of newly discovered evidence allegedly relating to Applicant's claim of self-defense. This application included a witness affidavit. When the PCR docket for April 18, 2023, was initially published, Mr. Thomas gave notice that he intended to Amend this third petition for Post-Conviction Relief by adding a second alleged newly discovered witness. Mr. Thomas served his Amendment electronically on April 13, 2023, and the State received it without objection. The State had previously served its Return and Motion to Dismiss in response to the third PCR application on July 14, 2022.

CURRENT APPLICATION

In this third PCR application, Applicant alleges he is detained unlawfully for the following

reasons (excerpts verbatim):

1. [Original 3rd PCR Application] "Newly discovered evidence – affidavit attached – a witness has come forward who until this year [2021], was unknown. This witness provides evidence that Applicant acted in self-defense."

2. [Amendment to 3rd PCR Application] [A second witness has come forward and] "That this information meets the criteria for after discovered evidence, is relevant, material and would have had an impact on Mr. McGill's case."

STATEMENT OF FACTS[1]

On April 22, 2013, Applicant was at the Kangaroo Convenience Store, went inside the store, and was making a purchase at the food counter. (Tr. 18). The victim was present as was a third party. (Tr. 18). All three parties arrived in separate cars. (Tr. 18). This was a chance meeting. (Tr. 18). The men animatedly exchanged words, cursing throughout. (Tr. 18). The men separated themselves in the store, made their purchases, each leaving separately. (Tr. 19). The victim and Applicant went to their cars. (Tr. 19). The argument continued outside. (Tr. 19). The victim believed Applicant was involved in a car theft of a friend of his. (Tr. 19). Words were exchanged a couple months before the incident and that the argument was over. (Tr. 19). No blows were ever exchanged, but the victim took off his shirt and threw it at Applicant's car. (Tr. 19). Applicant drove off, pulled around near the victim, got out of the car, and stared him down. (Tr. 20). Applicant got back into his car, started driving away, and shot out his passenger window five or six times and peeled off at a high rate of speed, striking a guardrail. (Tr. 20). Applicant backed up and fled over the bridge, towards the highway. (Tr. 20-21). The victim was hospitalized and died four days later from a gunshot wound to the head. (Tr. 21).

TESTIMONY PRESENTED AT THE EVIDENCE HEARING

The PCR evidentiary hearing was conducted before this Court on April 18, 2023. The

[1] The factual summary is taken from the third return in response to the third PCR application.

State reserved its arguments regarding its Motion to Dismiss until after the testimony presented on behalf of the Applicant. Testifying on behalf of the Applicant were: (1) Bridgette Tessner; (2) Ricky Austin; and (3) Brian McGill (Applicant). Testifying on behalf of the State were: (1) N. Douglass Brannon, Esquire (defense/plea counsel); and (2) Fletcher N. Smith, Jr. (defense/plea counsel). The first two witnesses called by Applicant are alleged to have been unknown, or their favorable testimony unknown, before Applicant filed his third PCR application on October 5, 2021.

Bridgette Tessner was a customer at the Convenience Store the evening of the shooting. Mrs. Tessner lives in North Carolina. She testified consistent with an affidavit dated June 19, 2021, that was marked a Applicant's Exhibit No. 1 at the hearing. Mrs. Tessner testified that she witnessed a verbal altercation between two men at the store, saw one of the men reach into a sports car to retrieve something, and, while she was driving away from the convenience store, heard gunshots and then saw in her rearview mirror a second vehicle crash into a guardrail. Mrs. Tessner testified that she did not see what the first man was trying to retrieve from the sports car. Based on independent testimony, the man reaching into the sports car was the victim of the shooting at the Convenience Store and the Applicant was the man driving the car that crashed into the guardrail. Mrs. Tessner testified that she never observed a gun and that she did not see who shot a gun. Mrs. Tessner was frightened and did not stay at the scene. Mrs. Tessner said that she was reminded of the incident at the Convenience Store now, after visiting friends in Gaffney. On June 10, 2021, she met with a private investigator who had been hired by Mr. Thomas, Applicant's current PCR attorney, and soon thereafter executed her affidavit. Mrs. Tessner said that no one had attempted to contact her about the incident beforehand. Her affidavit states in part that she was "a regular customer at Aunt M's Kangaroo Express, the clerks at the gas station never said

[that the] *police* wanted to speak with me." (italics added)

Ricky Eugene Austin is currently serving a fifteen-year sentence at Trenton Correctional Institute after entering a plea for, *inter alia*, trafficking methamphetamines. Mr. Austin testified that he knew that the Victim, who was known as Que or Quenton, and Applicant had an altercation at least two weeks before the incident at the Convenience Store. On the day of the incident, Mr. Austin was with the Victim at the Victim's club. The Victim received a telephone call, which Mr. Austin was not a party to, and after angrily hanging up the phone retrieved a gun from behind the bar in the club. Mr. Austin testified he did not know who was on the other end of the telephone call. Mr. Austin testified that he knew the Victim had a gun when he left the club, and that the Victim was going to the Convenience Store. However, Mr. Austin did not leave the club with the Victim and he only heard about the shooting sometime thereafter from someone else. Mr. Austin testified that he was previously interviewed prior to the trial/plea date by trial defense counsel's private investigator; however, at that time Mr. Austin told the private investigator that he was not involved with the shooting at the Convenience Store and had nothing to offer as a witness at trial. Mr. Austin testified that he only recently came forward because he wanted to get whatever information he has about the Convenience Store incident "off his chest." He said he was recently contacted about six or seven months prior to the PCR evidentiary hearing.

Applicant started his testimony acknowledging that if his plea was withdrawn and he was granted a new trial, the result on retrial could be more than the twenty-three year sentence he is currently serving. Applicant said that he understood during his second PCR evidentiary hearing that his trial attorneys were going to admit to their ineffective assistance of counsel. (Which the trial defense attorneys did not corroborate when they testified in this, the third PCR evidentiary hearing.) Applicant was emphatic in his testimony at the hearing that he had evidence of a self-

defense claim. He said that the Victim was reaching for a gun inside a car, which Applicant then reacted to by laying down inside his own car while driving off and returning gunshots in self-defense. Applicant testified that Victim was angry towards Applicant, thinking that Applicant had stolen Victim's car. Two weeks before the Convenience Store shooting, Victim threatened Applicant's life. Applicant was also aware that Victim had shot other people before.

Applicant acknowledged that his trial attorneys discussed the possibility of putting forward a defense of self-defense at trial. Applicant testified that "out of the blue" the morning of trial his attorneys told him that he should consent to a plea because there was a "70% or 80% chance of losing" the case because there was no corroborating testimony to his claim of self-defense. Applicant said he had no knowledge of Mrs. Tessner until recently and that the ladies working at the Convenience Store did not provide any information to locate Mrs. Tessner. Applicant admitted that Mr. Austin had been interviewed by a private investigator hired by trial defense counsel, but he did not know that Mr. Austin would testify that Victim had a gun on him when he left his club. On cross examination, the State asked Applicant about a handwritten note that was signed by Applicant. (State's Exhibit No. 1) Applicant acknowledged writing and signing this note that is dated October 24, 2014, the Friday before the trial was scheduled to start on Monday, November 3, 2014. This note states: "I give Mr. Douglas Brannon and Mr. Fletcher Smith [the authority] to negotiate a sentence between 0-20 years." Applicant concluded that had he known of the testimony presented at the hearing by Mrs. Tessner and Mr. Austin, he would not have pled guilty and would have instead gone to trial.

After Applicant's testimony, the parties argued the State's Motion to Dismiss. Generally, the State argued that Applicant did not present evidence sufficient to meet the standard of Jamison v. State, 410 S.C. 456, 765 S.E.2d 123 (2014), sufficient to receive a new trial based on after-

discovered evidence following a guilty plea. Applicant's PCR attorney argued that this Court should evaluate the after-discovered evidence raised by Applicant using a balancing test and, even if the testimony is not very strong, it is sufficient to move the PCR hearing forward. Applicant's PCR attorney argued that the plea hearing transcript provided additional support to Applicant. Without objection, Applicant's PCR attorney entered a two-page summary document (Applcant's Exhibit No. 2) titled "Excerpts from Plea Transcript, State v. Brian McGill, November 3rd & 4th, 2014" that includes ten numbered paragraphs of quotations from the plea hearing transcript. This Court reserved its judgment on the Motion to Dismiss and asked the State to call its witnesses.

The State called both of Applicant's trial/plea attorneys. Mr. Brannon was lead trial counsel. Mr. Brannon testified that he and his co-counsel Fletcher Smith were ready to go to trial, but Applicant instead wanted to plead. He said that he was not going to acknowledge providing ineffective counsel at the prior, second PCR hearing. Mr. Brannon said that he, Mr. Smith, and Applicant had a very long meeting on the Friday before the case was up for trial to discuss the case, the possible defenses in the case, including self-defense, as well as what entering a plea would entail. Mr. Brannon did not recall providing percentages of a successful defense, but he did testify that he and Mr. Smith hired some mock jurors to test the case before trial and the results from the mock jurors was not favorable to Applicant. Mr. Brannon noted that there were several evidentiary issues that would come up at trial that could have swayed the jury significantly. For example, Mr. Brannon testified that he intended to put up a witness who himself was a shooting victim of the Victim in Applicant's case. Mr. Brannon hoped this witness would show the proclivity and character of Victim carrying a gun and shooting people; however, the extent that the trial judge would let this testimony in was uncertain. Mr. Brannon further testified that his private investigator followed up on the eight witness leads that Applicant gave them. One of the

people interviewed was Mr. Austin. However, Mr. Austin told the private investigator that he knew nothing about the Convenience Store shooting and wanted nothing to do with the trial.

Mr. Brannon pointed out that Applicant had other issues that would be brought out at his trial that would have impacted the case. For example, after the shooting at the Convenience Store, Applicant and/or his girlfriend shot up Applicant's car to make it look like Applicant had been shot at. The problem with this evidence was the bullet holes were located on the wrong side of Applicant's car. Moreover, the bullets used to shoot up Applicant's car matched the bullet(s) that killed the Victim, so it was clear the same gun was used. Mr. Brannon also expected the State to use telephone recordings between Applicant and his girlfriend that were made while Applicant was in detention in which Applicant was instructing his girlfriend how to testify about the Convenience Store shooting. In summary, Mr. Brannon testified that although he was prepared to go to trial, given the evidence that he expected the State to put up at trial, entering a plea was a reasonable decision for Applicant.

Mr. Smith was originally hired by Applicant's family, but Mr. Brannon was subsequently hired as lead counsel. Mr. Smith generally corroborated the testimony provided by Mr. Brannon; however, Mr. Smith was more candid regarding Applicant's lack of truthfulness. Mr. Smith noted that the Applicant created problems for the defense by his own actions and the "disadvantage" of Applicant not appearing to tell the truth. Mr. Smith reiterated that Applicant and his girlfriend shot up Applicant's car after the Convenience Store shooting; albeit, Applicant said it was his girlfriend's idea. Mr. Smith noted that the mock jury would have found Applicant guilty for either murder or involuntary manslaughter. Regarding the two witnesses that testified at the third PCR evidentiary hearing, Mr. Smith offered that even if these witnesses were around for the trial, their testimony would not tilt the balance in favor of Applicant's defense or claim of self-defense.

Finally, Mr. Smith testified that one of the family members who testified on behalf of Applicant prior to the sentencing on Tuesday was an attorney from North Carolina. Mr. Smith noted that neither Applicant nor Applicant's family member attorney raised any issues regarding the guilty plea that was entered the previous day.

In cross examination, at Applicant's insistence, Mr. Smith was asked if he had some familial relationship with the Victim's family, suggesting a conflict of interest. Mr. Smith was surprised by this question and said that he had no relationship with the Victim.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Standard of Review

Under the Uniform Post-Conviction Procedures Act, an applicant may seek post-conviction relief upon the following types of allegations:

1. That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;

2. That the court was without jurisdiction to impose sentence;

3. That the sentence exceeds the maximum authorized by law;

4. That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

5. That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or

6. That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy[.]

S.C. Code Ann. § 17-27-20(A).

Applicant's third PCR filed nearly seven years after the plea hearing is clearly untimely unless Applicant can demonstrate he is entitled to relief based on after-discovered evidence. "The

granting of a new trial because of after-discovered evidence is not favored [by the Court." State v. Harris, 391 S.C. 539, 545, 706 S.E.2d 526, 529 (Ct.App. 2011) (citation omitted). "The credibility of newly-discovered evidence is for the trial court to determine." Id. "The burden of proof is on the Applicant in post-conviction proceedings to prove the allegations in his application." Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985) (citation omitted). Simply put, "an applicant must show both error and prejudice to be granted relief in a PCR proceeding." Von Dohlen v. State, 360 S.C. 598, 603, 602 S.E.2d 738, 741 (2004), reh'g den. (Oct. 2, 2004), cert. den. (March 21, 2005) (citing Strickland v. Washington, 466 U.S. 668, 687-688 (1984) and Scott v. State, 334 S.C. 248, 513 S.E.2d 100 (1999)).

In order to receive relief from a guilty plea, the Applicant must establish that there is a reasonable probability that, but for the Applicant's attorney(s) at the plea hearing, the Applicant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 US 52 (1985). In South Carolina, a guilty plea is regarded as a waiver of non-jurisdictional defects and claims of violations of constitutional rights. State v. Rice, 401 S.C. 330, 331–32, 737 S.E.2d 485, 485–86 (2013) (citing Hyman v. State, 397 S.C. 35, 44, 723 S.E.2d 375, 379 (2012)). Therefore, an applicant requesting a new trial based on after-discovered evidence following a guilty plea must show that:

> (1) the newly discovered evidence was discovered after the entry of the plea and, in the exercise of reasonable diligence, could not have been discovered prior to the entry of the plea; and (2) the newly discovered evidence is of such a weight and quality that, under the facts and circumstances of that particular case, the "interest of justice" requires the applicant's guilty plea to be vacated. In other words, a PCR applicant may successfully disavow his or her guilty plea only where the interests of justice outweigh the waiver and solemn admission of guilt encompassed in a plea of guilty and the compelling interests in maintaining the finality of guilty-plea convictions.

Jamison v. State, 410 S.C. 456, 470, 765 S.E.2d 123, 130 (2014).

Alleged After-Discovered witness #1: Bridgette Tessner

According to her testimony at the hearing, Mrs. Tessner did not realize that a private investigator hired by Applicant's defense counsel was looking for witnesses to the shooting at the Convenience Store. Instead, while visiting friends, presumably around the time that she met with current PCR counsel's private investigator on June 10, 2021, she realized that she could offer such testimony. It is a close call whether Mrs. Tessner could have been discovered before the trial/plea date by the exercise of due diligence. See State v. Harris, 391 S.C. at 545, 706 S.E.2d at 529 (stating the evidence that the applicant/movant must prove to warrant the granting of a new trial on the ground of after-discovered evidence). The timing when Applicant alleges that Mrs. Tessner was actually "discovered" is certainly several years after the plea was entered; nonetheless, this Court is satisfied by their testimony at the hearing that Applicant's trial/plea attorneys did exercise their due diligence to follow up on and try to locate witnesses for the trial. Defense counsel testified that they tracked down every witness lead provided to them by Applicant and found some additional witnesses of their own. Defense counsel further clarified that not all of the witnesses they interviewed were expected to provide testimony beneficial to Applicant's case.

Whether Mrs. Tessner's testimony is newly discovered or not is inconsequential here. Mrs. Tessner did not actually witness the shooting—she heard gunshots and then saw a car wreck while looking into her rearview mirror. Mrs. Tessner does not add anything new. Her testimony is merely cumulative of other testimony that trial counsel was prepared to present at the trial. See Jamison, supra; and see State v. Harris, Id. (among other things the applicant must prove regarding after-discovered evidence, they must prove the evidence is material and not merely cumulative or impeaching). Applicant's claim regarding Mrs. Tessner and her testimony does not rise to the standards of Jamison and, therefore, this claim is **DENIED**.

Alleged After-Discovered witness #2: Ricky Austin

Mr. Austin was the second witness called by Applicant at the hearing. Mr. Austin testified that he in fact had spoken with the private investigator hired by Applicant's trial/plea counsel, but he said at that time that he knew nothing about and did not want to get involved with the Convenience Store shooting. Applicant acknowledged that he knew that his attorneys had interviewed Mr. Austin and that Mr. Austin did not want get involved in the case. Essentially, Applicant asks this court to find that not knowing the content of a possible witness's testimony should be deemed as after-discovered evidence. This Court rejects that invitation. Mr. Austin's testimony does not meet the definition of after-discovered evidence. Mr. Austin changing his motivation to testify now does not make this testimony after-discovered. See State v. Harris, 391 S.C. at 545, 706 S.E.2d at 529 ("Recantation of testimony ordinarily is unreliable and should be subjected to the closest scrutiny when offered as ground for a new trial.") (citations omitted). Applicant's claim regarding Mr. Austin and his testimony does not rise to the standards of Jamison and, therefore, this claim is **DENIED**.

Additional Discussion Regarding the "Interest of Justice"

Even if the testimony from Mrs. Tessner and Mr. Austin are classified as after-discovered, this testimony is not "of such weight and quality that, under the facts and circumstances of [this] particular case, the 'interest of justice' requires the [A]pplicant's guilty plea to be vacated." Jamison, 410 S.C. at 470, 765 S.E.2d at 130. Stated another way, the interests of justice to not outweigh Applicant's waiver and solemn admission of guilt at his guilty plea. See Jamison, Id.

Applicant's trial/plea counsel testified that they and/or their private investigator tried to locate every witness regarding the Convenience Store. Of the witnesses they found, several were expected to testify poorly regarding Applicant. They also tested this case with a mock jury and

asked the mock jury to answer questions based on the possible admission or exclusion of different types of impeachment evidence. Mr. Brannon and Mr. Smith testified that no gun was found with the Victim but the Applicant's gun was used to shoot the Victim and the same gun shot up Applicant's vehicle to give the appearance that Applicant was returning fire while at the Convenience Store. Applicant's trial/plea attorneys were also concerned that Applicant would be impeached with recorded jailhouse telephone calls where Applicant was instructing his girlfriend how to testify about certain facts in the case. Mr. Fletcher noted that Applicant's own actions made defending the case very difficult. At the plea hearing, Mr. Brannon noted several times that Applicant was in fear of his own life during the Convenience Store incident, which highlighted Applicant's claim of self-defense. Applicant was aware of the strengths and weaknesses of his case prior to trial, and he was aware that his attorneys were prepared to put forward a defense of self-defense. Applicant discussed his desire to enter a plea prior to the trial, which is corroborated by the handwritten note signed by Applicant on the Friday before this case was scheduled to go to trial the following Monday.

Finally, the Court notes that Applicant's plea and sentencing was conducted over two days. Applicant entered his plea on Monday, November 3, 2014. The sentencing phase was on Tuesday, November 4, 2014, so that some family members could speak to the court on behalf of Applicant before the sentencing was passed down. One of the family members that spoke on behalf of Applicant was an attorney from North Carolina. Applicant acknowledged that he did not ask to withdraw his plea between Monday, November 3rd and Tuesday, November 4th. This is further evidence that Applicant entered his plea voluntarily and that he was accepting responsibility by accepting his guilt. See, e.g., Rolen v. State, 384 S.C. 409, 413, 683 S.E.2d 471, 474 (2009), reh'g den. (Oct. 21, 2009) (finding that defense counsel should have moved to set aside the guilty plea

because the defendant "repeatedly asserted his innocence during the plea hearing before the plea judge [that] sentenced him.") Under the facts and circumstances of this case, based on the record and testimony before this Court, the Applicant's claims are not of such weight and quality that require, in the interest of justice, for Applicant's guilty plea to be vacated. Applicant's claim for relief on this point is **DENIED**.

CONCLUSION

Based on the evidence presented at the evidentiary hearing and a thorough review of the record, this Court finds and concludes Applicant failed to meet his burden of proof pursuant to Jamison and Rule 71.1, SCRCP. This Court finds that the testimony of Applicant's additional witnesses do not satisfy the test for newly discovered evidence. Even if this testimony could be deemed as newly-discovered, the testimony is not of such weight and quality that, under the facts and circumstances in this case and under the interest of justice, the Applicant's guilty plea should be vacated. Therefore, based on the foregoing, this Court denies relief on all allegations and dismisses this PCR action with prejudice.

Applicant must file and serve a notice of appeal within thirty days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review pursuant to Rule 203, SCACR. Applicant has a right to appellate counsel's assistance in seeking review of the denial of PCR. Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991). Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to Rule 243, SCACR, for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. The application for post-conviction relief be denied and dismissed with prejudice; and

2. Applicant Brian McGill remain remanded to the custody of the State of South Carolina.

AND IT IS SO ORDERED this 5th day of May, 2023.

Perry H. Gravely
Seventh Judicial Circuit

Greenville, South Carolina